CASES

FEDERAL CASES

1. *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)

2. *Chamber of Commerce v. Whiting*, No. 09-115, 2011 U.S. LEXIS 4018 (U.S. May 26, 2011)

3. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

4. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004)

5. *Hines v. Davidowitz*, 312 U.S. 52 (1941)

6. *United States v. Arizona*, No. 10-16645, 2011 U.S. App. LEXIS 7413 (9th Cir. Ariz. Apr. 11, 2011)

7. *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000)

515 U.S. 200, 115 S.Ct. 2097, 67 Fair Empl.Prac.Cas. (BNA) 1828, 66 Empl. Prac. Dec. P 43,556, 78 Rad. Reg. 2d (P & F) 357, 132 L.Ed.2d 158, 63 USLW 4523, 40 Cont.Cas.Fed. (CCH) P 76,756
(Cite as: 515 U.S. 200, 115 S.Ct. 2097)

Supreme Court of the United States
ADARAND CONSTRUCTORS, INC., Petitioner
v.
Federico PENA, Secretary of Transportation, et al.

No. 93-1841.
Argued Jan. 17, 1995.
Decided June 12, 1995.

Subcontractor that was not awarded guardrail portion of federal highway project brought action challenging constitutionality of federal program designed to provide highway contracts to disadvantaged business enterprises. The United States District Court for the District of Colorado, Jim R. Carrigan, J., granted summary judgment in favor of defendants, 790 F.Supp. 240, and subcontractor appealed. The Court of Appeals affirmed, 16 F.3d 1537, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) subcontractor had standing to seek forward-looking declaratory and injunctive relief; (2) all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny, overruling *Metro Broadcasting*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445; and (3) remand was required to determine whether challenged program satisfied strict scrutiny.

Vacated and remanded.

Justice O'Connor filed opinion joined by Justice Kennedy.

Justices Scalia and Thomas filed opinions concurring in part and concurring in judgment.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

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

Justice Ginsburg filed dissenting opinion in which Justice Breyer joined.

West Headnotes

[1] Declaratory Judgment 118A 300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of relief in general. Most Cited Cases
(Formerly 92k42.2(2))

Subcontractor that was not awarded guardrail portion of federal highway contract as result of contract's subcontractor compensation clause, offering financial incentives to prime contractor for hiring disadvantaged subcontractor, had standing to seek forward-looking declaratory and injunctive relief against future use of such compensation clauses on equal protection grounds; evidence indicated that government let contracts involving guardrail work that contained such clauses at least once per year in state, that subcontractor was likely to bid on each such contracts, and was required to compete for such contracts against small disadvantaged businesses. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

[2] Action 13 13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General

170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Fact of past injury, while presumably affording plaintiff standing to claim damages, does nothing to establish real and immediate threat that plaintiff would again suffer similar injury in the future. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const. Art. 3, § 1 et seq.

[3] Constitutional Law 92 925

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k925 k. Government contracts. Most Cited Cases
(Formerly 92k42.2(2))

Subcontractor that challenged subcontractor compensation clause of government highway contract, offering financial incentives to prime contractor for hiring disadvantaged subcontractors was not required to demonstrate that it had been, or would be, low bidder on government contract to have standing to challenge clause on equal protection grounds. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

[4] Constitutional Law 92 3677

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)11 Contracts
92k3677 k. Public contracts. Most Cited Cases
(Formerly 92k219.1)

To extent subcontractor compensation program, offering financial incentives to prime contractors on government projects for hiring disadvantaged subcontractors, was based on disadvantage, not race, it was subject to relaxed equal protection scrutiny. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amend. 5; Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3).

[5] Constitutional Law 92 3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, national origin, or ethnicity. Most Cited Cases
(Formerly 92k215)

All governmental action based on race should be subject to detailed judicial inquiry to ensure that personal right to equal protection of the laws has not been infringed. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

[6] Constitutional Law 92 3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, national origin, or ethnicity. Most Cited Cases
(Formerly 92k215)

All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest; overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445. (Per opinion of

Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

[7] Constitutional Law 92 ⚿3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, national origin, or ethnicity. Most Cited Cases
(Formerly 92k215)

Federal racial classifications, like those of a state, must serve compelling governmental interest and must be narrowly tailored to further that interest. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law 92 ⚿3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, national origin, or ethnicity. Most Cited Cases
(Formerly 92k215)

When race-based action is necessary to further compelling interest, such action is within constitutional constraints if it satisfies "narrow tailoring" test Supreme Court has set out in previous cases. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) U.S.C.A. Const.Amends. 5, 14.

[9] Federal Courts 170B ⚿462

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk462 k. Determination and disposition of cause. Most Cited Cases

Remand was required to determine whether subcontractor compensation clauses in federal highway contracts, offering financial incentives to prime contractor for hiring disadvantaged subcontractors, with presumption that minority-owned subcontractors were disadvantaged, served compelling governmental interest, as required by strict scrutiny equal protection test. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3); Surface Transportation and Uniform Relocation Assistance Act of 1987, § 106(c)(1), 23 U.S.C.A. § 101 note; 13 C.F.R. § 124.106(a), (b)(1); 48 C.F.R. § 19.703(a)(2); 49 C.F.R. § 23.62; 49 C.F.R. Part 23, Subpart D, App. C.

****2099** *Syllabus* FN*

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

***200** Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: under one of two SBA programs-known as the 8(a)

and 8(d) programs-or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents summary judgment. In affirming, the Court of Appeals assessed the constitutionality of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by ****2100***Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445.

Held: The judgment is vacated, and the case is remanded.

16 F.3d 1537 (CA10 1994), vacated and remanded.

Justice O'CONNOR delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, concluding that:

1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor ***201** for hiring disadvantaged subcontractors. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351. Pp. 2104-2105.

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 2105-2114; 2117-2118.

(a) In *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While *Croson* did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273-274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260. Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson, supra,* at 494, 109 S.Ct., at 722. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 2105-2111.

(b) However, a year after *Croson,* the Court, in *Metro Broadcasting,* upheld two federal race-based policies against a Fifth Amendment challenge. The Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884, by holding that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. By adopting that standard, *Metro Broadcasting* departed from prior cases in two significant respects.

First, it turned its back on *Croson's* explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court's earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 2111-2112.

(c) The propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental***202** action based on race-a group classification long recognized as in most circumstances irrelevant and therefore prohibited-should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict scrutiny is the proper standard for analysis of all racial classifications, whether ****2101** imposed by a federal, state, or local actor. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled. Pp. 2112-2114.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases. Pp. 2117-2126.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." Nor did it address the question of narrow tailoring in terms of this Court's strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. P. 2118.

Justice SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. P. 2118.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., and by ***203** SCALIA, J., to the extent heretofore indicated; and Part III-C was joined by KENNEDY, J. SCALIA, J., *post*, p. 2118, and THOMAS, J., *post*, p. 2119, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 2120. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 2131. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 2134.
William Perry Pendley, Denver, CO, for petitioner.

Drew S. Days, III, New Haven, CT, for respondents.

For U.S. Supreme Court briefs, see:1994 WL 614914 (Pet.Brief)1994 WL 694992 (Resp.Brief)

***204** Justice O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, and an opinion with respect to Part III-C in which Justice KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under****2102** a different standard of review than the one the Court of Appeals applied. We therefore***205** vacate the Court of Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.*, at 28-31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of ***206** race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act (Act), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, ... shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to

diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).

In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," ***207** which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e.g.*, 13 CFR §§ 124.303-124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in ****2103** this case, 15 U.S.C. § 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged ... pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. 48 CFR §§ 19.001, ***208** 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§ 124.111(c)-(d), 124.601-124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100-17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes

of this subsection." § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i.e.*, eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

> ***209** "*Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals....
>
> "A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies,****2104** counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> . . . . .
>
> "The Contractor will be paid an amount computed as follows:
>
> "1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> "2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24-26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above-SBA's 8(a) or 8(d) program, or certification by a State ***210** under the DOT regulations-would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F.3d 1537 (1994). It understood our decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F.3d, at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court of Appeals upheld the use of subcontract-

or compensation clauses. 16 F.3d, at 1547. We granted certiorari. 512 U.S. 1288, 115 S.Ct. 41, 129 L.Ed.2d 936 (1994).

II

[1][2] Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22-23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages ..., does ***211** nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.*, at 105, 103 S.Ct., at 1667.

[3] If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" ****2105** as to Adarand. We note that, contrary to respondents' suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at 666, 113 S.Ct., at 2303.

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes-that the injury is '*certainly* impending.' " *Lujan, supra*, at 565, n. 2, 112 S.Ct., at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

***212** We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5-A. According to documents produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90-C-1413, Exh. I, Attachment A (D.Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.;* see also *id.*, Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation

clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1 1/2 contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.*, Exh. F, Attachments 1-3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

[4] Respondents urge that "[t]he Subcontracting Compensation Clause program is ... a program based on *disadvantage*, not on race," and thus that it is subject only to "the most ***213** relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.*, at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall ... be deprived ****2106** of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall ... deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940's, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank v. United States*, 317 U.S. 329, 337, 63 S.Ct. 297, 301, 87 L.Ed. 304 (1943); see also, *e.g.*, *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 482 (1941); ***214***LaBelle Iron Works v. United States*, 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment ...; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed-correctly-that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.*, at 100, 63 S.Ct., at 1385. But it also cited *Detroit*

Bank for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," 320 U.S., at 100, 63 S.Ct., at 1385, and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.*, at 102, 63 S.Ct., at 1386.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank*, that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and] courts must subject them to the most rigid scrutiny." 323 U.S., at 216, 65 S.Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications ***215** than are the States. Cf. *id.*, at 234-235, 65 S.Ct., at 202 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the *Hirabayashi* case," *id.*, at 217, 65 S.Ct., at 194, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.," *id.*, at 218, 65 S.Ct., at 195, the racially discriminatory order was nonetheless within the Federal Government's power.[FN*]

FN* Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." *Korematsu*, 323 U.S., at 233, 65 S.Ct., at 202. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub.L. 100-383, § 2(a), 102 Stat. 903 ("The Congress recognizes that ... a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

****2107** In *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' " *id.*, at 499, 74 S.Ct., at 694. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500, 74 S.Ct., at 695.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi, supra*, 320 U.S., at 100, 63 S.Ct., at 1385, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," ***216** *Korematsu, supra*, 323 U.S., at 216, 65 S.Ct., at 194, carry no less force in the context of federal action than in the context of action by the States-indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U.S., at 499, n. 3, 74 S.Ct., at 694, n. 3, and reiterated " 'that the Constitution of the United States, in its present form, forbids, so far as civil

and political rights are concerned, discrimination *by the General Government, or by the States,* against any citizen because of his race,' " *id.,* at 499, 74 S.Ct., at 694 (quoting *Gibson v. Mississippi,* 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' *Bolling v. Sharpe,* 347 U.S. 497, 499 [74 S.Ct. 693, 694]; and subject to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U.S. 214, 216 [65 S.Ct. 193, 194]; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100 [63 S.Ct. 1375, 1385]." *Id.,* at 191-192, 85 S.Ct., at 288.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation ***217** suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L.Rev. 541, 554 (1977). *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications ... be subjected to the 'most rigid scrutiny.' " 388 U.S., at 11, 87 S.Ct., at 1823. The various opinions in *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case that invalidated sex discrimination by a State, without mentioning ****2108** any possibility of a difference between the standards applicable to state and federal action. *Frontiero,* 411 U.S. at 682-684, 93 S.Ct., at 1768-1769 (plurality opinion of Brennan, J.); *id.,* at 691, 93 S.Ct., at 1772 (Stewart, J., concurring in judgment); *id.,* at 692, 93 S.Ct., at 1773 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; see also *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *United States v. Paradise,* 480 U.S. 149, 166, n. 16, 107 S.Ct. 1053, 1064, n. 16, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to ***218** the political branches of the Federal Government to be appropriate, *e.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 101-102, n. 21, 96 S.Ct. 1895, 1903, 1904-1905, n. 21, 48 L.Ed.2d 495 (1976)

(federal power over immigration), to detract from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.' " *Id.*, at 287-288, 98 S.Ct., at 2747 (opinion of Powell, J.) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S., at 289-290, 98 S.Ct., at 2748. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.*, at 291, 98 S.Ct., at 2748. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.*, at 359, 98 S.Ct., at 2783 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. *Id.*, at 411-412, 421, 98 S.Ct., at 2809-2810, 2815 (STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, ***219** JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke*, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke*, there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S., at 491, 100 S.Ct., at 2781. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.*, at 492, 100 S.Ct., at 2781. It employed instead ****2109** a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.*, at 473, 100 S.Ct., at 2772. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either 'test' articulated in the several *Bakke* opinions." *Id.*, at 492, 100 S.Ct., at 2781. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his *Bakke* opinion-*i.e.*, it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest"-and had done so correctly. 448 U.S., at 496, 100 S.Ct., at 2783-2784 (concurring opinion). Justice Stewart (joined by then-Justice REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.*, at 523, and n. 1, 100 S.Ct., at 2797, and n. 1, and that the program before the Court failed that standard. Justice STEVENS also dissented,***220** arguing that "[r]acial classifications are simply too pernicious to

permit any but the most exact connection between justification and classification," *id.*, at 537, 100 S.Ct., at 2805, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." *Id.*, at 541, 100 S.Ct., at 2807. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"-*i.e.*, such action should be subjected only to what we now call "intermediate scrutiny." 448 U.S., at 518-519, 100 S.Ct., at 2795.

In *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.*, at 273, 106 S.Ct., at 1846, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.*, at 274, 106 S.Ct., at 1847. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.' " *Id.*, at 285, 106 S.Ct., at 1852 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.*, at 274, 106 S.Ct., at 1847, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.*, at 276, 106 S.Ct., at 1848, and insisted instead that "a public employer ... must ***221** ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.*, at 277, 106 S.Ct., at 1848-1849. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.*, at 295, 106 S.Ct., at 1858. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.*, at 301-302, 106 S.Ct., at 1861-1862 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. See ****2110***United States v. Paradise*, 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e.g.*, *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); *Williams v. New Orleans*, 729 F.2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 851

(CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), concerned a ***222** city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493-494, 109 S.Ct., at 722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); *id.*, at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree ... with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision ... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.*, at 491-492, 109 S.Ct., at 720-721, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,' " *id.*, at 500, 109 S.Ct., at 725 (majority opinion) (quoting *Wygant, supra*, at 277, 106 S.Ct., at 1849 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U.S., at 508, 109 S.Ct., at 729-730.

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson's* facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment. *Id.*, at 491, 109 S.Ct., at 720 (plurality opinion); see also *id.*, at 522, 109 S.Ct., at 737 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* ..., I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action***223** when it vacated a decision upholding such action and remanded for further consideration in light of *Croson. H.K. Porter Co. v. Metropolitan Dade County*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989); see also *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in *H.K. Porter Co.*), rev'd *sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e.g.*, *Mann v. Albany*, 883 F.2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg*, 876 F.2d, at 910 (noting the difficulty of extracting general principles ****2111** from the Court's fractured opinions); *id.*, at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting, supra.*

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching

examination,' " *Wygant,* 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); *Fullilove,* 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger, C.J.); see also *id.,* at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin,* 379 U.S., at 192, 85 S.Ct., at 288 ("[R]acial classifications [are] 'constitutionally suspect' "); *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385 ("Distinctions ***224** between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also *Bakke,* 438 U.S., at 289-290, 98 S.Ct., at 2747-2748 (opinion of Powell, J.), *i.e.,* all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo,* 424 U.S., at 93, 96 S.Ct., at 670; see also *Weinberger v. Wiesenfeld,* 420 U.S., at 638, n. 2, 95 S.Ct., at 1228, n. 2; *Bolling v. Sharpe,* 347 U.S., at 500, 74 S.Ct., at 694. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [*Korematsu*], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling ***225** governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer,* 334 U.S. [1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948)]." *Bakke, supra,* 438 U.S., at 299, 98 S.Ct., at 2753 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc. v. FCC,* involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission (FCC). In *Metro Broadcasting,* the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, ****2112***Bolling, supra,* at 500, 74 S.Ct., at 694. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "[B]enign" federal racial classifications, the Court said, "-even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination-are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives." *Metro Broadcasting,* 497 U.S., at 564-565, 110 S.Ct., at 3008-3009 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an 'examination of the legislat-

ive scheme and its history' will separate benign measures from other types of racial classifications." *Id.*, at 564, n. 12, 110 S.Ct., at 3009, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.*, at 566, 110 S.Ct., at 3009. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *id.*, at 566-567, 110 S.Ct., at 3009-3010, and that they were ***226** "substantially related" to that objective, *id.*, at 569, 110 S.Ct., at 3011. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson, supra,* at 493, 109 S.Ct., at 721 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke, supra,* at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L.J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two-skepticism of all racial ***227** classifications and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra,* at 2110-2111. Under *Metro Broadcasting,* certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

[5][6] The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons,* not *groups.* It follows from that principle that all governmental action based on race-a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited," ****2113***Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385-should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.,* should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local govern-

mental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, Justice STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications," *post*, at 2120. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

***228** Justice STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Post,* at 2122. What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account-indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See *supra*, at 2112. And Justice STEVENS concedes that "some cases may be difficult to classify," *post*, at 2122, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," *post*, at 2121; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove*, 448 U.S., at 534, 100 S.Ct., at 2803 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

Justice STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." *Post*, at 2121. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And Justice STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain ***229** a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception-*especially when fostered by the Congress of the United States*-can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S., at 545, 100 S.Ct., at 2809 (dissenting opinion) (emphasis added; footnote omitted); see also *id.*, at 537, 100 S.Ct., at 2805 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson*, 488 U.S., at 516-517, 109 S.Ct., at 734 (STEVENS, J., concurring in part and concurring in judgment) ****2114** ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *supra*, at 2112; but cf. *post*, at 2121-2122 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny

itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads Justice STEVENS to dissent. According to Justice STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," *post,* at 2122, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat," *post,* at 2120, 2121. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because ***230** of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson,* see 488 U.S., at 493-494, 109 S.Ct., at 721-722 (plurality opinion); *id.,* at 520-521, 109 S.Ct., at 735-736 (SCALIA, J., concurring in judgment); see also *Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 2824-2845, 125 L.Ed.2d 511 (1993); *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991). Justice STEVENS does not explain how his views square with *Croson,* or with the long line of cases understanding equal protection as a personal right.

Justice STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e.g.*, *Metro Broadcasting,* 497 U.S., at 605-606, 110 S.Ct., at 3030-3031 (O'CONNOR, J., dissenting); *Croson,* 488 U.S., at 486-493, 109 S.Ct., at 717-722 (opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White, J.); *id.,* at 518-519, 109 S.Ct., at 734-735 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 521-524, 109 S.Ct., at 736-738 (SCALIA, J., concurring in judgment); ***231***Fullilove,* 448 U.S., at 472-473, 100 S.Ct., at 2771-2772 (opinion of Burger, C.J.); *id.,* at 500-502, and nn. 2-3, 515, and n. 14, 100 S.Ct., at 2786-2787, and nn. 2-3, 2793, and n. 14 (Powell, J., concurring); *id.,* at 526-527, 100 S.Ct., at 2799-2800 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that Justice STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post,* at 2123-2125, 2127, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that " *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable,****2115** when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior

cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years, see *supra*, at 2105-2112. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect ***232** the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering:* We cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, *e.g.*, Fried, *Metro Broadcasting, Inc. v. FCC:* Two Concepts of Equality, 104 Harv.L.Rev. 107, 113-117 (1990) (arguing that *Metro Broadcasting*'s adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC:* Requiem for a Heavyweight, 69 Texas L.Rev. 125, 145-146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC:* The Solution Almost Nobody Wanted, 59 UMKC L.Rev. 293, 297, 316-317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission,* 17 T. Marshall L.Rev. 317, 319, 354-355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), we overruled the recent case of *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon, supra,* at 704, 712, 113 S.Ct., at 2860, 2864. In *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), we overruled *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." ***233***Solorio, supra,* at 439-441, 450-451, 107 S.Ct., at 2926-2928, 2932-2933. And in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), we overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T.V., supra,* at 47-48, 58, 97 S.Ct., at 2556, 2561. See also, *e.g., Payne v. Tennessee,* 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) (overruling *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)); *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 695-701, 98 S.Ct. 2018, 2038-2041, 56 L.Ed.2d 611 (1978) (partially overruling *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), because *Monroe* was a "departure from prior practice" that had not ****2116** engendered substantial reliance); *Swift & Co. v. Wickham,* 382 U.S. 111, 128-129, 86 S.Ct. 258, 267-268, 15 L.Ed.2d 194

(1965) (overruling *Kesler v. Department of Public Safety of Utah,* 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962), to reaffirm "pre- *Kesler* precedent" and restore the law to the "view ... which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.,* at 854, 112 S.Ct., at 2808. In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.,* at 856, 112 S.Ct., at 2809 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases-and did so quite recently. By refusing to follow ***234** *Metro Broadcasting,* then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838-839, 130 L.Ed.2d 753 (1995) (declining to overrule *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the 10 years since *Southland* was decided).

Justice STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis.* But again, he misunderstands our position. We have acknowledged that, after *Croson,* "some uncertainty persisted with respect to the standard of review for federal racial classifications," *supra,* at 2110, and we therefore do not say that we "merely restor[e] the *status quo ante* " today, *post,* at 2127. But as we have described *supra,* at 2105-2113, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting,* and we therefore disagree with Justice STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," *post,* at 2127. We also disagree with Justice STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument, see *post,* at 2128, and n. 13. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " *Fullilove,* 448 U.S., at 523, and n. 1, 100 S.Ct., at 2798, and n. 1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is ***235** wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.,* at 524, 100 S.Ct., at 2798. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition, *post,* at 2128. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley, Loving, McLaughlin, Bolling, Hirabayashi,* and *Korematsu,* see *Fullilove, supra,* at 524-526, 100 S.Ct., at 2798-2800, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over

its later misapplications." ****2117***Helvering,* 309 U.S., at 122, 60 S.Ct., at 453. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

[7] Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove,* 448 U.S., at 496, 100 S.Ct., at 2783-84 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt ... the formulas of analysis articulated in such cases as [*Bakke*]." *Id.,* at 492, 100 S.Ct., at 2781 (opinion of Burger, C.J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

***236** Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e.g., post,* at 2122 (STEVENS, J., dissenting); *Croson,* 488 U.S., at 514-515, and n. 5, 109 S.Ct., at 733, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting,* 497 U.S., at 610, 110 S.Ct., at 3033 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with Justice STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove, supra,* at 533-535, 537, 100 S.Ct., at 2803-2804, 2805 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu,* 323 U.S., at 223, 65 S.Ct., at 197 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub.L. 100-383, § 2(a), 102 Stat. 903-904 ("[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons ... and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

[8] ***237** Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove, supra,* at 519, 100 S.Ct., at 2795 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise,* 480 U.S., at 167, 107 S.Ct., at 1064 (plurality opinion of Brennan, J.); *id.,* at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); *id.,* at 196, 107 S.Ct., at 1079-1080 (O'CONNOR, J., dissenting). When

race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

****2118** IV

[9] Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove,* analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F.3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of ***238** race-neutral means to increase minority business participation" in government contracting, *Croson, supra,* at 507, 109 S.Ct., at 729, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove, supra,* at 513, 100 S.Ct., at 2792-2793 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR § 124.106(a) (1994), whereas the DOT's regulations implementing STURAA § 106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR § 124.106(b) (1994) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR § 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra*. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business *who are not socially disadvantaged,*" 13 CFR § 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," § 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question,should ***239** be addressed in the first instance by the lower courts.

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

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520, 109 S.Ct. 706, 735-736, 102 L.Ed.2d 854 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a cred-

itor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, § 1 ("[N]or shall any State ... deny *to any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, § 1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, § 3 ("[N]o Attainder of Treason ****2119** shall work Corruption of Blood"); Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement-even for the most admirable and benign of purposes-is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

***240** Justice THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post,* at 2120 (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine***241** of oppression," *post,* at 2120 (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid.* But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, Justice STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove v. Klutznick,* 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference

are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. FN* In each instance, it is racial discrimination, plain and simple.

> FN* It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," *post,* at 2136 (GINSBURG, J., dissenting); see also, *post,* at 2122 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on " 'whose ox is gored,' " *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 295, n. 35, 98 S.Ct. 2733, 2751, n. 35, 57 L.Ed.2d 750 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

****2120 *242** Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See *ante,* at 2110-2111. I shall comment on each of these propositions, then add a few words about *stare decisis,* and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." *Fullilove v. Klutznick,* 448 U.S. 448, 533-535, 100 S.Ct. 2758, 2804, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, *id.,* at 480, 100 S.Ct., at 2775-2776; in Justice Powell's concurrence, *id.,* at 496, 100 S.Ct., at 2783-2784; and in my dissent in *Fullilove, id.,* at 533-534, 100 S.Ct., at 2803-2804. I welcome its renewed endorsement by the Court today. But, as the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

***243** II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of

the Government's constitutional obligation to "govern impartially," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976), should ignore this distinction.[FN1]

FN1. As Justice GINSBURG observes, *post*, at 2136, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate " 'relevant differences,' " *ante*, at 2113; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See *Missouri v. Jenkins*, 515 U.S. 70, 112, 115 S.Ct. 2038, 2060-2061, 132 L.Ed.2d 63 (1995) (O'CONNOR, J., concurring) ("[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice.... It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different-something less strict-when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

****2121 *244** To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens-a curfew and exclusion from certain areas on the West Coast[FN2]-on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. Cf. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834[FN3] ***245** as comparable to the official discrimination against African-Americans that was prevalent for much of our history.

FN2. These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in *Hirabayashi* and *Korematsu*. See *Korematsu*, 323 U.S., at 223, 65 S.Ct., at 197 ("Regardless of the true nature of the assembly and relocation centers ... we are dealing specifically with nothing but an exclusion order").

FN3. See *Morton v. Mancari*, 417 U.S. 535, 541, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). To be eligible for the preference in 1974, an individual had to " 'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' " *Id.*, at 553, n. 24, 94 S.Ct., at 2484, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U.S., at 553-554, 94 S.Ct., at 2484-2485. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.*, at 551-552, 94 S.Ct., at 2483-2484. In this case Respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. *Ante*, at 2111-2112. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases ****2122** may be difficult to classify,[FN4] but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a ***246** disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. *Feeney*, 442 U.S., at 279, 99 S.Ct., at 2296.

FN4. For example, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see *id.*, at 253-254, 96 S.Ct., at 2054 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate

treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451-455, 105 S.Ct. 3249, 3260-3262, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98-110, 93 S.Ct. 1278, 1329-1336, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

***247** Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans-even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See *Associated General Contractors of Cal., Inc. v. San Francisco*, 813 F.2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.[FN5] Indeed, ***248** as I have previously argued, the former is virtually always repugnant to ****2123** the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 316-317, 106 S.Ct. 1842, 1869-70, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting).[FN6] ***249** By insisting on a doctrinaire notion of "consistency" in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

FN5. In his concurrence, Justice THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. *Ante*, at 2119. Although I agree that this cost may be more significant than many people realize, see *Fullilove v. Klutznick*, 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality-perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find Justice THOMAS' extreme proposition-that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, *ante*, at 2119-at all persuas-

ive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents-whether members of majority or minority races-who have supported affirmative action over the years, to segregationists and bigots.

Finally, although Justice THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but not without a strong element of common sense, see *id.,* at 252-256, 96 S.Ct., at 2053-2055 (STEVENS, J., concurring); *id.,* at 256-270, 96 S.Ct., at 2055-2062 (BRENNAN, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See *Fullilove,* 448 U.S., at 521, 100 S.Ct., at 2796-2797 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism," *ante,* at 2119 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.

FN6. As I noted in *Wygant:*

"There is ... a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

"The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) , and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce

assumptions of inequality." 476 U.S., at 316-317, 106 S.Ct., at 1869 (dissenting opinion).

III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today's majority. Thus, in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which we upheld a federal program designed****2124** to foster racial diversity in broadcasting, we identified the special "institutional***250** competence" of our National Legislature. *Id.,* at 563, 110 S.Ct., at 3008. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership programs have been specifically approved-indeed, mandated-by Congress." *Ibid.* We recalled the several opinions in *Fullilove* that admonished this Court to " 'approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the ... general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [*Fullilove,* 448 U.S.], at 472 [100 S.Ct., at 2771]; see also *id.,* at 491 [100 S.Ct., at 2781]; *id.,* at 510, and 515-516, n. 14 [100 S.Ct., at 2791, 2794, n. 14] (Powell, J., concurring); *id.,* at 517-520 [100 S.Ct., at 2794-2796] (MARSHALL, J., concurring in judgment)." 497 U.S., at 563, 110 S.Ct., at 3008. We recalled that the opinions of Chief Justice Burger and Justice Powell in *Fullilove* had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." 497 U.S., at 563, 110 S.Ct., at 3008 (citations and footnote omitted).

The majority in *Metro Broadcasting* and the plurality in *Fullilove* were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520-524, 109 S.Ct. 706, 735-738, 102 L.Ed.2d 854 (1989), Justice SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based conduct by the Federal Government-whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5-and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1." *Id.,* at 521-522, 109 S.Ct., at 736. Continuing, Justice SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the ***251** Civil War Amendments, but upon social reality and governmental theory." *Id.,* at 522, 109 S.Ct., at 737.

> "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776-1787, pp. 499-506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:
>
> " 'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of in-

> dividuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961)." *Id.*, at 523 (opinion concurring in judgment).

In her plurality opinion in *Croson*, Justice O'CONNOR also emphasized the importance of this distinction when she responded to the city's argument that *Fullilove* was controlling. She wrote:

> ***252** "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define ****2125** situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U.S., at 490, 109 S.Ct., at 720 (joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768, n. 2, 65 S.Ct. 1515, 1519-1520, n. 2, 89 L.Ed. 1915 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See *ante*, at 2114-2115. It provides not a word of direct explanation for its sudden and enormous departure from ***253** the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature. FN7 The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly. FN8

> FN7. Despite the majority's reliance on *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *ante*, at

2106, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." 323 U.S., at 216, 65 S.Ct., at 194, quoted *ante*, at 2106 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority.

FN8. We have rejected this proposition outside of the affirmative-action context as well. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 1903-1904, 48 L.Ed.2d 495 (1976), we held:

> "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

****2126 *254** Our opinion in *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U.S., at 563, 110 S.Ct., at 3008. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in *Fullilove*, FN9 with respect to the States themselves. When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment. FN10 That section reads: ***255** "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. FN11 This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

> FN9. The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for

DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA § 106(c)(4), 101 Stat. 146.

In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' § 5 authority even if the federal contracts are not. See *Metro Broadcasting*, 497 U.S., at 603-604, 110 S.Ct., at 3029-3030 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

FN10. Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5's application to pure federal regulation of individuals.

FN11. We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In *Katzenbach*, this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. *Id.*, at 648-651, 86 S.Ct., at 1722-1724. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it ***256** were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 and the second in 1990, ****2127***Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the Court upheld the program. Today the Court explicitly overrules *Metro Broadcasting* (at least in part), *ante*, at 2112-2113, and undermines *Fullilove* by recasting the standard on which it rested and by calling even its holding into question, *ante*, at 2116-2117. By way of explanation, Justice O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." *Ante*, at 2116. A skeptical observer might ask

whether this pronouncement is a faithful application of the doctrine of *stare decisis.*[FN12] A brief comment on each of the two ailing cases may provide the answer.

> FN12. Our skeptical observer might also notice that Justice O'CONNOR's explanation for departing from settled precedent is joined only by Justice KENNEDY. *Ante,* at 2100. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis.*

In the Court's view, our decision in *Metro Broadcasting* was inconsistent with the rule announced in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Ante,* at 2111-2112. But two decisive distinctions separate those two cases. First, *Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove,* which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today's majority trumpeted the importance of that distinction in *Croson,* they now reject it in the name of "congruence." It is therefore ***257** quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante,* for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

Second, *Metro Broadcasting* 's holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action cases-including the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 311-319, 98 S.Ct. 2733, 2759-2763, 57 L.Ed.2d 750 (1978). Later, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.,* at 314-315, 98 S.Ct., at 2760-61 (STEVENS, J., dissenting); in response, Justice O'CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.,* at 288, n., 106 S.Ct., at 1854, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Ibid.*

Thus, prior to *Metro Broadcasting,* the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting,* of course, answered that question in the ***258** affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. *Ante,* at 2112. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today-indeed, the question is not remotely presented in this case-and I do not take the Court's ****2128** opinion to diminish that aspect of our decision in *Metro Broadcasting.*

The Court's suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, *ante,* at 2117, is even more

disingenuous than its treatment of *Metro Broadcasting.* For the Court endorses the "strict scrutiny" standard that Justice Powell applied in *Bakke,* see *ante,* at 2111, and acknowledges that he applied that standard in *Fullilove* as well, *ante,* at 2108-2109. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke,* which of course included Justice Powell's. 448 U.S., at 492, 100 S.Ct., at 2781-82. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case's continued vitality and accuses it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.,* at 532-554, 100 S.Ct., at 2802-2814 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, *id.,* at 522-532, 100 S.Ct., at 2797-2803, contained any suggestion that the issue the Court was resolving had been decided before.[FN13] As was true ***259** of *Metro Broadcasting,* the Court in *Fullilove* decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

FN13. Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See *ante,* at 2116, citing 448 U.S., at 523-526, 100 S.Ct., at 2797-2799. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before *Fullilove.* The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

V

The Court's holding in *Fullilove* surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in *Fullilove,* is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE's significantly less objectionable than the 1977 categorical grant of $400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." *Fullilove,* 448 U.S., at 532, 100 S.Ct., at 2803 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,[FN14] gives rise to a second rebuttable presumption ***260** of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995); 48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., Apps. A and C (1994). Thus, the current ****2129** preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

FN14. STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR §

124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, *id.*, § 124.106. Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See 15 U.S.C. § 637(d)(3) (1988 ed. and Supp. V); 13 CFR § 124.601 (1995).

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see *Fullilove*, 448 U.S., at 537-538, 540, 543-544, and n. 16, 546, 100 S.Ct., at 2805-2806, 2806-2807, 2808-2809, and n. 16, 2809-2810 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.[FN15] 13 CFR § 124.106(a)(1)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice-along with its lingering effects-still survives.[FN16] The presumption of economic disadvantage ***261** embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted. 13 CFR §§ 124.601-124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties-specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom-or with whose friends-they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a ***262** forward-looking response to practical problems faced by minority subcontractors.

FN15. The Government apparently takes this exclusion seriously. See *Autek Systems Corp. v. United States*, 835 F.Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under § 8(a) program), aff'd, 43 F.3d 712 (CADC 1994).

FN16. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Ante*, at 2117.

"Our findings clearly state that groups such as black Americans, Hispanic

> Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong.Rec. 34097 (1978)

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE's, 15 U.S.C. §§ 637(a)(1)(B)-(C) (1988 ed., Supp. V); 13 CFR § 124.602(a) (1995),[FN17] and DBE status can be challenged ****2130** by a competitor at any time under any of the routes to certification. 13 CFR § 124.603 (1995); 49 CFR § 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR § 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

> FN17. The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of § 8(d) certification, although such review may be derivative for those businesses that receive § 8(d) certification as a result of § 8(a) or STURAA certification.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement-numerical or otherwise-that a general contractor must hire DBE subcontractors. The program we upheld in *Fullilove* required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, ***263** and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. *Bakke*, 438 U.S., at 319-320, 98 S.Ct., at 2763-2764 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see *Fullilove*, 448 U.S., at 549-550, 100 S.Ct., at 2811-2812 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.[FN18] However we might ***264** evaluate the benefits and costs-both fiscal and social-of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove*. If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution-a vision the Court expressly endorses today-it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

> FN18. Respondents point us to the following legislative history: H.R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H.R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Busi-

ness in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U.S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women-Owned Businesses-An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs-Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9-10, n. 9.

****2131** VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of ***265** discrimination, as under *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), sufficient to justify surpassing the congressional objective. See 16 F.3d 1537, 1544 (CA10 1994) ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240, 242 (Colo.1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson* "); cf. Complaint ¶ 28, App. 20 (federal regula-

tions violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is applied, and petitioner did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE's) on the basis of certain race-based presumptions. See generally *ante,* at 2102-2103. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing***266** remedies for the continuing effects of past discrimination, see, *e.g., Fullilove, supra,* at 465-466, 100 S.Ct., at 2768 (citing legislative history describing SBA § 8(a) as remedial); S.Rep. No. 100-4, p. 11 (1987) U.S.Code Cong. & Admin.News 1987, pp. 66, 76 (Committee Report stating that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite. See, *e.g.,* 16 F.3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act ... satisfies the evidentiary requirements of *Fullilove* "); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90-C-1413 (D.Colo.), p. 12 (*Fullilove* is not applicable to the case at bar because "[f]irst and foremost, *Fullilove* stands for only one proposition relevant ****2132** here: the ability of the U.S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy").

In these circumstances, I agree with Justice STEVENS's conclusion that *stare decisis* compels the application of *Fullilove.* Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment. [FN1] ***267***Fullilove,* 448 U.S., at 477-478, 100 S.Ct., at 2774-2775 (opinion of Burger, C.J.); *id.,* at 503, 100 S.Ct., at 2787 (Powell, J., concurring); *id.,* at 520-521, 100 S.Ct., at 2796-2797 (Marshall, J., concurring in judgment). Once *Fullilove* is applied, as Justice STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in *Fullilove,* see *ante,* at 2128-2130 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

FN1. If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as Justice STEVENS has noted, see *ante,* at 2122-2123, n. 5, 2123, n. 6, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

The Court today, however, does not reach the application of *Fullilove* to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the *Fullilove* plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered *Fullilove* 's conclusion obsolete as judged under the *Fullilove* plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what *Fullilove* would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in *Fullilove* was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, ***268***Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 564, 110 S.Ct. 2997, 3008, 111 L.Ed.2d 445 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. *Fullilove, supra,* at 495-496, 100 S.Ct., at 2783 (concurring opinion) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451, 105 S.Ct. 3249, 3260, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring, joined by Burger, C.J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante,* at 2117 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, ****2133** but fatal in fact.' *Fullilove, supra,* at 519 [100 S.Ct., at 2795-2796] (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact' ").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. The Court simply notes the observation in *Croson* "that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson* 's facts did not implicate Congress's broad power under § 5 of the Fourteenth Amendment," *ante,* at 2110, and explains that there is disagreement***269** among today's majority about the extent of the § 5 power, *ante,* at 2114-2115. There is therefore no reason to treat the opinion as affecting one way or another the views of § 5 power, described as "broad," *ante,* at 2110, "unique," *Fullilove,* 448 U.S., at 500, 100 S.Ct., at 2786 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (opinion of O'CONNOR, J.). See also *Jenkins, post,* at 113, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) ("Congress ... enjoys ' "discretion in determining

whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," ' *Croson,* 488 U.S., at 490, 109 S.Ct., at 720 (quoting *Katzenbach v. Morgan,* 384 U.S., at 651 [86 S.Ct., at 1723])"). Thus, today's decision should leave § 5 exactly where it is as the source of an interest of the National Government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily have any effect on the resolution of an issue that was just as pertinent under *Fullilove* 's unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future' "), quoting *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). This is so whether the remedial authority is exercised by a court, see *ibid.; Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968), the Congress, see *Fullilove, supra,* 448 U.S., at 502, 100 S.Ct., at 2787 (Powell, J., concurring), or some other legislature, see ***270***Croson, supra,* 488 U.S., at 491-492, 109 S.Ct., at 720-721 (opinionof O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, *e.g., ante,* at 2113-2114, 2117-2118 (opinion of O'CONNOR, J.); *ante,* at 2120 (STEVENS, J., with whom GINSBURG, J., joins, dissenting); *post,* at 2135, 2136 (GINSBURG, J., with whom BREYER, J. joins, dissenting); *Jenkins,* 515 U.S., at 112, 115 S.Ct., at 2061 (O'CONNOR, J., concurring) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this ****2134** price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in *Fullilove* that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S., at 513, 100 S.Ct., at 2792-2793; *ante,* at 2117-2118 (opinion of the Court).

Surely the transition from the *Fullilove* plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand ***271** had chosen to press a challenge to the reasonableness of the burden of these statutes, [FN2] more than a decade after *Fullilove* had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

FN2. I say "press a challenge" because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

Justice GINSBURG, with whom Justice BREYER joins, dissenting.

For the reasons stated by Justice SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with Justice STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." *Ante*, at 2125 (STEVENS, J., dissenting); see *ante*, at 2126.[FN1] I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement-the common understandings and concerns-revealed in opinions that together speak for a majority of the Court.

FN1. On congressional authority to enforce the equal protection principle, see, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 286, 85 S.Ct. 348, 373, 13 L.Ed.2d 258 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under § 5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person-whatever his race, creed, or color-to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.*, at 291, 293, 85 S.Ct., at 375, 377 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 ... is the vindication of human dignity"; "Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147-151 (12th ed. 1991).

***272** I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Ante*, at 2117 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," *ante*, at 2119 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional ****2135** liberty." *Id.*, at 559, 16 S.Ct., at 1146 (dissenting opinion).

Not until *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.*, at 11, 87 S.Ct., at 1823.[FN2]

FN2. The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied

in *Loving*. See *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, vacated and remanded, 350 U.S. 891, 76 S.Ct. 151, 100 L.Ed. 784 (1955), reinstated and aff'd, 197 Va. 734, 90 S.E.2d 849, appeal dism'd, 350 U.S. 985, 76 S.Ct. 472, 100 L.Ed. 852 (1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S.E.2d, at 756.

***273** The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. *Ante*, at 2117 (lead opinion); see also *ante*, at 2133 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race.[FN3] White and African-American consumers still encounter different deals.[FN4] People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.[FN5] ***274** Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[FN6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[FN7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

FN3. See, *e.g.*, H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90-4, 1990) (*e.g.*, Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91-9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

FN4. See, *e.g.*, Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv.L.Rev. 817, 821-822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

FN5. See, *e.g.*, A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds. 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, R. Struyk, & J. Yinger, U.S. Dept. of Housing and Urban Development, Housing Discrimination Study: Synthesis i-vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African-

American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am.J.Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

FN6. See, *e.g.*, *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

FN7. Cf. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 318, 106 S.Ct. 1842, 1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); *Califano v. Goldfarb*, 430 U.S. 199, 222-223, 97 S.Ct. 1021, 1034-1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

****2136** Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.[FN8]

FN8. On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, *e.g.*, Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433-434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

***275** II

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. *Ante*, at 2117-2118. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); for in that case, scrutiny the Court described as "most rigid," *id.*, at 216, 65 S.Ct., at 194, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante*, at 2106 (lead opinion). A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," *ante*, at 2119 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is " 'fatal in fact.' " *Ante*, at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519, 100 S.Ct. 2758, 2795-2796, 65 L.Ed.2d 902 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante*, at 2113-2114 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e.g.*, *Hoyt v. Florida*, 368 U.S. 57, 60, 82 S.Ct. 159, 161-162, 7 L.Ed.2d 118 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law

barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from ***276** illegitimate uses of race in governmental decision-making," *ante,* at 2113 (lead opinion), "to 'differentiate between' permissible and impermissible governmental use of race," *ibid.*, to distinguish " 'between a "No Trespassing" sign and a welcome mat,' " *ante,* at 2114.

Close review also is in order for this further reason. As Justice SOUTER points out, *ante,* at 2133-2134 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e.g.*, *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n,* 482 F.2d 1333, 1341 (CA2 1973).

* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

U.S.Colo.,1995.
Adarand Constructors, Inc. v. Pena
515 U.S. 200, 115 S.Ct. 2097, 67 Fair Empl.Prac.Cas. (BNA) 1828, 66 Empl. Prac. Dec. P 43,556, 78 Rad. Reg. 2d (P & F) 357, 132 L.Ed.2d 158, 63 USLW 4523, 40 Cont.Cas.Fed. (CCH) P 76,756

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS v. MICHAEL B. WHITING ET AL.

No. 09-115

SUPREME COURT OF THE UNITED STATES

2011 U.S. LEXIS 4018

December 8, 2010, Argued
May 26, 2011, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 2009 U.S. App. LEXIS 7016 (9th Cir. Ariz., 2009)

DISPOSITION: Affirmed.

SYLLABUS

The Immigration Reform and Control Act (IRCA) makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). Employers that violate that prohibition may be subjected to federal civil and criminal sanctions. IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2).

IRCA also requires employers to take steps to verify an employee's eligibility for employment. In an attempt to improve that verification process in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created E-Verify -- an internet-based system employers can use to check the work authorization status of employees.

Against this statutory background, several States have recently **[*2]** enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws." Arizona is one of them. The Legal Arizona Workers Act provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. That law also requires that all Arizona employers use E-Verify.

The Chamber of Commerce of the United States and various business and civil rights organizations (collectively Chamber) filed this federal preenforcement suit against those charged with administering the Arizona law, arguing that the state law's license suspension and revocation provisions were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted. The District Court found that the plain language of IRCA's preemption clause did not invalidate the Arizona law because the law did no more than impose licensing conditions on businesses operating within the State. Nor was the state law preempted with respect to E-Verify, the court concluded, because although Congress had made

the program **[*3]** voluntary at the national level, it had expressed no intent to prevent States from mandating participation. The Ninth Circuit affirmed.

Held: The judgment is affirmed.

558 F.3d 856, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II-A, concluding that Arizona's licensing law is not expressly preempted.

Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted. While IRCA prohibits States from imposing "civil or criminal sanctions" on those who employ unauthorized aliens, it preserves state authority to impose sanctions "through licensing and similar laws." § 1324a(h)(2). That is what the Arizona law does -- it instructs courts to suspend or revoke the business licenses of in-state employers that employ unauthorized aliens. The definition of "license" contained in the Arizona statute largely parrots the definition of "license" that Congress codified in the Administrative Procedure Act (APA).

The state statute also includes within its definition of "license" documents such as articles of incorporation, certificates of partnership, and grants of authority **[*4]** to foreign companies to transact business in the State, Ariz. Rev. Stat. Ann. § 23-211(9), each of which has clear counterparts in APA and dictionary definitions of the word "license." And even if a law regulating articles of incorporation and the like is not itself a "licensing law," it is at the very least "similar" to one, and therefore comfortably within the savings clause. The Chamber's argument that the Arizona law is not a "licensing" law because it operates only to suspend and revoke licenses rather than to grant them is without basis in law, fact, or logic.

The Chamber contends that the savings clause should apply only to certain types of licenses or only to license revocation following an IRCA adjudication because Congress, when enacting IRCA, eliminated unauthorized worker prohibitions and associated adjudication procedures in another federal statute. But no such limits are even remotely discernible in the statutory text.

The Chamber's reliance on IRCA's legislative history to bolster its textual and structural arguments is unavailing given the Court's conclusion that Arizona's law falls within the plain text of the savings clause. Pp. 9-15.

THE CHIEF JUSTICE, joined by JUSTICE **[*5]** SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO, concluded in Part II-B:

The Arizona licensing law is not impliedly preempted by federal law. At its broadest, the Chamber's argument is that Congress intended the federal system to be exclusive. But Arizona's procedures simply implement the sanctions that Congress expressly allowed the States to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

And here Arizona's law closely tracks IRCA's provisions in all material respects. For example, it adopts the federal definition of who qualifies as an "unauthorized alien," compare 8 U.S.C. § 1324a(h)(3) with Ariz. Rev. Stat. Ann. § 23-211(11); provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, making no independent determination of the matter, § 23-212(B); and requires a state court to "consider only the federal government's determination," § 23-212(H).

The Chamber's more general contention that the Arizona law is preempted because it upsets **[*6]** the balance that Congress sought to strike in IRCA also fails. The cases on which the Chamber relies in making this argument all involve uniquely federal areas of interest, see, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854. Regulating in-state businesses through licensing laws is not such an area. And those cases all concern state actions that directly interfered with the operation of a federal program, see, *e.g.*, *id.*, at 351, 121 S. Ct. 1012, 148 L. Ed. 2d 854. There is no similar interference here.

The Chamber asserts that employers will err on the side of discrimination rather than risk the "'business death penalty'" by "hiring unauthorized workers." That is not the choice. License termination is not an available sanction for merely hiring unauthorized workers, but is triggered only by far more egregious violations. And because the Arizona law covers only knowing or

intentional violations, an employer acting in good faith need not fear the law's sanctions. Moreover, federal and state antidiscrimination laws protect against employment discrimination and provide employers with a strong incentive not to discriminate. Employers also enjoy safe harbors from liability when using E-Verify as required by the **[*7]** Arizona law. The most rational path for employers is to obey both the law barring the employment of unauthorized aliens and the law prohibiting discrimination. There is no reason to suppose that Arizona employers will choose not to do so. Pp. 15-22.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part III-A, concluding that Arizona's E-Verify mandate is not impliedly preempted.

Arizona's requirement that employers use E-Verify is not impliedly preempted. The IIRIRA provision setting up E-Verify contains no language circumscribing state action. It does, however, constrain federal action: absent a prior violation of federal law, "the Secretary of Homeland Security may not require any person or . . . entity" outside the Federal Government "to participate in" E-Verify. IIRIRA, § 402(a), (e). The fact that the Federal Government may require the use of E-Verify in only limited circumstances says nothing about what the States may do. The Government recently argued just that in another case and approvingly referenced Arizona's law as an example of a permissible use of E-Verify when doing so.

Moreover, Arizona's use of E-Verify does not conflict with the federal scheme. The **[*8]** state law requires no more than that an employer, after hiring an employee, "verify the employment eligibility of the employee" through E-Verify. Ariz. Rev. Stat. Ann. § 23-214(A). And the consequences of not using E-Verify are the same under the state and federal law -- an employer forfeits an otherwise available rebuttable presumption of compliance with the law. Pp. 23-24.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO, concluded in Part III-B:

Arizona's requirement that employers use E-Verify in no way obstructs achieving the aims of the federal program. In fact, the Government has consistently expanded and encouraged the use of E-Verify, and Congress has directed that E-Verify be made available in all 50 States. And the Government has expressly rejected the Chamber's claim that the Arizona law, and those like it, will overload the federal system. Pp. 24-25.

JUDGES: ROBERTS, C. J., delivered the opinion of the Court, except as to Parts II-B and III-B. SCALIA, KENNEDY, and ALITO, JJ., joined that opinion in full, and THOMAS, J., joined as to Parts I, II-A, and III-A and concurred in the judgment. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., **[*9]** joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., took no part in the consideration or decision of the case.

OPINION BY: ROBERTS

OPINION

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Parts II-B and III-B. *

* JUSTICE THOMAS joins Parts I, II-A, and III-A of this opinion and concurs in the judgment.

Federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." 8 U.S.C. § 1324a(h)(2). A recently enacted Arizona statute -- the Legal Arizona Workers Act -- provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers. The question presented is whether federal immigration law preempts those provisions of Arizona law. Because we conclude that the State's licensing provisions fall squarely within the federal statute's savings clause and that the Arizona regulation does **[*10]** not otherwise conflict with federal law, we hold that the Arizona law is not preempted.

I

A

In 1952, Congress enacted the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq*. That statute established a "comprehensive federal statutory scheme for regulation

of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas* v. *Bica*, 424 U.S. 351, 353, 359, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

In the years following the enactment of the INA, several States took action to prohibit the employment of individuals living within state borders who were not lawful residents of the United States. For example, in 1971 California passed a law providing that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 1971 Cal. Stats. ch. 1442, § 1(a). The California law imposed fines ranging from $ 200 to $ 500 for each violation of this prohibition. § 1(b). At least 11 other States enacted provisions during that same time period proscribing the employment of unauthorized **[*11]** aliens. [1]

> 1 See Conn. Gen. Stat. § 31-51k (1973) (enacted 1972); Del. Code Ann., Tit. 19, § 705 (Cum. Supp. 1978) (enacted 1976); Fla. Stat. § 448.09 (1981) (enacted 1977); Kan. Stat. Ann. § 21-4409 (1981) (enacted 1973); 1985 La. Acts p. 1894; 1977 Me. Acts p. 171; 1976 Mass. Acts p. 641; Mont. Code Ann. § 41-121 (1977 Cum. Supp.); N. H. Rev. Stat. Ann. § 275-A:4-a (1986 Cum. Supp.) (enacted 1976); 1977 Vt. Laws p. 320; 1977 Va. Acts ch. 438.

We first addressed the interaction of federal immigration law and state laws dealing with the employment of unauthorized aliens in *De Canas*, 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 2d 43. In that case, we recognized that the "[p]ower to regulate immigration is unquestionably . . . a federal power." *Id.*, at 354, 96 S. Ct. 933, 47 L. Ed. 2d 43. At the same time, however, we noted that the "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," *id.*, at 356, 96 S. Ct. 933, 47 L. Ed. 2d 43, that "prohibit[ing] the knowing employment . . . of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [the State's] police power," *ibid.*, and that the Federal Government had "at best" expressed "a peripheral **[*12]** concern with [the] employment of illegal entrants" at that point in time, *id.*, at 360, 96 S. Ct. 933, 47 L. Ed. 2d 43. As a result, we declined to hold that a state law assessing civil fines for the employment of unauthorized aliens was preempted by federal immigration law.

Ten years after *De Canas*, Congress enacted the Immigration Reform and Control Act (IRCA), 100 Stat. 3359. IRCA makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). IRCA defines an "unauthorized alien" as an alien who is not "lawfully admitted for permanent residence" or not otherwise authorized by the Attorney General to be employed in the United States. § 1324a(h)(3).

To facilitate compliance with this prohibition, IRCA requires that employers review documents establishing an employee's eligibility for employment. § 1324a(b). An employer can confirm an employee's authorization to work by reviewing the employee's United States passport, resident alien card, alien registration card, or other document approved by the Attorney General; or by reviewing a combination of other documents such as **[*13]** a driver's license and social security card. § 1324a(b)(1)(B)-(D). The employer must attest under penalty of perjury on Department of Homeland Security Form I-9 that he "has verified that the individual is not an unauthorized alien" by reviewing these documents. § 1324a(b)(1)(A). The form I-9 itself "and any information contained in or appended to [it] . . . may not be used for purposes other than for enforcement of" IRCA and other specified provisions of federal law. § 1324a(b)(5).

Employers that violate IRCA's strictures may be subjected to both civil and criminal sanctions. Immigration and Customs Enforcement, an entity within the Department of Homeland Security, is authorized to bring charges against a noncompliant employer under § 1324a(e). Depending on the circumstances of the violation, a civil fine ranging from $ 250 to $ 16,000 per unauthorized worker may be imposed. See § 1324a(e)(4)(A); 73 Fed. Reg. 10136 (2008). Employers that engage in a pattern or practice of violating IRCA's requirements can be criminally prosecuted, fined, and imprisoned for up to six months. § 1324a(f)(1). The Act also imposes fines for engaging in "unfair immigration-related employment practice[s]" **[*14]** such as discriminating on the basis of citizenship or national origin. § 1324b(a)(1); see § 1324b(g)(2)(B). Good-faith

compliance with IRCA's I-9 document review requirements provides an employer with an affirmative defense if charged with a § 1324a violation. § 1324a(a)(3).

IRCA also restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2). Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *De Canas* are now expressly preempted.

In 1996, in an attempt to improve IRCA's employment verification system, Congress created three experimental complements to the I-9 process as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009-655, note following 8 U.S.C. § 1324a. *Arizona Contractors Assn., Inc.* v. *Candelaria*, 534 F. Supp. 2d 1036, 1042 (Ariz. 2008); see 8 U.S.C. § 1324a(d). Only one of those programs -- E-Verify -- remains **[*15]** in operation today. Originally known as the "Basic Pilot Program," E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status." *Chicanos Por La Causa, Inc.* v. *Napolitano*, 558 F.3d 856, 862 (CA9 2009). An employer submits a request to the E-Verify system based on information that the employee provides similar to that used in the I-9 process. In response to that request, the employer receives either a confirmation or a tentative nonconfirmation of the employee's authorization to work. An employee may challenge a nonconfirmation report. If the employee does not do so, or if his challenge is unsuccessful, his employment must be terminated or the Federal Government must be informed. See *ibid.*

In the absence of a prior violation of certain federal laws, IIRIRA prohibits the Secretary of Homeland Security from "requir[ing] any person or . . . entity" outside the Federal Government "to participate in" the E-Verify program, § 402(a), (e), 110 Stat. 3009-656 to 3009-658. To promote use of the program, however, the statute provides that any employer that utilizes E-Verify "and obtains confirmation of identity and employment eligibility in compliance **[*16]** with the terms and conditions of the program . . . has established a rebuttable presumption" that it has not violated IRCA's unauthorized alien employment prohibition, § 402(b)(1), *id.*, at 3009-656 to 3009-657.

B

Acting against this statutory and historical background, several States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws," 8 U.S.C. § 1324a(h)(2). [2] Arizona is one of them. The Legal Arizona Workers Act of 2007 allows Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23-211, 212, 212.01 (West Supp. 2010) (citing 8 U.S.C. § 1324a).

2 See, *e.g.*, Colo. Rev. Stat. Ann. § 8-17.5-102 (2008); Miss. Code Ann. § 71-11-3(7)(e) (Supp. 2010); Mo. Rev. Stat. §§ 285-525, 285-535 (2009 Cum. Supp.); Pa. Stat. Ann., Tit. 73, § 820.311 (Purdon Supp. 2010); S. C. Code Ann. § 41-8-50(D)(2) (Supp. 2010); Tenn. Code Ann. § 50-1-103(d) (2008); Va. Code Ann. § 2.2-4311.1 (Lexis 2008); W. Va. Code Ann. § 21-1B-7 (Lexis Supp. 2010).

Under the Arizona law, if an individual **[*17]** files a complaint alleging that an employer has hired an unauthorized alien, the attorney general or the county attorney first verifies the employee's work authorization with the Federal Government pursuant to 8 U.S.C. § 1373(c). Ariz. Rev. Stat. Ann. § 23-212(B). Section 1373(c) provides that the Federal Government "shall respond to an inquiry by a" State "seeking to verify or ascertain the citizenship or immigration status of any individual . . . by providing the requested verification or status information." The Arizona law expressly prohibits state, county, or local officials from attempting "to independently make a final determination on whether an alien is authorized to work in the United States." Ariz. Rev. Stat. Ann. § 23-212(B). If the § 1373(c) inquiry reveals that a worker is an unauthorized alien, the attorney general or the county attorney must notify United States Immigration and Customs Enforcement officials, notify local law enforcement, and bring an action against the employer. § 23-212(C)(1)-(3), (D).

When a complaint is brought against an employer under Arizona law, "the court shall consider only the

federal government's determination pursuant to" 8 U.S.C. § 1373(c) **[*18]** in "determining whether an employee is an unauthorized alien." § 23-212(H). Good-faith compliance with the federal I-9 process provides employers prosecuted by the State with an affirmative defense. § 23-212(J).

A first instance of "knowingly employ[ing] an unauthorized alien" requires that the court order the employer to terminate the employment of all unauthorized aliens and file quarterly reports on all new hires for a probationary period of three years. § 23-212(A), (F)(1)(a)-(b). The court may also "order the appropriate agencies to suspend all licenses . . . that are held by the employer for [a period] not to exceed ten business days." § 23-212(F)(1)(d). A second knowing violation requires that the adjudicating court "permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work." § 23-212(F)(2).

For a first intentional violation, the court must order the employer to terminate the employment of all unauthorized aliens and file quarterly reports on all new hires for a probationary period of five years. § 23-212.01(A), (F)(1)(a)-(b). The court must also suspend all the employer's licenses for a minimum **[*19]** of 10 days. § 23-212.01(F)(1)(c). A second intentional violation requires the permanent revocation of all business licenses. § 23-212.01(F)(2).

With respect to both knowing and intentional violations, a violation qualifies as a "second violation" only if it occurs at the same business location as the first violation, during the time that the employer is already on probation for a violation at that location. § 23-212(F)(3)(a)-(b); § 23-212.01(F)(3)(a)-(b).

The Arizona law also requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" by using E-Verify. § 23-214(A). [3] "[P]roof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien." § 23-212(I).

3 Several States have passed statutes mandating the use of E-Verify. See, *e.g.*, Miss. Code Ann. § 71-11-3(3)(d), (4)(b)(i) (Supp. 2010); S. C. Code Ann. § 41-8-20(B)-(C) (Supp. 2010); Utah Code Ann. § 13-47-201(1) (Lexis Supp. 2010); Va. Code Ann. § 40.1-11.2 (Lexis Supp. 2010).

C

The Chamber of Commerce of the United States and various business and civil rights organizations **[*20]** (collectively Chamber of Commerce or Chamber) filed a pre-enforcement suit in federal court against those charged with administering the Arizona law: more than a dozen Arizona county attorneys, the Governor of Arizona, the Arizona attorney general, the Arizona registrar of contractors, and the director of the Arizona Department of Revenue (collectively Arizona). [4] The Chamber argued that the Arizona law's provisions allowing the suspension and revocation of business licenses for employing unauthorized aliens were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted.

4 No suits had been brought under the Arizona law when the complaint in this case was filed. As of the date that Arizona submitted its merits brief to this Court only three enforcement actions had been pursued against Arizona employers. See *Arizona* v. *Waterworld Ltd. Partnership*, No. CV2009-038848 (Maricopa Cty. Super. Ct., filed Dec. 21, 2009) (resolved by consent judgment); *Arizona* v. *Danny's Subway Inc*., No. CV2010-005886 (Maricopa Cty. Super. Ct., filed Mar. 9, 2010) (resolved by consent decree); *Arizona* v. *Scottsdale Art Factory, LLC*, No. CV2009-036359 **[*21]** (Maricopa Cty. Super. Ct., filed Nov. 18, 2009) (pending).

The District Court held that Arizona's law was not preempted. 534 F. Supp. 2d 1036. It found that the plain language of IRCA's preemption clause did not preempt the Arizona law because the state law does no more than impose licensing conditions on businesses operating within the State. *Id.*, at 1045-1046. With respect to E-Verify, the court concluded that although Congress had made the program voluntary at the national level, it had expressed no intent to prevent States from mandating participation. *Id.*, at 1055-1057. The Court of Appeals affirmed the District Court in all respects, holding that Arizona's law was a "'licensing and similar law[]'" falling within IRCA's savings clause and that none of the state law's challenged provisions was "expressly or impliedly preempted by federal policy." 558 F.3d at 860, 861, 866.

We granted certiorari. 561 U.S. ___, 131 S. Ct. 624, 178 L. Ed. 2d 431 (2010).

II

The Chamber of Commerce argues that Arizona's law is expressly preempted by IRCA's text and impliedly preempted because it conflicts with federal law. We address each of the Chamber's arguments in turn.

A

When a federal law contains an express preemption clause, we "focus **[*22]** on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

IRCA expressly preempts States from imposing "civil or criminal sanctions" on those who employ unauthorized aliens, "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The Arizona law, on its face, purports to impose sanctions through licensing laws. The state law authorizes state courts to suspend or revoke an employer's business licenses if that employer knowingly or intentionally employs an unauthorized alien. Ariz. Rev. Stat. Ann. § 23-212(A) and (F); § 23-212.01(A) and (F). The Arizona law defines "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in" the State. § 23-211(9)(a). That definition largely parrots the definition of "license" that Congress codified in the Administrative Procedure Act. See 5 U.S.C. § 551(8) ("'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, **[*23]** statutory exemption or other form of permission").

Apart from that general definition, the Arizona law specifically includes within its definition of "license" documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State. Ariz. Rev. Stat. Ann. § 23-211(9). These examples have clear counterparts in the APA definition just quoted. See 5 U.S.C. § 551(8) (defining "license" as including a "registration" or "charter").

A license is "a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful." Webster's Third New International Dictionary 1304 (2002). Articles of incorporation and certificates of partnership allow the formation of legal entities and permit them as such to engage in business and transactions "which but for such" authorization "would be unlawful." *Ibid.*; see Ariz. Rev. Stat. Ann. §§ 10-302, 302(11) (West 2004) (articles of incorporation allow a corporation "to carry out its business and affairs" and to "[c]onduct its business"); see also § 10-202(A)(3) **[*24]** (West Supp. 2010). As for state-issued authorizations for foreign businesses to operate within a State, we have repeatedly referred to those as "licenses." See, *e.g.*, *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *G. D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 413, n. 8, 102 S. Ct. 1137, 71 L. Ed. 2d 250 (1982); *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516, 518, 43 S. Ct. 170, 67 L. Ed. 372 (1923). Moreover, even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a "licensing law," it is at the very least "similar" to a licensing law, and therefore comfortably within the savings clause. 8 U.S.C. § 1324a(h)(2). [5]

5 JUSTICE BREYER recognizes that Arizona's definition of the word "license" comports with dictionaries' treatment of the term, but argues that "license" must be read in a more restricted way so as not to include things such as "marriage licenses" and "dog licens[es]." *Post*, at 2, 12 (dissenting opinion). Luckily, we need not address such fanciful hypotheticals; Arizona limits its definition of "license" to those state permissions issued "for the purposes of operating a business" in the State. Ariz. Rev. Stat. Ann. § 23-211(9)(a) (West Supp. 2010).

JUSTICE **[*25]** BREYER's primary concern appears to be that state permissions such as articles of incorporation and partnership certificates are treated as "licensing and similar laws." Because myriad other licenses are required to operate a business, that concern is largely academic. See § 42-5005(A) (West 2006) (Corporations that receive "gross proceeds of sales or gross income upon which a privilege tax

> is imposed . . . shall make application to the department for a privilege license." Such a corporation "shall not engage or continue in business until the [corporation] has obtained a privilege license."). Suspending or revoking an employer's articles of incorporation will often be entirely redundant. See §§ 42-5010, 5061-5076 (West 2006 and West Supp. 2010) (describing when transaction privilege tax licenses are required).

The Chamber and the United States as *amicus* argue that the Arizona law is not a "licensing" law because it operates only to suspend and revoke licenses rather than to grant them. Again, this construction of the term runs contrary to the definition that Congress itself has codified. See 5 U.S.C. § 551(9) ("'licensing' includes agency process respecting the grant, renewal, denial, **[*26]** *revocation*, *suspension*, *annulment*, *withdrawal*, limitation, amendment, modification, or conditioning of a license" (emphasis added)). It is also contrary to common sense. There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether.

The Chamber also submits that the manner in which Congress amended a related statute when enacting IRCA supports a narrow interpretation of the savings clause. The Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801 *et seq*., requires employers to secure a registration certificate from the Department of Labor before engaging in any "farm labor contracting activity." § 1811(a). Prior to IRCA, AWPA had contained its own prohibition on hiring unauthorized workers, with accompanying adjudication procedures. See § 1813(a); § 1816(a) (1982 ed.) (repealed by IRCA, 100 Stat. 3372); § 1851(a)-(b) (1982 ed.) (amended by IRCA, 100 Stat. 3372). When Congress enacted IRCA, it repealed AWPA's separate unauthorized worker prohibition and eliminated the associated adjudication process. Under the current state of the law, an AWPA **[*27]** certification may be denied based on a prior IRCA violation. § 1813(a)(6) (2006 ed.). And once obtained, that certification can be revoked because of the employment of an unauthorized alien only following a finding of an IRCA violation. *Ibid.*

The Chamber asserts that IRCA's amendment of AWPA shows that Congress meant to allow state licensing sanctions only after a federal IRCA adjudication, just as adverse action under AWPA can now be taken only through IRCA's procedures. But the text of IRCA's savings clause says nothing about state licensing sanctions being contingent on prior federal adjudication, or indeed about state licensing processes at all. The simple fact that federal law creates procedures for federal investigations and adjudications culminating in federal civil or criminal sanctions does not indicate that Congress intended to prevent States from establishing their own procedures for imposing their own sanctions through licensing. Were AWPA not amended to conform with IRCA, two different federal agencies would be responsible for administering two different unauthorized alien employment laws. The conforming amendments eliminated that potential redundancy and centralized federal **[*28]** adjudicatory authority. That hardly supports a conclusion that any state licensing programs must also be contingent on the central federal system.

In much the same vein, the Chamber argues that Congress's repeal of "AWPA's separate prohibition concerning unauthorized workers belies any suggestion that IRCA meant to authorize each of the 50 States . . . to impose its own separate prohibition," and that Congress instead wanted uniformity in immigration law enforcement. Brief for Petitioners 36. JUSTICE BREYER also objects to the departure from "one centralized enforcement scheme" under federal law. *Post*, at 7 (dissenting opinion). But Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that -- like our federal system in general -- necessarily entails the prospect of some departure from homogeneity. And as for "separate prohibition[s]," it is worth recalling that the Arizona licensing law is based exclusively on the federal prohibition -- a court reviewing a complaint under the Arizona law may "consider only the federal government's determination" with respect to "whether an employee is an unauthorized alien." § 23-212(H).

Even more boldly, **[*29]** the Chamber contends that IRCA's savings clause was intended to allow States to impose licensing sanctions solely on AWPA-related farm contracting licensees. AWPA specifically recognized that federal regulation of farm contracting licensing was only "intended to supplement State law," 29 U.S.C. § 1871, and the Chamber argues that the purpose of IRCA's savings clause was limited to preserving existing state

farm contractor licensing programs. But here again no such limit is remotely discernible in the statutory text. Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause. See *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83, 53 S. Ct. 42, 77 L. Ed. 175 (1932) ("extrinsic aids to construction" may be used "to solve, but not to create, an ambiguity" (emphasis and internal quotation marks omitted)).

The Chamber argues that its textual and structural arguments are bolstered by IRCA's legislative history. We have already concluded that Arizona's law falls within the plain text of IRCA's savings clause. And, as we have said before, Congress's "authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005); **[*30]** see also *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 149-150, n. 4, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002). Whatever the usefulness of relying on legislative history materials in general, the arguments against doing so are particularly compelling here. Beyond verbatim recitation of the statutory text, all of the legislative history documents related to IRCA save one fail to discuss the savings clause at all. The Senate Judiciary Committee Report on the Senate version of the law does not comment on it. See S. Rep. No. 99-132 (1985). Only one of the four House Reports on the law touches on the licensing exception, see H. R. Rep. No. 99-682, pt. 1, p. 58 (1986), and we have previously dismissed that very report as "a rather slender reed" from "one House of a politically divided Congress." *Hoffman*, *supra*, at 149-150, n. 4, 122 S. Ct. 1275, 152 L. Ed. 2d 271. And the Conference Committee Report does not discuss the scope of IRCA's preemption provision in any way. See H. Conf. Rep. No. 99-1000 (1986). [6]

> 6 JUSTICE BREYER poses several rhetorical questions challenging our reading of IRCA and then goes on to propose two seemingly alternative views of the phrase "licensing and similar laws" -- that it was meant to refer to "employment-related licensing **[*31]** systems," *post*, at 11 (dissenting opinion) (emphasis deleted), or, even more narrowly, to "the licensing of firms in the business of recruiting or referring workers for employment, such as . . . state agricultural labor contractor licensing schemes," *post*, at 13. If we are asking questions, a more telling one may be why, if Congress had intended such limited exceptions to its prohibition on state sanctions, it did not simply say so, instead of excepting "licensing and similar laws" generally?
>
> JUSTICE SOTOMAYOR takes a different tack. Invoking arguments that resemble those found in our implied preemption cases, she concludes that the Arizona law "falls outside" the savings clause and is expressly preempted because it allows "state courts to determine whether a person has employed an unauthorized alien." *Post*, at 2 (dissenting opinion). While JUSTICE BREYER would add language to the statute narrowly limiting the phrase "licensing and similar laws" to specific types of licenses, JUSTICE SOTOMAYOR creates an entirely new statutory requirement: She would allow States to impose sanctions through "licensing and similar laws" only after a federal adjudication. Such a requirement is found nowhere **[*32]** in the text, and JUSTICE SOTOMAYOR does not even attempt to link it to a specific textual provision.
>
> It should not be surprising that the two dissents have sharply different views on how to read the statute. That is the sort of thing that can happen when statutory analysis is so untethered from the text.

IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.

B

As an alternative to its express preemption argument, the Chamber contends that Arizona's law is impliedly preempted because it conflicts with federal law. At its broadest level, the Chamber's argument is that Congress "intended the federal system to be exclusive," and that any state system therefore necessarily conflicts with federal law. Brief for Petitioners 39. But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress **[*33]** did not intend to prevent the States from using

appropriate tools to exercise that authority.

And here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." Compare 8 U.S.C. § 1324a(h)(3) (an "unauthorized alien" is an alien not "lawfully admitted for permanent residence" or not otherwise authorized by federal law to be employed) with Ariz. Rev. Stat. Ann. § 23-211(11) (adopting the federal definition of "unauthorized alien"); see *De Canas*, 424 U.S., at 363, 96 S. Ct. 933, 47 L. Ed. 2d 43 (finding no preemption of state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country").

Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." § 23-212(B). What is more, a state court "shall consider *only* the federal government's determination" when deciding **[*34]** "whether an employee is an unauthorized alien." § 23-212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage. [7]

> 7 After specifying that a state court may consider "only" the federal determination, the Arizona law goes on to provide that the federal determination is "a rebuttable presumption of the employee's lawful status," Ariz. Rev. Stat. Ann. § 23-212(H) (West Supp. 2010). Arizona explains that this provision does not permit the State to establish unlawful status apart from the federal determination -- the provision could hardly do that, given the foregoing. It instead operates to "ensur[e] that the *employer* has an opportunity to rebut the evidence presented to establish a worker's unlawful status." Brief for Respondents 49 (emphasis added). Only in that sense is the federal determination a "rebuttable presumption." See Tr. of Oral Arg. 46-47. Giving an employer a chance to show that it did not break the state law certainly does not place the Arizona regime in conflict with federal law.

The federal determination on which the State must rely is provided under **[*35]** 8 U.S.C. § 1373(c). See *supra*, at 6-7. That provision requires the Federal Government to "verify or ascertain" an individual's "citizenship or immigration status" in response to a state request. JUSTICE BREYER is concerned that this information "says nothing about work authorization." *Post*, at 9 (dissenting opinion). JUSTICE SOTOMAYOR shares that concern. *Post*, at 10 (dissenting opinion). But if a § 1373(c) inquiry reveals that someone is a United States citizen, that certainly answers the question whether that individual is authorized to work. The same would be true if the response to a § 1373(c) query disclosed that the individual was a lawful permanent resident alien or, on the other hand, had been ordered removed. In any event, if the information provided under § 1373(c) does not confirm that an employee is an unauthorized alien, then the State cannot prove its case. See Brief for Respondents 50, n. 10 ("if the information from the federal authorities does not establish that a person is an unauthorized alien, it means that the county attorney cannot satisfy his burden of proof in an enforcement action"); Tr. of Oral Arg. 47.

From this basic starting point, the Arizona law continues **[*36]** to trace the federal law. Both the state and federal law prohibit "knowingly" employing an unauthorized alien. Compare 8 U.S.C. § 1324a(a)(1)(A) with Ariz. Rev. Stat. Ann. § 23-212(A). [8] But the state law does not stop there in guarding against any conflict with the federal law. The Arizona law provides that "'[k]nowingly employ an unauthorized alien' means the actions described in 8 United States Code § 1324a," and that the "term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations." § 23-211(8).

> 8 State law also prohibits "intentionally" employing an unauthorized alien, § 23-212.01(A), a more severe violation of the law. The Chamber does not suggest that this prohibition is any more problematic than the prohibition on "knowingly" employing an unauthorized alien.

The Arizona law provides employers with the same affirmative defense for good-faith compliance with the I-9 process as does the federal law. Compare 8 U.S.C. § 1324a(a)(3) ("A person or entity that establishes that it has complied in good faith with the [employment verification] requirements of [§ 1324a(b)] with respect to

hiring . . . an alien . . . has established **[*37]** an affirmative defense that the person or entity has not violated" the law) with Ariz. Rev. Stat. Ann. § 23-212(J) ("an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien"). [9] And both the federal and Arizona law accord employers a rebuttable presumption of compliance with the law when they use E-Verify to validate a finding of employment eligibility. Compare IIRIRA § 402(b), 110 Stat. 3009-656 to 3009-657 with Ariz. Rev. Stat. Ann. § 23-212(I).

> 9 The Chamber contends that the Arizona law conflicts with federal law because IRCA prohibits the use of the I-9 form and "any information contained in or appended to [it]" from being "used for purposes other than for enforcement of" IRCA and other specified federal laws. 8 U.S.C. § 1324a(b)(5). That argument mistakenly assumes that an employer would need to use the I-9 form or its supporting documents themselves to receive the benefit of the affirmative defense in Arizona court. In fact, "[a]n employer [could] establish good faith compliance with [the] I-9 process[] . . . **[*38]** through testimony of employees and descriptions of office policy." Brief for Respondents 52; see Tr. of Oral Arg. 33.

Apart from the mechanics of the Arizona law, the Chamber argues more generally that the law is preempted because it upsets the balance that Congress sought to strike when enacting IRCA. In the Chamber's view, IRCA reflects Congress's careful balancing of several policy considerations -- deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination. According to the Chamber, the harshness of Arizona's law "'exert[s] an extraneous pull on the scheme established by Congress'" that impermissibly upsets that balance. Brief for Petitioners 45 (quoting *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)); see Brief for Petitioners 42-45; Reply Brief for Petitioners 20.

As an initial matter, the cases on which the Chamber relies in advancing this argument all involve uniquely federal areas of regulation. See *Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 401, 405-406, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) (presidential conduct of foreign policy); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373-374, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) **[*39]** (foreign affairs power); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (fraud on a federal agency); *United States* v. *Locke*, 529 U.S. 89, 97, 99, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) (regulation of maritime vessels); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 143-144, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989) (patent law). Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.

Furthermore, those cases all concern state actions that directly interfered with the operation of the federal program. In *Buckman*, for example, the Court determined that allowing a state tort action would cause applicants before a federal agency "to submit a deluge of information that the [agency] neither wants nor needs, resulting in additional burdens on the [agency's] evaluation of an application," and harmful delays in the agency process. 531 U.S., at 351, 121 S. Ct. 1012, 148 L. Ed. 2d 854. In *Garamendi*, a state law imposing sanctions on insurance companies directly "thwart[ed] the [Federal] Government's policy of repose" for insurance companies that participated in an international program negotiated by the President. 539 U.S., at 425, 123 S. Ct. 2374, 156 L. Ed. 2d 376. *Crosby* involved a state law imposing sanctions on any entity doing **[*40]** business with Burma, a law that left the President with "less to offer and less economic and diplomatic leverage" in exercising his foreign affairs powers. 530 U.S., at 377, 120 S. Ct. 2288, 147 L. Ed. 2d 352. The state law in *Bonito Boats* extended patent-like protection "for subject matter for which patent protection has been denied or has expired," "thus eroding the general rule of free competition upon which the attractiveness of the federal patent bargain depends." 489 U.S., at 159, 161, 109 S. Ct. 971, 103 L. Ed. 2d 118. And the portions of *Locke* on which the Chamber relies involved state efforts "to impose additional unique substantive regulation on the at-sea conduct of vessels" -- "an area where the federal interest has been manifest since the beginning of our Republic." 529 U.S., at 106, 99, 120 S. Ct. 1135, 146 L. Ed. 2d 69. There is no similar interference with the federal program in this case; that program operates unimpeded by the state law.

License suspension and revocation are significant sanctions. But they are typical attributes of a licensing regime. Numerous Arizona laws provide for the suspension or revocation of licenses for failing to comply with specified state laws. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 5-108.05(D), 32-852.01(L), 32-1154(B), 32-1451(M), 41-2186 (West **[*41]** 2002). Federal law recognizes that the authority to license includes the authority to suspend, revoke, annul, or withdraw a license. See 5 U.S.C. § 551(9). Indeed, AWPA itself -- on which the Chamber so heavily relies -- provides that AWPA "certificates of registration" can be suspended or revoked for employing an unauthorized alien. 29 U.S.C. § 1813(a)(6). It makes little sense to preserve state authority to impose sanctions through licensing, but not allow States to revoke licenses when appropriate as one of those sanctions.

The Chamber and JUSTICE BREYER assert that employers will err on the side of discrimination rather than risk the '"business death penalty'" by "hiring unauthorized workers." *Post*, at 6-7 (dissenting opinion); see Brief for Petitioners 3, 35. That is not the choice. License termination is not an available sanction simply for "hiring unauthorized workers." Only far more egregious violations of the law trigger that consequence. The Arizona law covers only knowing or intentional violations. The law's permanent licensing sanctions do not come into play until a second knowing or intentional violation at the same business location, and only if the second violation occurs **[*42]** while the employer is still on probation for the first. These limits ensure that licensing sanctions are imposed only when an employer's conduct fully justifies them. An employer acting in good faith need have no fear of the sanctions.

As the Chamber points out, IRCA has its own anti-discrimination provisions, see 8 U.S.C. § 1324b(a)(1), (g)(1)(B) (imposing sanctions for discrimination "against any individual . . . with respect to the hiring . . . or the discharging of the individual from employment"); Arizona law certainly does nothing to displace those. Other federal laws, and Arizona anti-discrimination laws, provide further protection against employment discrimination -- and strong incentive for employers not to discriminate. See, *e.g.*, 42 U.S.C. § 2000e-2(a) (prohibiting discrimination based on "race, color, religion, sex, or national origin"); Ariz. Rev. Stat. Ann. § 41-1463(B)(1) (West Supp. 2010) (prohibiting employment discrimination based on "race, color, religion, sex, age, or national origin").

All that is required to avoid sanctions under the Legal Arizona Workers Act is to refrain from knowingly or intentionally violating the employment law. Employers enjoy safe harbors **[*43]** from liability when they use the I-9 system and E-Verify -- as Arizona law requires them to do. The most rational path for employers is to obey the law -- both the law barring the employment of unauthorized aliens and the law prohibiting discrimination -- and there is no reason to suppose that Arizona employers will choose not to do so.

As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions -- those imposed "through licensing and similar laws."

Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in **[*44]** IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.

Implied preemption analysis does not justify a "free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law." *Gade* v. *National Solid Wastes Management Assn.*, 505 U.S. 88, 111, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (KENNEDY, J., concurring in part and concurring in judgment); see *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Our precedents "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Gade*, *supra*, at 110, 112 S. Ct. 2374, 120 L. Ed. 2d 73. That threshold is not met here.

III

The Chamber also argues that Arizona's requirement

that employers use the federal E-Verify system to determine whether an employee is authorized to work is impliedly preempted. In the Chamber's view, "Congress wanted to develop a reliable and non-burdensome system of work-authorization verification" that could serve as an alternative to the I-9 procedures, and the "mandatory use of E-Verify impedes that purpose." 558 F.3d at 866.

A

We **[*45]** begin again with the relevant text. The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action. It does, however, constrain federal action: absent a prior violation of federal law, "the Secretary of Homeland Security may not require any person or other entity [outside of the Federal Government] to participate in a pilot program" such as E-Verify. IIRIRA § 402(a), 110 Stat. 3009-656. That provision limits what the Secretary of Homeland Security may do -- nothing more.

The Federal Government recently argued just that, and approvingly referenced Arizona's E-Verify law when doing so. In 2008, an Executive Order mandated that executive agencies require federal contractors to use E-Verify as a condition of receiving a federal contract. See Exec. Order No. 13465, 73 Fed. Reg. 33286 (2008). When that Order and its implementing regulation were challenged, the Government pointed to Arizona's E-Verify mandate as an example of a permissible use of that system: "[T]he State of Arizona has required all public and private employers in that State to use E-Verify . . . . *This is permissible* because the State of Arizona is not the Secretary **[*46]** of Homeland Security." Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment in No. 8:08-cv-03444 (D Md.), p. 7 (emphasis added), appeal dism'd, No. 09-2006 (CA4, Dec. 14, 2009).

Arizona's use of E-Verify does not conflict with the federal scheme. The Arizona law requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" through E-Verify. Ariz. Rev. Stat. Ann. § 23-214(A) (West Supp. 2010). That requirement is entirely consistent with the federal law. And the consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with the law. Compare IIRIRA § 402(b)(1) with Ariz. Rev. Stat. Ann. § 23-212(I). [10]

10 Arizona has since amended its statute to include other consequences, such as the loss of state-allocated economic development incentives. See 2008 Ariz. Sess. Laws ch. 152. Because those provisions were not part of the statute when this suit was brought, they are not before us and we do not address their interaction **[*47]** with federal law.

B

Congress's objective in authorizing the development of E-Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy. 8 U.S.C. § 1324a(d)(2). Arizona's requirement that employers operating within its borders use E-Verify in no way obstructs achieving those aims.

In fact, the Federal Government has consistently expanded and encouraged the use of E-Verify. When E-Verify was created in 1996, it was meant to last just four years and it was made available in only six States. IIRIRA § 401(b) and (c)(1), 110 Stat. 3009-655 to 3009-656. Congress since has acted to extend the E-Verify program's existence on four separate occasions, the most recent of which ensures the program's vitality through 2012. [11] And in 2003 Congress directed the Secretary of Homeland Security to make E-Verify available in all 50 States. 117 Stat. 1944; IIRIRA § 401(c)(1), 110 Stat. 3009-656. The Department of Homeland Security has even used "billboard and radio advertisements . . . to encourage greater participation" in the E-Verify program. 534 F. Supp. 2d, at 1056.

11 See Basic Pilot Extension Act of 2001, § 2, 115 Stat. 2407; **[*48]** Basic Pilot Program Extension and Expansion Act of 2003, § 2, 117 Stat. 1944; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Div. A, § 143, 122 Stat. 3580; Department of Homeland Security Appropriations Act of 2010, § 547, 123 Stat. 2177.

The Chamber contends that "if the 49 other States followed Arizona's lead, the state-mandated drain on federal resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress's primary objective in establishing E-Verify."

Brief for Petitioners 50-51. Whatever the legal significance of that argument, the United States does not agree with the factual premise. According to the Department of Homeland Security, "the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create." Brief for United States as *Amicus Curiae* 34. And the United States notes that "[t]he government continues to encourage more employers to participate" in E-Verify. *Id.*, at 31.

The Chamber has reservations about E-Verify's reliability, see Brief for Petitioners 49, n. 27, but again the United States disagrees. The Federal Government reports that "E-Verify's **[*49]** successful track record . . . is borne out by findings documenting the system's accuracy and participants' satisfaction." Brief for United States as *Amicus Curiae* 31. Indeed, according to the Government, the program is "the best means available to determine the employment eligibility of new hires." U.S. Dept. of Homeland Security, U.S. Citizenship and Immigration Services, E-Verify User Manual for Employers 4 (Sept. 2010). [12]

12 JUSTICE BREYER shares the Chamber's concern about E-Verify's accuracy. See *post*, at 8, 19. Statistics from Fiscal Year 2010, however, indicate that of the 15,640,167 E-Verify cases submitted, 98.3% were automatically confirmed as work authorized, 0.3% were confirmed as work authorized after contesting and resolving an initial nonconfirmation -- an avenue available to all workers -- and 1.43% were not found work authorized. E-Verify Statistics and Reports, available at http://www.uscis.gov/portal/site/uscis/menuitem/statistics (as visited May 23, 2011, and available in the Clerk of Court's case file). As JUSTICE BREYER notes, the initial mismatches (the 0.3%) are frequently due to "'incorrectly spelled [names] in government databases or on identification documents.'" **[*50]** *Post*, at 19. Such a hazard is of course not unique to E-Verify. Moreover, JUSTICE BREYER's statistical analysis underlying his conclusion that E-Verify queries, at least initially, wrongly "suggest[] that an individual [i]s not lawfully employable" "*18% of the time*" needs to be understood for what it is. *Post*, at 8. If E-Verify initially indicated that two individuals were not found work authorized, and later revealed that one of those determinations was incorrect, JUSTICE BREYER would be able to exclaim that the error rate was *50%*.

* * *

IRCA expressly reserves to the States the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws. In exercising that authority, Arizona has taken the route least likely to cause tension with federal law. It uses the Federal Government's own definition of "unauthorized alien," it relies solely on the Federal Government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the Federal Government's own system for checking employee status. If even this gives rise to impermissible conflicts with federal law, then there really is no way for the State to implement licensing **[*51]** sanctions, contrary to the express terms of the savings clause.

Because Arizona's unauthorized alien employment law fits within the confines of IRCA's savings clause and does not conflict with federal immigration law, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

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

DISSENT BY: BREYER; SOTOMAYOR

DISSENT

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The federal Immigration Reform and Control Act of 1986 (Act or IRCA) pre-empts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The state law before us, the Legal Arizona Workers Act, imposes civil sanctions upon those who employ unauthorized aliens. See Ariz. Rev. Stat. Ann. § 23-211 *et seq.* (West Supp. 2010). Thus the state law falls within the federal Act's general pre-emption rule and is pre-empted -- unless it also falls within that rule's exception for "licensing and similar

laws." Unlike the Court, I do not believe the state law falls within **[*52]** this exception, and I consequently would hold it pre-empted.

Arizona calls its state statute a "licensing law," and the statute uses the word "licensing." But the statute strays beyond the bounds of the federal licensing exception, for it defines "license" to include articles of incorporation and partnership certificates, indeed *virtually every* state-law authorization for *any* firm, corporation, or partnership to do business in the State. § 23-211(9)(a); cf. § 23-211(9)(c) (excepting professional licenses, and water and environmental permits). Congress did not intend its "licensing" language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act's pre-emption provision, indeed to subvert the Act itself, by undermining Congress' efforts (1) to protect lawful workers from national-origin-based discrimination and (2) to protect lawful employers against erroneous prosecution or punishment.

Dictionary definitions of the word "licensing" are, as the majority points out, broad enough to include virtually any permission that the State chooses to call a "license." See *ante*, at 10 (relying on a dictionary and the federal Administrative Procedure Act). But **[*53]** neither dictionary definitions nor the use of the word "license" in an unrelated statute can demonstrate what scope Congress intended the word "licensing" to have *as it used that word in this federal statute*. Instead, statutory context must ultimately determine the word's coverage. Context tells a driver that he cannot produce a partnership certificate when a policeman stops the car and asks for a license. Context tells all of us that "licensing" as used in the Act does not include marriage licenses or the licensing of domestic animals. And context, which includes statutory purposes, language, and history, tells us that the federal statute's "licensing" language does not embrace Arizona's overly broad definition of that term. That is to say, ordinary corporate charters, certificates of partnership, and the like do not fall within the scope of the word "licensing" as used in this federal exception. See *Dolan* v. *Postal Service*, 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006) (statutory interpretation requires courts to "rea[d] the whole statutory text, conside[r] the purpose and context of the statute, and consul[t] any precedents or authorities that inform the analysis"); *United States* v. *Heirs of Boisdore*, 49 U.S. 113, 8 How. 113, 122, 12 L. Ed. 1009 (1849) **[*54]** (similar).

I

To understand how the majority's interpretation of the word "licensing" subverts the Act, one must understand the basic purposes of the pre-emption provision and of the Act itself. Ordinarily, an express pre-emption provision in a federal statute indicates a particular congressional interest in *preventing* States from enacting laws that might interfere with Congress' statutory objectives. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987). The majority's reading of the provision's "licensing" exception, however, does the opposite. It *facilitates* the creation of "'obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

A

Essentially, the federal Act requires employers to verify the work eligibility of their employees. And in doing so, the Act balances three competing goals. First, it seeks to discourage American employers from hiring aliens not authorized to work in the United States. H. R. Rep. No. 99-682, pt. 1, p. 56 (1986).

Second, Congress wished to avoid "placing an undue burden on employers," **[*55]** *id.*, at 90, and the Act seeks to prevent the "harassment" of "innocent employers," S. Rep. No. 99-132, p. 35 (1985).

Third, the Act seeks to prevent employers from disfavoring job applicants who appear foreign. Reiterating longstanding antidiscrimination concerns, the House Committee Report explained:

> "Numerous witnesses . . . have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to

> hire persons because of their linguistic or physical characteristics." H. R. Rep. No. 99-682, at 68.

See also 42 U.S.C. § 2000e-2(a)(1) (making it an "unlawful employment practice" for an employer to discriminate against an individual "because of such individual's race, color, religion, sex, or national origin"); U.S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 74 (1980) (finding that "increased employment discrimination against United States citizens and legal residents who are racially and **[*56]** culturally identifiable with major immigrant groups could be the unintended result of an employer sanctions law"). The Committee concluded that "every effort must be taken to minimize the potentiality of discrimination." H. R. Rep. No. 99-682, at 68.

B

The Act reconciles these competing objectives in several ways:

First, the Act prohibits employers from hiring an alien knowing that the alien is unauthorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(A).

Second, the Act provides an easy-to-use mechanism that will allow employers to determine legality: the I-9 form. In completing an I-9 form, the employer certifies that he or she has examined one or two documents (*e.g.*, a passport, or a driver's license along with a Social Security card) that tend to confirm the worker's identity and employability. § 1324a(b)(1). Completion of the form in good faith immunizes the employer from liability, even if the worker turns out to be unauthorized. §§ 1324a(a)(3), 1324a(b)(6).

A later amendment to the law also allows an employer to verify an employee's work eligibility through an Internet-based federal system called E-Verify. If the employer does so, he or she will receive the benefit of a rebuttable **[*57]** presumption of compliance. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 402(b), 110 Stat. 3009-656 to 3009-657, note following 8 U.S.C. § 1324a, p. 331 (Pilot Programs for Employment Eligibility Confirmation).

Third, the Act creates a central enforcement mechanism. The Act directs the Attorney General to establish a single set of procedures for receiving complaints, investigating those complaints that "have a substantial probability of validity," and prosecuting violations. 8 U.S.C. § 1324a(e)(1). The relevant immigration officials and administrative law judges have the power to access necessary evidence and witnesses, § 1324a(e)(2), and the employer has the right to seek discovery from the Federal Government, 28 CFR § 68.18 (2010). The employer also has the right to administrative and judicial review of the administrative law judge's decision. §§ 68.54, 68.56.

Fourth, the Act makes it "an unfair immigration-related employment practice . . . to discriminate against any individual" in respect to employment "because of such individual's national origin." 8 U.S.C. § 1324b(a).

Fifth, the Act sets forth a carefully calibrated sanction system. The penalties **[*58]** for hiring unauthorized aliens are graduated to prevent the Act from unduly burdening employers who are not serious offenders. As adjusted for inflation, civil penalties for a first violation of the employment restrictions range from $ 375-$ 3,200 per worker, and rise to $ 3,200-$ 16,000 per worker for repeat offenders. § 1324a(e)(4)(A); 73 Fed. Reg. 10133 (2008); see also § 1324a(f) (imposing criminal fines of not more than $ 3,000 per worker and imprisonment for up to six months for "pattern or practice" violators of employment restrictions).

As importantly, the Act limits or removes any incentive to discriminate on the basis of national origin by setting antidiscrimination fines at equivalent levels: $ 375-$ 3,200 per worker for first-time offenders, and $ 3,200-$ 16,000 per worker for repeat offenders. § 1324b(g)(2)(B)(iv); 73 Fed. Reg. 10134. The Act then ties its unlawful employment and antidiscrimination provisions together by providing that, should the antihiring provisions terminate, the antidiscrimination provisions will also terminate, § 1324b(k), "the justification for them having been removed," H. R. Conf. Rep. No. 99-1000, p. 87 (1986).

C

Now, compare and contrast Arizona's **[*59]** statute. As I have said, that statute applies to virtually all business-related licenses, other than professional licenses. Ariz. Rev. Stat. Ann. § 23-211(9). Like the federal Act, the state law forbids the employment of unauthorized aliens. §§ 23-212(A), 23-212.01(A). It also provides

employers with somewhat similar defenses. §§ 23-212(I)-(J), 23-212.01(I)-(J). But thereafter the state and federal laws part company.

First, the state statute seriously threatens the federal Act's antidiscriminatory objectives by radically skewing the relevant penalties. For example, in the absence of the Arizona statute, an Arizona employer who intentionally hires an unauthorized alien for the second time would risk a maximum penalty of $ 6,500. 8 U.S.C. § 1324a(e)(4) (A)(ii); 73 Fed. Reg. 10133. But the Arizona statute subjects that same employer (in respect to the same two incidents) to mandatory, permanent loss of the right to do business in Arizona--a penalty that Arizona's Governor has called the "business death penalty." Ariz. Rev. Stat. Ann. § 23-212.01(F)(2); News Release, Governor Signs Employer Sanctions Bill (2007), App. 399. At the same time, the state law leaves the other side of the punishment **[*60]** balance -- the antidiscrimination side -- unchanged.

This is no idle concern. Despite the federal Act's efforts to prevent discriminatory practices, there is evidence that four years after it had become law, discrimination was a serious problem. In 1990, the General Accounting Office identified "widespread discrimination . . . as a result of " the Act. Report to the Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination 3, 37, 80. Sixteen percent of employers in Los Angeles admitted that they applied the I-9 requirement "only to foreign-looking or foreign-sounding persons," and 22 percent of Texas employers reported that they "began a practice to (1) hire only persons born in the United States or (2) not hire persons with temporary work eligibility documents" because of the Act. *Id.*, at 41-43. If even the federal Act (with its carefully balanced penalties) can result in some employers discriminating, how will employers behave when erring on the side of discrimination leads only to relatively small fines, while erring on the side of hiring unauthorized workers leads to the "business death penalty"?

Second, Arizona's law subjects lawful employers to increased **[*61]** burdens and risks of erroneous prosecution. In addition to the Arizona law's severely burdensome sanctions, the law's procedures create enforcement risks not present in the federal system. The federal Act creates one centralized enforcement scheme, run by officials versed in immigration law and with access to the relevant federal documents. The upshot is an increased likelihood that federal officials (or the employer) will discover whether adverse information flows from an error-prone source and that they will proceed accordingly, thereby diminishing the likelihood that burdensome proceedings and liability reflect documentary mistakes.

Contrast the enforcement system that Arizona's statute creates. Any citizen of the State can complain (anonymously or otherwise) to the state attorney general (or any county attorney), who then "*shall* investigate," Ariz. Rev. Stat. Ann. § 23-212(B) (emphasis added), and, upon a determination that that the "complaint is not false and frivolous . . . shall notify the appropriate county attorney to bring an action," § 23-212(C)(3). This mandatory language, the lower standard ("not frivolous" instead of "substantial"), and the removal of immigration officials **[*62]** from the state screening process (substituting numerous, elected county attorneys) increase the likelihood that suspicious circumstances will lead to prosecutions and liability of employers -- even where more careful investigation would have revealed that there was no violation.

Again, this matter is far from trivial. Studies of one important source of Government information -- the E-Verify system -- describe how the federal administrative process *corrected* that system's tentative "unemployable" indications *18% of the time*. This substantial error rate is not a function of a small sample size. See *ante*, at 26, n. 12. Rather, data from one fiscal year showed 46,921 workers initially rejected but later "confirmed as work authorized" -- all while E-Verify was used by only a fraction of the Nation's employers. U.S. Citizenship and Immigration Services, Statistics and Reports, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9a c89243c6a7543f6d1a/?vgnextchannel=7c579589cdb76210V gnVCM100000b92ca60aRCRD (Feb. 4, 2011) (as visited May 18, 2011, and available in Clerk of Court's case file). That is to say nearly one-in-five times that the E-Verify system suggested that an individual **[*63]** was not lawfully employable (*i.e.*, returned a tentative nonconfirmation of work authorization), the system was wrong; and subsequent review in the federal administrative process determined as much. (And those wrongly identified were likely to be persons of foreign, rather than domestic, origin, by a ratio of approximately 20 to 1.) See Westat, Findings of the

E-Verify Program Evaluation xxxi, 210, 246 (Dec. 2009) (assessing data from April to June 2008). E-Verify's accuracy rate is even worse "in states that require the use of E-Verify for all or some of their employees." *Id.*, at 122.

A related provision of the state law aggravates the risk of erroneous prosecutions. The state statute says that in "determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 [U.S.C.] § 1373(c)." Ariz. Rev. Stat. Ann. § 23-212(H). But the federal provision to which the state law refers, 8 U.S.C. § 1373(c), says only that the Federal Government, upon a State's request, shall verify a person's "citizenship or immigration status." It says nothing about work authorization. See *post*, at 7-10 (SOTOMAYOR, J., dissenting). It says **[*64]** nothing about the source of the Federal Government's information. It imposes no duty upon the Federal Government or anyone else to investigate the validity of that information, which may falsely implicate an employer 18% of the time.

So what is the employer to do? What statute gives an employer whom the State proceeds against in state court the right to conduct discovery against the Federal Government? The Arizona statute, like the federal statute, says that the employer's use of an I-9 form provides a defense. But there is a hitch. The federal Act says that neither the I-9 form, nor "any information contained in or appended to" the form, "may . . . be used for purposes other than for enforcement of this" federal Act. § 1324a(b)(5). So how can the employer present a defense, say, that the Government's information base is flawed? The majority takes the view that the forms are not *necessary* to receive the benefit of the affirmative defense. *Ante*, at 18, n. 9. But the I-9 form would surely be the employer's most effective evidence. See also *post*, at 11 (SOTOMAYOR, J., dissenting) (suggesting that the unavailability of I-9 forms to defend against state-court charges means that Congress "intended **[*65]** no such" proceedings).

Nor does the Arizona statute facilitate the presentation of a defense when it immediately follows (1) its statement that "the court shall consider *only* the federal government's determination" when it considers "whether an employee is an *unauthorized alien"* with (2) its statement that "[t]he federal government's determination creates a rebuttable presumption of the employee's *lawful* status." Ariz. Rev. Stat. Ann. § 23-212(H) (emphasis added). The two statements sound as if they mean that a Federal Government determination that the worker is *unlawful* is conclusive against the employer, but its determination that the worker's employment is *lawful* is subject to rebuttal by the State. Arizona tells us that the statute means the opposite. See *ante*, at 16, n. 7. But the legal briefs of Arizona's attorney general do not bind the state courts. And until the matter is cleared up, employers, despite I-9 checks, despite efforts to use E-Verify, will hesitate to hire those they fear will turn out to lack the right to work in the United States.

And that is my basic point. Either directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens **[*66]** upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens -- without counterbalancing protection against unlawful discrimination. And by defining "licensing" so broadly, by bringing nearly all businesses within its scope, Arizona's statute creates these effects statewide.

Why would Congress, after deliberately limiting ordinary penalties to the range of a few thousand dollars per illegal worker, want to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses? Why would Congress, after carefully balancing sanctions to avoid encouraging discrimination, want to allow States to destroy that balance? Why would Congress, after creating detailed procedural protections for employers, want to allow States to undermine them? Why would Congress want to write into an express pre-emption provision -- a provision designed to prevent States from undercutting federal statutory objectives -- an exception that could so easily destabilize its efforts? The answer to these questions is that Congress would not have wanted to do any of these things. And that fact indicates that the majority's **[*67]** reading of the licensing exception -- a reading that would allow what Congress sought to forbid -- is wrong.

II

The federal licensing exception cannot apply to a state statute that, like Arizona's statute, seeks to bring virtually all articles of incorporation and partnership certificates within its scope. I would find the scope of the exception to federal pre-emption to be far more limited. Context, purpose, and history make clear that the "licensing and similar laws" at issue involve

employment-related licensing systems.

The issuance of articles of incorporation and partnership certificates and the like have long had little or nothing to do with hiring or "employment." Indeed, Arizona provides no evidence that any State, at the time the federal Act was enacted, had refused to grant or had revoked, say, partnership certificates, in light of the partners' hiring practices of any kind, much less the hiring of unauthorized aliens. See Ariz. Rev. Stat. Ann. § 29-308 (limited partnership formed upon the filing of a certificate of partnership providing names and addresses); § 29-345 (providing for dissolution of a limited partnership "[o]n application by or for a partner or assignee . . . **[*68]** whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement").

To read the exception as covering laws governing corporate charters and partnership certificates (which are not usually called "licensing" laws) is to permit States to turn virtually every permission-related state law into an employment-related "licensing" law. The State need only call the permission a "license" and revoke the license should its holder hire an unauthorized alien. If what was not previously an employment-related licensing law can become one simply by using it as a sanction for hiring unauthorized aliens or simply by state definition, indeed, if the State can call a corporate charter an employment-related licensing law, then why not an auto licensing law (amended to revoke the driver's licenses of those who hire unauthorized aliens)? Why not a dog licensing law? Or why not "impute" a newly required license to conduct any business to every human being in the State, withdrawing that license should that individual hire an unauthorized alien? See S. C. Code Ann. § 41-8-20 (Supp. 2010) (providing that "[a]ll private employers in South Carolina . . . shall be imputed **[*69]** a South Carolina employment license, which permits a private employer to employ a person in this State," but conditioning the license on the company's not hiring unauthorized aliens).

Such laws might prove more effective in stopping the hiring of unauthorized aliens. But they are unlikely to do so consistent with Congress' other critically important goals, in particular, Congress' efforts to protect from discrimination legal workers who look or sound foreign. That is why we should read the federal exemption's "licensing" laws as limited to those that involve the kind of licensing that, in the absence of this general state statute, would nonetheless have some significant relation to employment or hiring practices. Otherwise we read the federal "licensing" exception as authorizing a State to undermine, if not to swallow up, the federal pre-emption rule.

III

I would therefore read the words "licensing and similar laws" as covering state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created. This reading **[*70]** is consistent with the provision's history and language, and it minimizes the risk of harm of the kind just described.

The Act's history supports this interpretation. Ever since 1964, the Federal Government has administered statutes that create a federal licensing scheme for agricultural labor contractors, firms that specialize in recruiting agricultural workers and referring them to farmers for a fee. Farm Labor Contractor Registration Act of 1963 (FLCRA), 78 Stat. 920; Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 96 Stat. 2583. The statutes require agricultural labor contractors to register with the federal Secretary of Labor, to obtain a registration certificate (in effect a license), and to require the contractor's employees to carry that certificate with them when engaging in agricultural labor contracting activities. AWPA § 101; FLCRA § 4. The statutes list a host of forbidden activities, one of which (prior to 1986) was hiring unauthorized aliens. See AWPA §§ 103, 106; FLCRA § 5(b). Prior to 1986, if the federal Labor Department believed a firm had violated these substantive provisions, it could institute administrative proceedings within the Labor Department. **[*71]** And if the Secretary found the labor contracting firm had violated the provisions, the Secretary could impose monetary penalties or withdraw the firm's registration. AWPA §§ 103, 503; FLCRA §§ 5(b), 9.

Most important, and unlike the 1986 Act before us, the earlier agricultural labor contracting statutes *did not pre-empt similar state laws*. To the contrary, the earlier Acts were "intended to supplement State law" and did not "excuse any person from compliance with appropriate State law and regulation." AWPA § 521; see FLCRA §

12. By 1986, nearly a dozen States had developed state licensing systems for agricultural labor contractors, *i.e.*, firms that recruited and referred farm (and sometimes forestry) workers for a fee; some of these laws provided that state licenses could be revoked if the contractors hired unauthorized aliens. See, *e.g.*, Cal. Lab. Code § 1690(f) (Deering Supp. 1991); 43 Pa. Cons. Stat. §§ 1301.503(4), 1301.505(3) (1965-1983 Supp. Pamphlet); Ore. Rev. Stat. §§ 658.405(1), 658.440(2)(d) (1987) (covering forestry workers).

In 1986, Congress (when enacting the Act now before us) focused directly upon the earlier federal agricultural labor contractor licensing system. And **[*72]** it changed that earlier system by including a series of conforming amendments in the Act. One amendment removes from the earlier statutes the specific prohibition against hiring unauthorized aliens. It thereby makes agricultural labor contractors subject to the Act's similar general prohibition against such hiring. IRCA § 101(b)(1)(C) (repealing AWPA § 106). Another amendment takes from the Secretary of Labor most of the Secretary's enforcement powers in respect to the hiring of unauthorized aliens. It thereby leaves agricultural labor contractors subject to the same single unified enforcement system that the immigration Act applies to all employers. See 29 U.S.C. § 1853. A third amendment, however, leaves with the Secretary of Labor the power to withdraw the federal registration certificate from an agricultural labor contractor that hired unauthorized aliens. IRCA § 101(b)(1)(B)(iii), 29 U.S.C. § 1813(a)(6). Thus, the Act leaves this subset of employers (*i.e.*, agricultural labor contractors but not other employers) subject to a federal licensing scheme.

So far, the conforming amendments make sense. But have they not omitted an important matter? Prior to 1986, States as well as the **[*73]** Federal Government could license agricultural labor contractors. Should the 1986 statute not say whether Congress intended that dual system to continue? The answer is that the 1986 Act does not omit this matter. It answers the coexistence question directly with the parenthetical phrase we are now considering, namely, the phrase, "other than through licensing and similar laws," placed in the middle of the Act's pre-emption provision. 8 U.S.C. § 1324a(h)(2). That phrase refers to agricultural labor contractors, and it says that, in respect to those licensing schemes, dual state/federal licensing can continue.

As of 1986, there were strong reasons for permitting that dual system to continue *in this specialized area*. Dual enforcement had proved helpful in preventing particularly serious employment abuses. See, *e.g.*, 128 Cong. Rec. 24090 (1982) (reflecting concerns that agricultural workers were "housed in hovels; . . . subjected to physical abuse and kept in virtual slavery"). And because the contractors' business consists of providing labor forces, their hiring of authorized workers is closely related to their general fitness to do business. See S. Rep. No. 202, 88th Cong., 1st Sess., **[*74]** 1 (1963) (explaining that farm labor contractor registration laws are needed to prevent "irresponsible crew leaders" from "exploit[ing] . . . farmers"); Martin, Good Intentions Gone Awry: IRCA and U.S. Agriculture, 534 Annals Am. Acad. Pol. & Soc. Sci. 44, 49 (1994) (describing how farmers who relied on contractors risked losing their labor forces to immigration raids). Dual enforcement would not create a federal/state penalty disparity, for federal systems as well as state systems provide for license revocation. Experience had shown that dual enforcement had not created any serious conflict or other difficulty. And in light of the specialized nature and comparatively small set of businesses subject to dual enforcement, to permit licensing of that set of businesses would not seriously undermine the objectives of the Act or its pre-emption provision.

Thus, it is not surprising that the legislative history of the 1986 Act's pre-emption provision says that the licensing exception is about the licensing of agricultural labor contractors. The House Report on the Act, referring to the licensing exception, states that the Committee did "not intend to preempt licensing or 'fitness to do business **[*75]** laws,' *such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens*." H. R. Rep. No. 99-682, at 58 (emphasis added).

The Act's language, while not requiring this interpretation, is nonetheless consistent with limiting the scope of the phrase in this way. Context can limit the application of the term "licensing" to particular *types* of licensing. The Act's subject matter itself limits the term to employment-related licensing. And the Act's specific reference to those who "recruit or refer for a fee for employment, unauthorized aliens," is consistent with employment-related licensing that focuses primarily upon labor contracting businesses.

Thus, reading the phrase as limited in scope to laws licensing businesses that recruit or refer workers for employment is consistent with the statute's language, with the relevant history, and with other statutory provisions in the Act. That reading prevents state law from undermining the Act and from turning the pre-emption clause on its head. That is why I consider it the better reading of the statute.

IV

Another section of the Arizona **[*76]** statute requires "every employer, after hiring an employee," to "verify the employment eligibility of the employee" through the Federal Government's E-Verify program. Ariz. Rev. Stat. Ann. § 23-214. This state provision makes participation in the federal E-Verify system *mandatory* for virtually all Arizona employers. The federal law governing the E-Verify program, however, creates a program that is *voluntary*. By making mandatory that which federal law seeks to make voluntary, the state provision stands as a significant "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby*, 530 U.S., at 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (quoting *Hines*, 312 U.S., at 67, 61 S. Ct. 399, 85 L. Ed. 581). And it is consequently pre-empted.

The federal statute itself makes clear that participation in the E-Verify program is voluntary. The statute's relevant section bears the title "Voluntary Election to Participate in a Pilot Program." IIRIRA § 402, note following 8 U.S.C. § 1324a, p. 331. A subsection bears the further title, "Voluntary Election." § 402(a). And within that subsection, the statute says that employers "*may* elect to participate." (Emphasis added.) The statute elsewhere requires the Secretary of Homeland **[*77]** Security to "widely publicize . . . the voluntary nature" of the program. § 402(d)(2); see also § 402(d)(3)(A) (requiring the designation of local officials to advertise the "voluntary nature" of the program). It adds that employers may "terminate" their "election" to participate by following certain procedures. § 402(c)(3). And it tells the Secretary of Homeland Security (as an earlier version told the Attorney General) that she "may not require any person or other entity to participate." § 402(a); see also § 402(e) (creating exceptions, none of which is applicable here, that require federal employers and certain others to participate in E-Verify or another pilot program).

Congress had strong reasons for insisting on the voluntary nature of the program. E-Verify was conceived as, and remains, a pilot program. Its database consists of tens of millions of Social Security and immigration records kept by the Federal Government. These records are prone to error. See, *e.g.*, Office of the Inspector General, Social Security Administration, Congressional Response Report: Accuracy of the Social Security Administration's Numident File 12 (2006) (hereinafter Social Security Report) (estimating **[*78]** that 3.3 million naturalized citizens are misclassified in a Social Security database used by E-Verify); GAO, Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain 16 (GAO-11-146, 2010) (hereinafter GAO Report) (noting that "erroneous [nonconfirmations] related to name inconsistencies . . . remain an issue" that "can create the appearance of discrimination because of their disparate impact on certain cultural groups"). And making the program mandatory would have been hugely expensive. See *post*, at 16 (SOTOMAYOR, J., dissenting).

The E-Verify program is still a pilot program, as a matter of statute and practice. See IIRIRA § 401; Letter from H. Couch to R. Stana (Dec. 8, 2010) (discussing aspects of E-Verify that have yet to be implemented). The effects of the program's efforts to take account of, and correct for, potential errors remain uncertain. Congress could decide that, based on the results of the pilot, E-Verify should become a mandatory program. But it has not yet made that determination. And in making that decision, it will have to face a number of questions: Will workers receiving tentative negative verdicts understand **[*79]** the possibility of administrative challenge? Will they make the effort to invoke that process, say traveling from a farm to an urban Social Security office? Will employers prove willing to undergo the financial burden of supporting a worker who might lose the challenge? Will employers hesitate to train those workers during the time they bring their challenges? Will employers simply hesitate to hire workers who might receive an initial negative verdict -- more likely those who look or sound foreign? Or will they find ways to dismiss those workers? These and other unanswered questions convinced Congress to make E-Verify a pilot program, to commission continuous study and evaluation, and to insist that participation be voluntary.

In co-opting a federal program and changing the key terms under which Congress created that program,

Arizona's mandatory state law simply ignores both the federal language and the reasoning it reflects, thereby posing an "'obstacle to the accomplishment'" of the objectives Congress' statute evinces. *Crosby*, *supra*, at 373, 120 S. Ct. 32288, 147 L. Ed. 2d 352 (quoting *Hines*, *supra*, at 67, 61 S. Ct. 399, 85 L. Ed. 581).

The majority reaches a contrary conclusion by pointing out (1) that Congress has renewed the E-Verify program several **[*80]** times, each time expanding its coverage, to the point where it now encompasses all 50 States; (2) that the E-Verify database has become more accurate; (3) that the Executive Branch has itself mandated participation for federal contractors; and (4) that the statute's language tells the Secretary of Homeland Security, *not the States*, to maintain the program as voluntary.

The short, and, I believe, conclusive answers to these objections are: (1) Congress has kept the language of the statute -- and the voluntary nature of the program -- the same throughout its program renewals. See 115 Stat. 2407; 117 Stat. 1944; § 547, 123 Stat. 2177. And it is up to Congress, not to Arizona or this Court, to decide when participation in the program should cease to be voluntary.

(2) The studies and reports have repeatedly found both (a) that the E-Verify program had achieved greater accuracy, but (b) that problems remain. See, *e.g.*, Social Security Report 11 (estimating that Social Security records contain 4.8 million "discrepancies that could require the numberholder to visit [the Social Security Administration] . . . before employment eligibility would be confirmed"); GAO Report 19 (estimating that, if **[*81]** E-Verify were made mandatory nationwide, 164,000 newly hired workers each year would erroneously be adjudged ineligible to work because of name mismatches, as when the worker's "first or last name is incorrectly spelled in government databases or on identification documents"). And it is up to Congress, not to Arizona or this Court, to determine when the federally designed and federally run E-Verify program is ready for expansion.

(3) Federal contractors are a special group of employers, subject to many special requirements, who enter voluntarily into a special relation with the Government. For the Federal Government to mandate that a special group participate in the E-Verify program tells us little or nothing about the effects of a State's mandating that nearly every employer within the State participate -- as Arizona has done. And insofar as we have not determined whether the Executive was authorized by Congress to mandate E-Verify for federal contractors, it says nothing about Congress' intent.

(4) There is no reason to imply negatively from language telling the Secretary *not* to make the program mandatory, permission for the States to do so. There is no presumption that a State may **[*82]** modify the operation of a uniquely federal program like E-Verify. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001); *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504-505, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988); see also *post*, at 15-16 (SOTOMAYOR, J., dissenting). The remaining federal statutory language makes clear the voluntary nature of the E-Verify program. Arizona's plan would undermine that federal objective.

For these reasons I would hold that the federal Act, including its E-Verify provisions, pre-empts Arizona's state law. With respect, I dissent from the majority's contrary holdings.

JUSTICE SOTOMAYOR, dissenting.

In enacting the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, Congress created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002). The Court reads IRCA's saving clause -- which preserves from pre-emption state "licensing and similar laws," 8 U.S.C. § 1324a(h)(2) -- to permit States to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions. This reading of the saving **[*83]** clause cannot be reconciled with the rest of IRCA's comprehensive scheme. Having constructed a federal mechanism for determining whether someone has knowingly employed an unauthorized alien, and having withheld from the States the information necessary to make that determination, Congress could not plausibly have intended for the saving clause to operate in the way the majority reads it to do. When viewed in context, the saving clause can only be understood to preserve States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA by knowingly employing an unauthorized alien. Because the Legal Arizona Workers Act instead creates a separate state mechanism for Arizona state

courts to determine whether a person has employed an unauthorized alien, I would hold that it falls outside the saving clause and is pre-empted.

I would also hold that federal law pre-empts the provision of the Arizona Act making mandatory the use of E-Verify, the federal electronic verification system. By requiring Arizona employers to use E-Verify, Arizona has effectively made a decision for Congress regarding use of a federal resource, in contravention of the **[*84]** significant policy objectives motivating Congress' decision to make participation in the E-Verify program voluntary.

I

A

I begin with the plain text of IRCA's pre-emption clause. IRCA expressly pre-empts States from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." [1] *Ibid.* The Arizona Act, all agree, imposes civil sanctions upon those who employ unauthorized aliens. The Act thus escapes express pre-emption only if it falls within IRCA's parenthetical saving clause for "licensing and similar laws." *Ibid.*

1 IRCA defines the term "unauthorized alien" to mean, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

The saving clause is hardly a paragon of textual clarity. IRCA does not define "licensing," nor does it use the word "licensing" in any other provision. Laws that impose sanctions by means of licensing exist in many forms. Some permit authorities **[*85]** to take action with respect to licenses upon finding that a licensee has engaged in prohibited conduct. See, *e.g.*, Ariz. Rev. Stat. Ann. § 4-210(A)(1) (West 2011) (liquor licenses may be suspended or revoked if the licensing authority determines after notice and a hearing that repeated acts of violence have occurred on the licensed premises). Others, more narrowly, permit authorities to take such action following a pre-existing determination by another authorized body that the licensee has violated another provision of law. See, *e.g.*, § 4-202(D) (liquor licenses may not be renewed to persons who have been convicted of felonies within the past five years). That both types of laws might be defined in some contexts as licensing laws does not necessarily mean that Congress intended the saving clause to encompass both types. See *Dolan* v. *Postal Service*, 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities"); see also *FCC* v. *AT&T Inc.*, 562 U.S. ___, ___ , slip op. at 9, 131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011) ("[C]onstruing statutory language is not merely an exercise in ascertaining the outer limits of [a word's] definitional possibilities" (internal **[*86]** quotation marks omitted; second alteration in original)). In isolation, the text of IRCA's saving clause provides no hint as to which type or types of licensing laws Congress had in mind.

B

Because the plain text of the saving clause does not resolve the question, it is necessary to look to the text of IRCA as a whole to illuminate Congress' intent. See *Dolan*, 546 U.S., at 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"); *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 222, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008) (construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) ("[St]tatutory language cannot be construed in a vacuum. 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"). [2]

2 As these cases demonstrate, a contextual analysis of a statutory provision is in no way "untethered" from the statute's text. *Ante*, at 15, n. 6. To the contrary, the majority's reading of the saving **[*87]** clause -- with its singular focus on the undefined word "licensing" to the exclusion of all contextual considerations -- is "untethered" from the statute as a whole.

Before Congress enacted IRCA in 1986, a number of States had enacted legislation prohibiting employment of unauthorized aliens. See *ante*, at 2, and n. 1 (citing 12 such laws). California, for example, prohibited the

knowing employment of an alien "who is not entitled to lawful residence in the United States" when "such employment would have an adverse effect on lawful resident workers," and made violations punishable by fines of $ 200 to $ 500. 1971 Cal. Stats. ch. 1442, § 1; see also *De Canas* v. *Bica*, 424 U.S. 351, 352, n. 1, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976). Kansas went even further, making it a misdemeanor, punishable by a term of confinement not to exceed one month, to employ a person within Kansas knowing "such person to be illegally within the territory of the United States." Kan. Stat. Ann. §§ 21-4409, 21-4502 (1981). [3]

> 3 None of the pre-IRCA state laws cited by the majority provided for licensing-related sanctions. The parties have not identified any pre-IRCA state laws related to licensing that purported to regulate the employment of unauthorized **[*88]** aliens other than those governing agricultural labor contractors. See *ante*, at 13-14 (BREYER, J., dissenting).

Congress enacted IRCA amidst this patchwork of state laws. IRCA "'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman*, 535 U.S., at 147, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (quoting *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, 112 S. Ct. 551, 116 L. Ed. 2d 546, and n. 8 (1991); brackets omitted); see also H. R. Rep. No. 99-682, pt. 1, p. 46 (1986) (hereinafter H. R. Rep. No. 99-682) ("[L]egislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens"). As the majority explains, IRCA makes it "unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." § 1324a(a)(1)(A); *ante*, at 3. IRCA also requires employers to verify that they have reviewed documents establishing an employee's eligibility for employment. See § 1324a(b); *ante*, at 3-4. These two provisions are the foundation of IRCA's "comprehensive scheme prohibiting the employment of illegal aliens in the United States." **[*89]** *Hoffman*, 535 U.S., at 147, 122 S. Ct. 1275, 152 L. Ed. 2d 271.

Congress made explicit its intent that IRCA be enforced uniformly. IRCA declares that "[i]t is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously *and uniformly*." § 115, 100 Stat. 3384 (emphasis added). Congress structured IRCA's provisions in a number of ways to accomplish this goal of uniform enforcement.

First, and most obviously, Congress expressly displaced the myriad state laws that imposed civil and criminal sanctions on employers who hired unauthorized aliens. See § 1324a(h)(2); see also H. R. Rep. No. 99-682, at 58 ("The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens"). Congress could not have made its intent to pre-empt state and local laws imposing civil or criminal sanctions any more "'clear [or] manifest.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

Second, Congress centralized in the Federal Government enforcement of IRCA's prohibition on the knowing employment **[*90]** of unauthorized aliens. IRCA instructs the Attorney General to designate a specialized federal agency unit whose "primary duty" will be to prosecute violations of IRCA. § 1324a(e)(1)(D). IRCA also instructs the Attorney General to establish procedures for receiving complaints, investigating complaints having "a substantial probability of validity," and investigating other violations. § 1324a(e)(1); see also 8 CFR § 274a.9 (2010). Upon concluding that a person has violated IRCA, the Attorney General must provide the person with notice and an opportunity for a hearing before a federal administrative law judge (ALJ). 8 U.S.C. §§ 1324a(e)(3)(A), (B). If the person does not request a hearing, the Attorney General may impose a final, nonappealable order requiring payment of sanctions. § 1324a(e)(3)(B). If the person requests a hearing, the ALJ is required to hold a hearing and, upon finding that the person has violated IRCA, must order the payment of sanctions. § 1324a(e)(3)(C). The ALJ's order is the final agency order, unless the affected person requests and obtains further administrative appellate review. § 1324a(e)(7); see also 28 CFR § 68.54 (2010). IRCA grants immigration officers **[*91]** and ALJs "reasonable access to examine evidence of any person or entity being investigated" and provides them with extensive subpoena powers. § 1324a(e)(2). And the immigration officers investigating suspected violations obviously have access to the relevant

federal information concerning the work authorization status of the employee in question. [4]

> 4 By regulation, the Attorney General has conferred on parties charged with violating IRCA the right to obtain discovery from the Federal Government in a hearing before an ALJ. See 28 CFR § 68.18.

Third, Congress provided persons "adversely affected" by an agency order with a right of review in the federal courts of appeals. § 1324a(e)(8); see also § 1324a(e)(9) (directing the Attorney General in cases of noncompliance to file suit in federal district court to enforce a final order imposing sanctions); § 1324a(f) (authorizing the Attorney General to pursue injunctive relief and criminal sanctions in federal district court). In this way, Congress ensured that administrative orders finding violations of IRCA would be reviewed by federal judges with experience adjudicating immigration-related matters.

Fourth, Congress created a uniquely federal **[*92]** system by which employers must verify the work authorization status of new hires. Under this system, an employer must attest under penalty of perjury on a form designated by the Attorney General (the I-9 form) that it has examined enumerated identification documents to verify that a new hire is not an unauthorized alien. § 1324a(b)(1)(A); see also 8 CFR § 274a.2; *ante*, at 3-4. Good-faith compliance with this verification requirement entitles an employer to an affirmative defense if charged with violating IRCA. § 1324a(a)(3); see also H. R. Rep. No. 99-682, at 57. Notably, however, IRCA prohibits use of the I-9 form for any purpose other than enforcement of IRCA and various provisions of federal criminal law. § 1324a(b)(5); 8 CFR § 274a.2(b)(4). Use of the I-9 form is thus limited to *federal* proceedings, as the majority acknowledges. See *ante*, at 18, n. 9.

Finally, Congress created no mechanism for States to access information regarding an alien's work authorization status for purposes of enforcing state prohibitions on the employment of unauthorized aliens. The relevant sections of IRCA make no provision for the sharing of work authorization information between federal and state authorities **[*93]** even though access to that information would be critical to a State's ability to determine whether an employer has employed an unauthorized alien. In stark contrast, a separate provision in the same title of IRCA creates a verification system by which States can ascertain the immigration status of aliens applying for benefits under programs such as Medicaid and the food stamp program. See IRCA § 121(a)(1)(C), 42 U.S.C. § 1320b-7(d)(3). The existence of a verification system in one provision of IRCA, coupled with its absence in the provision governing employment of unauthorized aliens, suggests strongly that Congress did not contemplate any role for the States in adjudicating questions regarding employment of unauthorized aliens. Cf. *Bates* v. *United States*, 522 U.S. 23, 29-30, 118 S. Ct. 285, 139 L. Ed. 2d 215 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and brackets omitted)).

In an attempt to show that Congress intended for the Federal Government to share immigration-related information with the **[*94]** States, Arizona points to a federal statute, 8 U.S.C. § 1373(c), requiring the Government to respond to certain inquiries from state agencies. Section 1373(c), however, merely requires the Government to respond to inquiries from state agencies "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency." It does not require the provision of information regarding an alien's work authorization status, which is not necessarily synonymous with immigration status. See 8 CFR § 274a.12(c) (identifying categories of *legal* aliens "who must apply for employment authorization"). [5] Arizona has not identified any federal statute or regulation requiring the Federal Government to provide information regarding an alien's work authorization status to a State. [6] More importantly, § 1373(c) was enacted in 1996, see § 642(c), 110 Stat. 3009-707, and thus says nothing about Congress' intent when it enacted IRCA's saving clause a decade earlier. See *Jones* v. *United States*, 526 U.S. 227, 238, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

> 5 For example, spouses and minor children of persons working in the United States as exchange visitors must apply for employment authorization even **[*95]** though they have lawful immigration status as dependents of the exchange visitor. See 8 CFR § 274a.12(c)(5).
>
> 6 In its capacity as an employer, a State may be able to access information regarding the work

authorization status of its employees through use of E-Verify.

Collectively, these provisions demonstrate Congress' intent to build a centralized, exclusively federal scheme for determining whether a person has "employ[ed], or recruit[ed] or refer[red] for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

C

IRCA's saving clause must be construed against this backdrop. Focusing primarily on the text of the saving clause, Arizona and the majority read the clause to permit States to determine themselves whether a person has employed an unauthorized alien, so long as they do so in connection with licensing sanctions. See *ante*, at 12-13. This interpretation overlooks the broader statutory context and renders the statutory scheme "[in]coherent and [in]consistent." *Ali*, 552 U.S., at 222.

Under the majority's reading of the saving clause, state prosecutors decide whether to commence licensing-related proceedings against a person suspected of employing an unauthorized alien. The **[*96]** majority's holding also permits state courts and other tribunals to adjudicate the question whether an employer has employed an unauthorized alien. The Arizona Act illustrates the problems with reading the saving clause to permit such state action. The Act directs prosecutors to verify an employee's work authorization with the Federal Government pursuant to § 1373(c), *e.g.*, Ariz. Rev. Stat. Ann. § 23-212(B) (West Supp. 2010), and the state court "shall consider only the federal government's determination pursuant to [§]1373(c)" in "determining whether an employee is an unauthorized alien," *e.g.*, § 23-212(H). [7] Putting aside the question whether § 1373(c) actually provides access to work authorization information, § 1373(c) did not exist when IRCA was enacted in 1986. See *supra*, at 9. Arizona has not identified any avenue by which States could have accessed work authorization information in the first decade of IRCA's existence. The absence of any such avenue at the time of IRCA's enactment speaks volumes as to how Congress would have understood the saving clause to operate: If States had no access to information regarding the work authorization status of aliens, how could state courts **[*97]** have accurately adjudicated the question whether an employer had employed an unauthorized alien?

7 However, the "federal government's determination creates [only] a rebuttable presumption of the employee's lawful status." *E.g.*, § 23-212(H).

The Arizona Act's reliance on § 1373(c) highlights the anomalies inherent in state schemes that purport to adjudicate whether an employee is an authorized alien. Even when Arizona prosecutors obtain information regarding an alien's *immigration* status pursuant to § 1373(c), the prosecutors and state court will have to determine the significance of that information to an alien's *work authorization* status, which will often require deciding technical questions of immigration law. See, *e.g.*, 8 CFR §§ 274a.12(a)-(c) (dividing 62 different classes of aliens into those authorized for employment incident to immigration status, those authorized for employment with a specific employer incident to immigration status, and those who must apply for work authorization). And, as discussed above, that information may not shed light at all on an alien's work authorization status, which is oftentimes distinct from immigration status. See *supra*, at 8, and n. 5. As a result, **[*98]** in many cases state decisions -- made by prosecutors and courts with no or little experience in federal immigration law -- will rest on less-than-complete or inaccurate information, "creat[ing] enforcement risks not present in the federal system." *Ante*, at 7 (BREYER, J., dissenting). I can discern no reason why Congress would have intended for state courts inexperienced in immigration matters to adjudicate, in the context of licensing sanctions, the very same question that IRCA commits to federal officers, ALJs, and the courts of appeals.

Equally problematic is the fact that employers charged under a state enforcement scheme with hiring unauthorized aliens are foreclosed from using I-9 forms in their defense in the state proceedings. Like IRCA, the Arizona Act confers an affirmative defense on employers who comply in good faith with IRCA's verification requirement. See Ariz. Rev. Stat. Ann. §§ 23-212(J), 23-212.01(J). As discussed above, however, IRCA prohibits an employer from using the I-9 form to establish that affirmative defense under Arizona law. See 8 U.S.C. § 1324a(b)(5); 8 CFR § 274a.2(b)(4). Not to worry, the majority says: The employer can establish the affirmative defense **[*99]** through office policies and testimony of employees. *Ante*, at 18, n. 9. But Congress made the I-9 verification system and accompanying good-faith defense central to IRCA. See, *e.g.*, H. R. Rep.

No. 99-682, at 60 ("[A]n effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential"). Given the importance of this procedure, if Congress in fact intended for state courts to adjudicate whether a person had employed an unauthorized alien in connection with licensing sanctions, why would it have prohibited that person from using the I-9 form -- "the employer's most effective evidence," *ante*, at 9 (BREYER, J., dissenting) -- in the state-court proceeding? The question answers itself: Congress intended no such thing.

Furthermore, given Congress' express goal of "unifor[m]" enforcement of "the immigration laws of the United States," IRCA § 115, 100 Stat. 3384, I cannot believe that Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens. Reading the saving clause as the majority does **[*100]** subjects employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA. Having carefully constructed a uniform federal scheme for determining whether a person has employed an unauthorized alien, Congress could not plausibly have meant to create such a gaping hole in that scheme through the undefined, parenthetical phrase "licensing and similar laws." See *Whitman* v. *American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes").

In sum, the statutory scheme as a whole defeats Arizona's and the majority's reading of the saving clause. Congress would not sensibly have permitted States to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal procedure for making such a determination, withholding from the States the information necessary to make such a determination, and precluding use of the I-9 forms in nonfederal proceedings. See *United States* v. *Locke*, 529 U.S. 89, 106, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme **[*101]** established by federal law").

To render IRCA's saving clause consistent with the statutory scheme, I read the saving clause to permit States to impose licensing sanctions following a final federal determination that a person has violated § 1324a(a)(1)(A) by knowingly hiring, recruiting, or referring for a fee an unauthorized alien. [8] This interpretation both is faithful to the saving clause's text, see *supra*, at 2-3, and best reconciles the saving clause with IRCA's "careful regulatory scheme," *Locke*, 529 U.S., at 106, 120 S. Ct. 1135, 146 L. Ed. 2d 69. It also makes sense as a practical matter. In enacting IRCA's pre-emption clause, Congress vested in the Federal Government the authority to impose civil and criminal sanctions on persons who employ unauthorized aliens. Licensing and other types of business-related permissions are typically a matter of state law, however. See, *e.g.*, *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) (noting that "[c]orporation law" is an area traditionally "governed by state-law standards"); *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127, 58 S. Ct. 125, 82 L. Ed. 147 (1937) ("How long and upon what terms a state-created corporation may continue to exist is a matter **[*102]** exclusively of state power"). As a result, if Congress wanted to "ensur[e] that a full range of sanctions [was] available to be used against businesses that employ unauthorized aliens," Brief for Respondent 37, Congress had to authorize the States and localities to impose licensing sanctions following a federal adjudication of a violation of IRCA.

> 8 This reading of the saving clause finds support in IRCA's legislative history. The House Committee on the Judiciary reported that IRCA was "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *in this legislation*." H. R. Rep. No. 99-682, at 58 (emphasis added). The Committee's reference to "this legislation" is, of course, a reference to IRCA, and only federal officers, ALJs, and courts have authority under IRCA to find that a person has violated the statute's sanctions provisions.
>
> My reading is also consistent with, though not compelled by, the provisions in IRCA that amended the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 96 Stat. 2583. As JUSTICE BREYER discusses **[*103]** in detail, see *ante*, at 13-15 (dissenting opinion),

AWPA requires entities to secure a certificate of registration from the Department of Labor before engaging in any "farm labor contracting activity." AWPA § 101, 96 Stat. 2587, 29 U.S.C. § 1811(a). Before 1986, AWPA prohibited farm labor contractors from hiring unauthorized aliens, and it permitted the Department of Labor to institute administrative proceedings to enforce this prohibition. See §§ 103(a)(3), 103(b), 106(a), 96 Stat. 2588-2590. In IRCA, Congress repealed this prohibition, IRCA § 101(b)(1)(C), but authorized the Secretary of Labor to withdraw a contractor's federal registration certificate upon a finding of an IRCA violation, IRCA § 101(b)(1)(B)(iii), 100 Stat. 3372, 29 U.S.C. § 1813(a)(6). Thus, IRCA made AWPA's licensing sanctions turn on a prior federal adjudication of a violation of IRCA.

I do not mean to suggest that the mere existence of a comprehensive federal scheme necessarily reveals a congressional intent to oust state remedies. Cf. *English* v. *General Elec. Co.*, 496 U.S. 72, 87, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) ("[T]he **[*104]** mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies"); *New York State Dept. of Social Servs.* v. *Dublino*, 413 U.S. 405, 415, 93 S. Ct. 2507, 37 L. Ed. 2d 688 (1973) (rejecting the argument that "pre-emption is to be inferred merely from the comprehensive character of the federal [program]"). Here, Congress has made clear its intent to oust state civil and criminal remedies; the sole question is the scope of the saving clause's exception for "licensing and similar laws." The comprehensive scheme established by Congress necessarily informs the scope of this clause. For all the reasons stated, the only interpretation of that clause that is consistent with the rest of the statute is that it preserves the States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA's prohibition on the knowing employment of unauthorized aliens.

Under my construction of the saving clause, the Arizona Act cannot escape pre-emption. The Act authorizes Arizona county attorneys to commence actions charging an employer with having employed an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23-212(D), 23-212.01(D). Arizona state **[*105]** courts must find that an employer has employed an unauthorized alien before imposing the sanctions enumerated in the Act. §§ 23-212(F), 23-212.01(F). Because the Act's sanctions are not premised on a final federal determination that an employer has violated IRCA, I would hold that the Act does not fall within IRCA's saving clause and is therefore pre-empted. [9]

9 Because I believe that the Arizona Act does not fall within IRCA's saving clause for this reason, I have no reason to consider the separate question whether the Act's definition of "license" sweeps too broadly. Compare *ante*, at 9-11, with *ante*, at 1-2, 11-12 (BREYER, J., dissenting).

II

I agree with the conclusion reached by JUSTICE BREYER in Part IV of his dissenting opinion that federal law impliedly pre-empts the provision in the Arizona Act requiring all Arizona employers to use the federal E-Verify program. See Ariz. Rev. Stat. Ann. § 23-214. I also agree with much of his reasoning. I write separately to offer a few additional observations.

As we have recently recognized, that a state law makes mandatory something that federal law makes voluntary does not mean, in and of itself, that the state law "stands as an obstacle to **[*106]** the accomplishment and execution of the full purposes and objectives of Congress," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (internal quotation marks omitted). See *Williamson* v. *Mazda Motor of America, Inc.*, 562 U.S. ___, ___ , 131 S. Ct. 1131, 1140, 179 L. Ed. 2d 75 (2011) (concluding that a federal regulation permitting manufacturers to choose between two seatbelt options did not pre-empt state tort liability based on a decision to install one of those options); see also *id.*, at ___ , slip op. at 2, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (SOTOMAYOR, J., concurring) ("[T]he mere fact that an agency regulation allows manufacturers a choice between options is insufficient to justify implied pre-emption").

This case, however, is readily distinguishable from cases like *Williamson*, in which state law regulates relationships between private parties. Here, the Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource. This case thus implicates the "uniquely federal interes[t]" in managing use of a federal resource. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504, 108 S. Ct. 2510,

101 L. Ed. 2d 442 (1988) (internal quotation marks omitted); see also **[*107]** *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law").

Significant policy objectives motivated Congress' decision to make use of E-Verify voluntary. In addition to those discussed by JUSTICE BREYER, see *ante*, at 17-19 (dissenting opinion), I note that Congress considered the cost of a mandatory program. In 2003, when Congress elected to expand E-Verify to all 50 States but declined to require its use, it cited a congressionally mandated report concluding that the annual cost of the pilot program was $ 6 million, the annual cost of a nationwide voluntary program would be $ 11 million, and the annual cost of a nationwide mandatory program would be $ 11.7 *billion*. H. R. Rep. No. 108-304, pt. 1, p. 6 (2003); see also Institute for Survey Research, Temple Univ., and Westat, INS Basic Pilot Evaluation: Summary Report 38 (2002) (concluding that the Social Security Administration (SSA) and the Immigration and Naturalization Service were not "capable of enrolling and administering **[*108]** a program for the hundreds of thousands of employers in any of the large mandatory programs explored here"). A more recent report prepared for the Department of Homeland Security similarly noted the costs associated with mandatory use of E-Verify. See Westat, Findings of the E-Verify tm Program Evaluation 224 (2009) (observing that the SSA estimated that it would have to hire an additional 1,500 field staff to handle a mandatory national program); *id.*, at 251 (recommending that any expansion of E-Verify take place gradually "to allow the Federal government adequate time to hire and train the new staff required to run such a program"). Permitting States to make use of E-Verify mandatory improperly puts States in the position of making decisions for the Federal Government that directly affect expenditure and depletion of federal resources. [10]

10 In *Williamson* v. *Mazda Motor of America, Inc.*, 562 U.S. ___, ___ , slip op. at 10, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011) , we held that the Federal Government's judgment regarding the cost effectiveness of seatbelt options did not reveal an intent "to forbid common-law tort suits in which a judge or jury might reach a different conclusion." The obvious distinction between that **[*109]** case and this one is that Congress' decision to keep use of E-Verify voluntary bears directly on the costs to the Federal Government itself.

The majority highlights the Government's statement in its *amicus* brief that "'the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.'" *Ante*, at 25 (quoting Brief for United States as *Amicus Curiae* 34). But "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic*, 518 U.S., at 494, 116 S. Ct. 2240, 135 L. Ed. 700 (internal quotation marks omitted). It matters not whether the Executive Branch believes that the Government is now capable of handling the burdens of a mandatory system. [11] Congressional intent controls, and Congress has repeatedly decided to keep the E-Verify program voluntary. Because state laws requiring use of E-Verify frustrate the significant policy objectives underlying this decision, thereby imposing explicitly unwanted burdens on the Federal Government, I would hold that federal law impliedly pre-empts the Arizona requirement.

11 Notably, the Government's brief does not state that the E-Verify system could accommodate the increased use that would result if all 50 **[*110]** States enacted similar laws; it limits its statement to "the Arizona statute and *existing* similar laws." Brief for United States as *Amicus Curiae* 34 (emphasis added).

* * *

For these reasons, I cannot agree with either of the Court's holdings in this case. I respectfully dissent.

Supreme Court of the United States
CITY OF RICHMOND, Appellant
v.
J.A. CROSON COMPANY.

No. 87-998.
Argued Oct. 5, 1988.
Decided Jan. 23, 1989.

Bidder brought suit challenging city's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises." The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., ruled in favor of city. Bidder appealed. The Court of Appeals, Fourth Circuit, 779 F.2d 181, affirmed. Certiorari was granted. The Supreme Court, 106 S.Ct. 3327, remanded case for further consideration. On remand, the Court of Appeals, 822 F.2d 1355, struck down the set-aside program, and probable jurisdiction was noted. The Supreme Court, Justice O'Connor, held that: (1) city failed to demonstrate compelling governmental interest justifying the plan, and (2) plan was not narrowly tailored to remedy effects of prior discrimination.

Affirmed.

Justices Stevens and Kennedy filed opinions concurring in part and concurring in the judgment.

Justice Scalia filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Brennan and Blackmun joined.

Justice Blackmun filed dissenting opinion in which Justice Brennan joined.

West Headnotes

[1] Federal Courts 170B 13

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13 k. Particular cases or questions, justiciable controversy. Most Cited Cases

Expiration of ordinance requiring prime contractors to whom city awarded construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" did not render controversy between city and bidder moot, as there remained a live controversy between the parties over whether city's refusal to award bidder a contract pursuant to the ordinance was lawful and thus entitle contractor to damages. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 3289

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3287 Contracts
92k3289 k. Public contracts. Most Cited Cases
(Formerly 92k215.2)

City's plan, requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises," denied certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race, and thus strict scrutiny standard of review had to be applied, which required firm evidentiary basis for concluding that underrepresentation of minorities was a product of past discrimination. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, national origin, or ethnicity. Most Cited Cases
(Formerly 92k215)

Standard of review under equal protection clause is not dependent on race of those burdened or benefited by a particular classification. U.S.C.A. Const.Amend. 14.

[4] Municipal Corporations 268 ⚿356

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k355 Performance of Work
268k356 k. In general. Most Cited Cases

City failed to demonstrate compelling government interest to justify plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises," since factual predicate supporting plan did not establish the type of identified past discrimination in city's construction industry that would authorize race-based relief. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚿2480

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2479 Determination of Facts
92k2480 k. In general. Most Cited Cases
(Formerly 92k70.1(4))

Municipal Corporations 268 ⚿63.5

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k63 Judicial Supervision
268k63.5 k. Discretion. Most Cited Cases
(Formerly 268k63.1(2))

Fact-finding process of legislative bodies is generally entitled to presumption of regularity and deferential review by the judiciary.

[6] Civil Rights 78 ⚿1545

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1545 k. Prima facie case. Most Cited Cases
(Formerly 78k383, 78k44(1))

Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination under Title VII, but when special qualifications are required to fill particular jobs, comparisons to the general population, rather than to smaller groups of individuals who possess the necessary qualifications, may have little probative value. Public Works Employment Act of 1976, § 102 et seq., 42 U.S.C.A. § 6701 et seq.

[7] Civil Rights 78 ⚿1542

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1542 k. Admissibility of evidence; statistical evidence. Most Cited Cases
(Formerly 78k381, 78k44(1))

Where special qualifications are necessary, relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

[8] Municipal Corporations 268 ⚿356

268 Municipal Corporations
268IX Public Improvements

268IX(C) Contracts
268k355 Performance of Work
268k356 k. In general. Most Cited Cases

City's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" was not narrowly tailored to remedy prior discrimination; there did not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting, and the 30% quota could not be said to be narrowly tailored to any goal, except perhaps outright racial balancing. U.S.C.A. Const.Amend. 14.

[9] Civil Rights 78 1406

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1406 k. Other particular cases and contexts. Most Cited Cases
(Formerly 78k240(1), 78k13.13(1))

Municipal Corporations 268 356

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k355 Performance of Work
268k356 k. In general. Most Cited Cases

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or locality's prime contractors, inference of discriminatory exclusion could arise; under such circumstances, city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on basis of race or other illegitimate criteria, and in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion. U.S.C.A. Const.Amend. 14.

[10] Municipal Corporations 268 356

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k355 Performance of Work
268k356 k. In general. Most Cited Cases

Racially motivated refusal to employ minority contractors would justify city in penalizing discriminator and providing appropriate relief to victim of such discrimination; moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to local government's determination that broader remedial relief is justified. U.S.C.A. Const.Amend. 14.

****708** *Syllabus* FN*

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

***469** Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE's), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced in-

cluded: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBE's were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U.S.C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove, supra,* which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in ****709***Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, in ***470** which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F.2d 1355 (CA4 1987), affirmed.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I, III-B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 724-728.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 724-725.

(b) None of the “facts” cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan de-

clares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's ***471** in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBE's eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 725-727.

****710** (c) The "evidence" relied upon by Justice MARSHALL's dissent-the city's history of school desegregation and numerous congressional reports-does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, Justice MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 727-728.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. P. 728.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBE's, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and ***472** waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 729-730.

Justice O'CONNOR, joined by THE CHIEF JUSTICE and Justice WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making

the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 718-721.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY, concluded in Parts III-A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed ****711** percentage of public contracts based solely on their race, *Wygant'* s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by Justice MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification ***473** before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 721-724.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 730-731.

Justice STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 731-734.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decision-

making, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 731-732.

(b) Legislative bodies such as the city council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proved guilty of violations of law. P. 732.

***474** c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city ****712** has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 733-734.

Justice KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 734-735.

Justice SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 735-738.

***475** 2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race-for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 739-740.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C.J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C.J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., *post,* p. 731, and KENNEDY, J., *post,* p. 734, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 735. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post,* p. 740. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 757.

John Payton argued the cause for appellant. With him on the briefs were *Mark S. Hersh, Drew St. J. Carneal, Michael L. Sarahan, Michael K. Jackson,* and *John H. Pickering.*

****713** *Walter H. Ryland* argued the cause and filed a brief for appellee.*

* Briefs of *amici curiae* urging reversal were filed for the State of Maryland by *J. Joseph Curran, Jr.,* Attorney General, and *Charles O. Monk II,* Deputy Attorney General; for the State of Michigan by *Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Brent E. Simmons,* Assistant Attorney General; for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *O. Peter Sherwood,* Solicitor General, and *Suzanne M. Lynn, Marjorie Fujiki,* and *Marla Tepper,* Assistant Attorneys General, *John K. Van de Kamp,* Attorney General of California, *Joseph I. Lieberman,* Attorney General of Connecticut, *Frederick D. Cooke,* Corporation Counsel of the District of Columbia, *Neil F. Hartigan,* Attorney General of Illinois, *James M. Shannon,* Attorney General of Massachusetts, *Hubert H. Humphrey III,* Attorney General of Minnesota, *W. Cary Edwards,* Attorney General of New Jersey, *Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *Dave Frohnmayer,* Attorney General of Oregon, *James E. O'Neil,* Attorney General of Rhode Island, *T. Travis Medlock,* Attorney General of South Carolina, *Kenneth O. Eikenberry,* Attorney General of Washington, *Charles G. Brown,* Attorney General of West Virginia, Donald Hanaway, *Attorney General of Wisconsin, and* Joseph B. Meyer, *Attorney General of Wyoming; for the Alpha Kappa Alpha Sorority et al. by* Eva Jefferson Paterson, Robert L. Harris, Judith Kurtz, William C. McNeill III, *and* Nathaniel Colley; *for the American Civil Liberties Union et al. by* Edward M. Chen, Steven R. Shapiro, John A. Powell, *and* John Hart Ely; *for the city of San Francisco, California, et al. by* Louise H. Renne *and* Burk E. Delventhal; *for the Lawyer's Committee for Civil Rights under Law et al. by* Stephen J. Pollak, James R. Bird, Paula A. Sweeney, Grover Hankins, Judith L. Lichtman, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson, Judith A. Winston, *and* Antonia Hernandez; *for the Maryland Legislative Black Caucus by* Koteles Alexander *and* Bernadette Gartrell; *for the Minority Business Enterprize Legal Defense and Education Fund, Inc., et al. by* Anthony W. Robinson, H. Russell Frisby, Jr., *and* Andrew L. Sandler; *for the NAACP Legal Defense and Educational Fund, Inc., by* Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper, Napoleon B. Williams, Jr., *and* Clyde E. Murphy; *and for the National League of Cities et al. by* Benna Ruth Solomon *and* David A. Strauss.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Glen G. Nager,* and *David K. Flynn;* for the Anti-Defamation League of B'nai B'rith by *Robert A.Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Jeffrey P. Sinensky,* and *Jill L. Kahn;* for Associated Specialty Contractors, Inc., by *John A. McGuinn* and *Gary L. Lieber;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for the Mountain States Legal Foundation by *Constance E.*

Brooks; for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley;* for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

***476** Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and Justice WHITE join, and an opinion with respect to Parts III-A and V, in which THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate***477** the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove,* some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, *e.g. South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County,* 723 F.2d 846 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984); *Ohio Contractors Assn. v. Keip,* 713 F.2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, *e. g., Michigan Road Builders Assn., Inc. v. Milliken,* 834 F.2d 583 (CA6 1987), appeal docketed, No. 87-1860; *Associated General Contractors of Cal. v. City and Cty. of San Francisco,* 813 F.2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, § 12-156(a) (1985). The 30% set-aside***478** did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

[1] The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled ... by minority group members." § 12-23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12-158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.*[FN1]

FN1. The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages. See *Memphis Light, Gas & Wa-*

ter Div. v. Craft, 436 U.S. 1, 8-9, 98 S.Ct. 1554, 1559-1560, 56 L.Ed.2d 30 (1978).

****714** The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12-157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Paragraph D of these rules provided:

> "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises ... are unavailable or unwilling to participate in the ***479** contract to enable meeting the 30% MBE goal." ¶ D, Record, Exh. 24, p. 1; see *J.A. Croson Co. v. Richmond,* 779 F.2d 181, 197 (CA4 1985) *(Croson I).*

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.*, at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exh. 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBE's named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I,* 779 F.2d, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12-126(a) (1985).

The Plan was adopted by the Richmond City Council after a public hearing. App. 9-50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction***480** contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

> "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in ****715** this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race

is widespread." *Id.,* at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *Id.,* at 42 (statement of Councilperson Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. *Id.,* at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there ***481** were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. *Id.,* at 32 (statement of Mr. Beck); *id.,* at 33 (statement of Mr. Singer); *id.,* at 35-36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. *Id.,* at 44. Some of the representatives of the local contractor's organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. *Id.,* at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.,* at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with Councilperson Gillespie abstaining. *Id.,* at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J.A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that ***482** to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBE's that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBE's. No MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE's. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. ****716** Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30

days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid.

By October 19, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated that Continental was "unqualified" and that the other MBE's contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based upon his discussions with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. Continental's bid was $6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This ***483** constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city asking for a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project, and that there is no appeal of such a decision. Shortly thereafter Croson brought this action under 42 U.S.C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris.Statement 112-232 (Supp.App.). In its original opinion, a divided panel of the Fourth Circuit ***484** Court of Appeals affirmed. *Croson I*, 779 F.2d 181 (1985). Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). See *Croson I*, *supra*, at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether ****717** 'the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.' " 779 F.2d, at 190 (quoting *Fullilove*, *supra*, 448 U.S., at 503, 100 S.Ct., at 2787 (Powell, J., concur-

ring)).

The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I,* 779 F.2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove"* test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.,* at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBE's in Richmond, but rather to the percentage of minority persons in the city's population. *Id.,* at 191. The panel held that to remedy the effects of past discrimination, "a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter ***485** the contracting industry and to allow existing minority contractors to grow." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). See 478 U.S. 1016, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J.A. Croson Co. v. Richmond,* 822 F.2d 1355 (CA4 1987) *(Croson II).* The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." 822 F.2d, at 1357. As the court read this requirement, "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.' "* *Id.,* at 1358 (quoting *Wygant, supra,* 476 U.S., at 274, 106 S.Ct., at 1847) (emphasis in original).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts...." *Croson II, supra,* at 1358. Moreover, the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F.2d, at 1359. The court concluded that, "[i]f this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.,* at 1360.

***486** The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant.* 822 F.2d, at 1362. We noted probable jurisdiction of the city's appeal, ****718**484 U.S. 1058, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988), and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant,* appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essen-

tially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: " 'Except to the extent the Secretary ***487** determines otherwise, no grant shall be made under this Act ... unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.' " *Fullilove*, 448 U.S., at 454, 100 S.Ct., at 2762 (quoting 91 Stat. 116, 42 U.S.C. § 6705(f)(2)). MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the ... general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S., at 472, 100 S.Ct., at 2771. The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? *Id.*, at 473, 100 S.Ct., at 2772.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.*, at 475-476, 100 S.Ct., at 2773-2774. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.*, at 476 100 S.Ct., at 2773 (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside. ***488** First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

> "Here we deal ... not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state* ****719** or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S., at 483, 100 S.Ct., at 2777 (principal opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to

avoid such conduct." *Id.,* at 483-484, 100 S.Ct., at 2777 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.,* at 458-467, 100 S.Ct., at 2764-2769. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.,* at 463-467, 100 S.Ct., at 2767-2769. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.,* at 478, 100 S.Ct., at 2775.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure***489** that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement. *Id.,* at 487-488, 100 S.Ct., at 2779-2780. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.,* a price not attributable to the present effects of prior discrimination." *Id.,* at 488, 100 S.Ct., at 2780. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.,* at 487, 100 S.Ct., at 2779.

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.,* at 503, 100 S.Ct., at 2787. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.,* at 514-515, 100 S.Ct., at 2793-2794. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.,* at 515-516, n. 14, 100 S.Ct., at 2794, n. 14.

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

***490 **720** What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach v. Morgan,* 384 U.S., at 651, 86 S.Ct., at 1723 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"). See also *South Carolina v. Katzenbach,* 383 U.S. 301, 326, 86 S.Ct. 803, 817, 15 L.Ed.2d 769 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth

Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of ***491** the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco*, 813 F.2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action"); see also Days, Fullilove, 96 Yale L.J. 453, 474 (1987) (hereinafter Days) ("*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program") (emphasis in original); Bohrer, *Bakke, Weber*, and *Fullilove:* Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512-513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as Justice MARSHALL's dissent suggests, see *post*, at 755-757, find in § 5 of the Fourteenth Amendment some form of federal preemption in matters of race. We simply note what should be apparent to all-§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, " 'a *positive* grant of legislative power' " to Congress. *Post*, at 755, quoting *Katzenbach v. Morgan, supra*, 384 U.S., at 651, 86 S.Ct., at 1723 (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873), cited by the dissent, *post*, at 756, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private ****721** discrimination***492** within its own legislative jurisdiction.[FN2] This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant*, 476 U.S., at 274, 106 S.Ct., at 1847. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred

in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

> FN2. In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I*, 779 F.2d 181, 184-186 (CA4 1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S.Ct. 2804, 2810, 37 L.Ed.2d 723 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, ***493** encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

[2] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

****722** [3] Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See ***494***University of California Regents v. Bakke*, 438 U.S., at 298, 98 S.Ct., at 2752 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant*, 476 U.S., at 279-280, 106 S.Ct., at 1849-1850; *id.*, at 285-286, 106 S.Ct., at 1852-1853 (O'CONNOR, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 105, 93 S.Ct. 1278, 1333, 36 L.Ed.2d 16 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omit-

ted).

Our continued adherence to the standard of review employed in *Wygant* does not, as Justice MARSHALL's dissent suggests, see *post*, at 752, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate, see *infra*, at 730-731, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke, supra,* 438 U.S., at 289-290, 98 S.Ct., at 2748.

Under the standard proposed by Justice MARSHALL's dissent, "race-conscious classifications designed to further remedial goals," *post*, at 743, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of ***495** the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," *Wygant, supra,* 476 U.S., at 320, 106 S.Ct., at 1871 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect ****723** "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority ***496** based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke, supra,* the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups.

Id., 438 U.S., at 288-289, 98 S.Ct., at 2747-2748. Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.*, at 306, 98 S.Ct., at 2756 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.*, at 271-272, 98 S.Ct., at 2738 (Powell, J.) (addressing constitutionality of Davis plan); *id.*, at 408, 98 S.Ct., at 2808 (STEVENS, J., joined by Burger, C.J. and Stewart and REHNQUIST, JJ. concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.*, at 307, 98 S.Ct., at 2757. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs ***497** worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the government have a compelling interest in favoring one race over another. *Id.*, at 308-309, 98 S.Ct., at 2757-2758.

In *Wygant*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. ****724** This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant, supra*, at 276, 106 S.Ct., at 1848.

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. 476 U.S., at 276, 106 S.Ct., at 1848; see also *id.*, at 294, 106 S.Ct., at 1857 (O'CONNOR, J., concurring in part and concurring in judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, because the role model theory had no ***498** relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" race-based decisionmaking essentially limitless in scope and duration. *Id.*, at 276, 106 S.Ct., at 1848 (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

B

[4] We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry.* " Supp.App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant, supra,* at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23-24. The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures,***499** and disability caused by an inadequate track record. *Id.*, at 25-26, and n. 41.

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local ****725** governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp.App. 163-167.

***500** None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant,* 476 U.S., at 277, 106 S.Ct., at 1849 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.*, at 274-275, 106 S.Ct., at 1846-1847; see also *id.*, at 293, 106

S.Ct., at 1856 (O'CONNOR, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger v. Wiesenfeld,* 420 U.S., at 648, n. 16, 95 S.Ct., at 1233, n. 16 ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

[5] The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.,* at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See *McLaughlin v. Florida,* 379 U.S. 184, 190-192, 85 S.Ct. 283, 287-289, 13 L.Ed.2d 222 (1964). A ***501** governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.,* at 193, 85 S.Ct., at 289; *Wygant, supra,* 476 U.S., at 277, 106 S.Ct., at 1848. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu v. United States,* 323 U.S. 214, 235-240, 65 S.Ct. 193, 202-205, 89 L.Ed. 194 (1944) (Murphy, J., dissenting).

[6] Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, ****726** they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.,* at 308, n. 13, 97 S.Ct., at 2742, n. 13. See also *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

[7] In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters v. United States,* 431 U.S. 324, 337-338, 97 S.Ct. 1843, 1855-1856, 52 L.Ed.2d 396 (1977) (statistical comparison between minority truck-drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating ***502** discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood, supra,* 433 U.S., at 308, 97 S.Ct.,

at 2741; *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring in judgment).

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. *Ohio Contractors Assn. v. Keip*, 713 F.2d, at 171 (relying on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco*, 813 F.2d, at 933 ("There is no finding-and we decline to assume-that male caucasian contractors will award contracts only to other male caucasians").[FN3] Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant *construction* projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information***503** on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

> FN3. Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va., City Code, § 17.2 *et seq.* (1985)). The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post*, at 747-748.

The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous****727** explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See The State of Small Business: A Report of the President 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore v. Friday*, 478 U.S. 385, 407-408, 106 S.Ct. 3000, 3013, 92 L.Ed.2d 315 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood*, 413

U.S., at 465, 93 S.Ct., at 2804; *Ohio Contractors, supra,* at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in ***504** a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove,* Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove,* 448 U.S., at 487, 100 S.Ct., at 2779 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See Days 480-481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

Justice MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an ***505** "onerous documentary obligatio[n]." *Post,* at 750. We cannot agree. In this regard, we are in accord with Justice STEVENS' observation in *Fullilove,* that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate ****728** treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove, supra,* at 533-535, 100 S.Ct., at 2803-2804 (dissenting opinion) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, Justice MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post,* at 750, quoting *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken v. Bradley,* 418 U.S. 717, 746, 94 S.Ct. 3112, 3128, 41 L.Ed.2d 1069 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore,

hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity ***506** and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications...." *Bakke,* 438 U.S., at 296-297, 98 S.Ct., at 2751 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp.App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant,* 476 U.S., at 284, n. 13, 106 S.Ct., at 1852, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

***507 **729** IV

[8] As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori,* lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove,* 448 U.S., at 463-467, 100 S.Ct., at 2767-2769; see also *id.,* at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be

narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494, 106 S.Ct. 3019, 3059, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of ***508** one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a ****730** program is not narrowly tailored to remedy the effects of prior discrimination.

***509** V

[9] Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore v. Friday*, 478 U.S., at 398, 106 S.Ct., at 3008; *Teamsters v. United States*, 431 U.S., at 337-339, 97 S.Ct., at 1856. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, *e.g.*, *New York State Club Assn. v. New York City*, 487 U.S. 1, 10-11, 13-14, 108 S.Ct. 2225, 2232-2233, 2234-2235, 101 L.Ed.2d 1 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

[10] Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp. v. Green*,

411 U.S. 792, 802-803, 93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters, supra*, 431 U.S., at 338, 97 S.Ct., at 1856.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding ***510** procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S., at 277, 106 S.Ct., at 1849.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve ****731** to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery***511** within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove*, 448 U.S., at 539, 100 S.Ct., at 2806 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions-including those that govern the relationships among different racial and ethnic groups-primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante*,

at 721-722. [FN1] I do, however, agree with the Court's explanation***512** of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III-B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

FN1. In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point-as I explained at some length in *Fullilove v. Klutznick*, 448 U.S. 448, 532-554, 100 S.Ct. 2758, 2802-2814, 65 L.Ed.2d 902 (1980) (dissenting opinion)-I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra;* see also Justice Powell's discussion in *University of California Regents v. Bakke*, 438 U.S. 265, 311-319, 98 S.Ct. 2733, 2759-2763, 57 L.Ed.2d 750 (1978).

First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty. As I pointed out in my dissent in that case, even if we completely disregard our history of racial ****732** injustice, race is not always irrelevant to sound governmental decisionmaking.[FN2] In the ***513** case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

FN2. "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.

> "[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior-and if the members of the group are all of the same race-it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reason-

> ably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.
>
> "In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant v. Jackson Board of Education,* 476 U.S., at 313-315, 106 S.Ct., at 1867-1869 (footnotes omitted).

Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.[FN3] It is the judicial system, rather than the legislative process, that is best equipped to identify***514** past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-1276, 28 L.Ed.2d 554 (1971).[FN4]

FN3. See U.S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, *e.g.*, Pub.L. 100-383, 102 Stat. 903 (provision of restitution to interned Japanese-Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

FN4. As I pointed out in my separate opinion concurring in the judgment in *United States v. Paradise,* 480 U.S. 149, 193-194, 107 S.Ct. 1053, 1078-1079, 94 L.Ed.2d 203 (1987):

> "A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), which did not involve any proven violations of law. In such cases the govern-

> mental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

****733** Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation,[FN5] I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring).[FN6] In this case that approach convinces***515** me that, instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

> FN5. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190, 211-212, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (STEVENS, J., concurring).

> FN6. "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'-for me at least-includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.
>
> "In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.' " *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S., at 452-453, 105 S.Ct., at 3261 (STEVENS, J., concurring).

The justification for the ordinance is the fact that in the past white contractors-and presumably other white citizens in Richmond-have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination-it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of ***516** white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty

of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975.[FN7] Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law,[FN8] and ****734** some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[FN9]

FN7. See *ante,* at 726, n. 3.

FN8. There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters v. United States,* 431 U.S. 324, 356-357, 360, 97 S.Ct. 1843, 1865, 1867, 52 L.Ed.2d 396 (1977).

FN9. There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher v. Daggett,* 462 U.S. 725, 744-765, 103 S.Ct. 2653, 2665-2668, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); *Rogers v. Lodge,* 458 U.S. 613, 631-653, 102 S.Ct. 3272, 3283-3294, 73 L.Ed.2d 1012 (1982) (STEVENS, J., dissenting); *Mobile v. Bolden,* 446 U.S. 55, 83-94, 100 S.Ct. 1490, 1508-1513, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment); *Cousins v. City Council of Chicago,* 466 F.2d 830, 848-853 (CA7) (STEVENS, J., dissenting), cert. denied, 409 U.S. 893, 93 S.Ct. 85, 34 L.Ed.2d 151 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its ***517** supposed beneficiaries. For, as I explained in my opinion in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980):

"[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.,* at 545, 100 S.Ct., at 2809.

"The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

"When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classifica-

tion is defined in racial terms, I believe that such particular identification is imperative.

"In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.,* at 552-554, 100 S.Ct., at 2813-2814 (footnote omitted).

***518** Accordingly, I concur in Parts I, III-B, and IV of the Court's opinion, and in the judgment.
Justice KENNEDY, concurring in part and concurring in the judgment.

I join all but Part II of Justice O'CONNOR's opinion and give this further explanation.

Part II examines our case law upholding congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection ****735** violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion would make it crystal clear to the ***519** political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in Justice O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to

say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as Justice O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We ***520** are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

Justice SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification****736** by race, whether or not its asserted purpose is "remedial" or "benign." *Ante*, at 721-722. I do not agree, however, with Justice O'CONNOR's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante*, at 713. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, *e.g.*, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-276, 106 S.Ct. 1842, 1847-1848, 90 L.Ed.2d 260 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee v. Washington*, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency-fatal to a Nation such as ours-to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution ***521** to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb-for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee v. Washington*, *supra*-can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those hold-

ings to the States. In *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination, see, *e.g., United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). As Justice O'CONNOR acknowledges, however, *ante,* at 717-720 it is one thing to permit racially based conduct by the Federal Government-whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5-and quite another to permit it by the precise entities against whose conduct in ***522** matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia, supra,* 100 U.S., at 345, the Civil War Amendments were designed to "take away all possibility of oppression by law because of race or color" and "to be ... limitations on the power of the States and enlargements of ****737** the power of Congress." Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U.S., at 453-495, 100 S.Ct., at 2762-2783 (opinion of Burger, C.J., joined by WHITE and Powell, JJ.), with *id.,* at 495-517, 100 S.Ct., at 2783-2794 (opinion of Powell, J.), and *id.,* at 517-522, 100 S.Ct., at 2794-2797 (opinion of MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ.)), I do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"-political qualities already to be doubted in a national legislature, *Fullilove, supra,* at 527, 100 S.Ct., at 2800 (Stewart, J., with whom REHNQUIST, J., joined, dissenting)-are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, *e.g., Ex parte Virginia, supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, Equal Justice Under Law, 1835-1875, pp. 312-334 (1982); Logan, Judicial Federalism in the Court of History, 66 Ore.L.Rev. 454, 494-515 (1988). And the struggle retains that character in modern times. See, *e.g., Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*); *United States v. Montgomery Board of Education,* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); ***523** *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Griffin v. Prince Edward County School Board,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Not all of that struggle has involved discrimination against blacks, see, *e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Hispanics), and not all of it has been in the Old South, see, *e.g., Columbus Board of Education v. Penick,* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Keyes v. School Dist. No. 1, Denver, Colorado,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.

See G. Wood, The Creation of the American Republic, 1776-1787, pp. 499-506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961).

524** The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens*738** also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)-and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore v. Friday*, 478 U.S. 385, 395-396, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment." *Columbus Board of Education v. Penick, supra*, 443 U.S., at 458-459, 99 S.Ct. at 2946-2947 (emphasis added). Concluding in this context that race-neutral efforts at "dismantling the state-imposed dual system" were so ineffective that they might "indicate a lack of good faith," *Green v. New Kent County School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695, 20 L.Ed.2d 716 (1968); see also ***525** *Raney v. Board of Education of Gould School Dist.*, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968), we have permitted, as part of the local authorities' "affirmative duty to disestablish the dual school system[s]," such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the same purpose. *McDaniel v. Barresi*, 402 U.S. 39, 40-41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971). While thus permitting the use of race to *de* classify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, *e.g.*, *Columbus Board of Education v. Penick, supra*, 443 U.S., at 465, 99 S.Ct., at 2950; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974); *Keyes v. School Dist. No. 1, Denver, Colorado, supra*, 413 U.S., at 213, 93 S.Ct., at 2699. And it is implicit in our cases that

after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore v. Friday*, *supra*, reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects-that is, any remaining all-black and all-white clubs. 478 U.S., at 407-408, 106 S.Ct., at 3012-3013. "[H]owever sound *Green* [*v. New Kent County School Board*, *supra*] may have been in the context of the public schools," we said, "it has no application to this wholly****739** different milieu." *Id.*, at 408, 106 S.Ct., at 3013. The same is so here.

***526** A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses-which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him-for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante*, at 729. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action-see, *e.g.*, *ante*, at 727-728, 729-but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race.* In other words, far from justifying racial classification, identification***527** of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote:

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, The Morality of Consent, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous,"

id., at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 677, 107 S.Ct. 1442, 1475, 94 L.Ed.2d 615 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A. DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312, 337, 94 S.Ct. 1704, 1716, 40 L.Ed.2d 164 (1974) (dissenting opinion). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the ****740** score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the ***528** source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

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

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from-and in fact was patterned upon-the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's ***529** position [FN1] is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations;

testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

> FN1. In the interest of convenience, I refer to the opinion in this case authored by Justice O'CONNOR as "the majority," recognizing that certain portions of that opinion have been joined by only a plurality of the Court.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The ****741** majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is ***530** the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. *Ante*, at 714-715. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (Act), a measure which appropriated $4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove*, *supra*, this Court upheld the validity of this federal set-aside. Chief Justice Burger's principal opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access***531** by the minority business community to public funds made available by congressional appropriations." *Fullilove*, 448 U.S., at 480, 100 S.Ct., at 2775. Finding the set-aside provision properly tailored to this goal, the Chief Justice concluded that the program was valid under either strict or intermediate scrutiny. *Id.*, at 492, 100 S.Ct., at 2781.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 Report by the House Committee on Small Business concluded:

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The

> Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. *The presumption must be made that past discriminatory systems have resulted in present economic inequities."* H.R.Rep. No. 94-468, pp. 1-2 (1975) (quoted in *Fullilove, supra,* at 465, 100 S.Ct., at 2768) (opinion of Burger, C.J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

> "[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation.****742** In the past more than the present, ***532** this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H.R.Rep. No. 94-1791, p. 182 (1977), summarizing H.R.Rep. No. 94-468, p. 17 (1976) (quoted in *Fullilove, supra,* at 466, n. 48, 100 S.Ct., at 2768, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Fullilove, supra,* at 467, 100 S.Ct., at 2769 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove, supra,* at 477-478, 100 S.Ct., at 2774. [FN2] Significantly,***533** this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove, supra,* at 478, 100 S.Ct., at 2774.[FN3]

> FN2. Other Reports indicating the dearth of minority-owned businesses include H.R.Rep. No. 92-1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H.R.Doc. No. 92-194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H.R.Doc. No. 92-169, p. 1 (1971) (text of message from President Nixon to

Congress, describing paucity of minority business ownership and federal efforts to give "every man an equal chance at the starting line").

FN3. Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated-and that, because of this legacy of discrimination, minority businesses across the Nation had still failed, as of 1983, to gain a real toehold in the business world. See, *e.g.*, H.R.Rep. No. 95-949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S.Rep. No. 95-1070, pp. 14-15 (1978), U.S.Code Cong. & Admin.News 1978, pp. 3835, 3848, 3849; (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "recogniz [ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S.Rep. No. 96-31, pp. IX, 107 (1979) (Report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S.Rep. No. 96-974, p. 3 (1980), U.S.Code Cong. & Admin.News 1980, pp. 4953, 4954 (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H.R.Rep. No. 97-956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H.R.Rep. No. 98-3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

****743** The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the ***534** majority, tellingly, elides. The transcript of the session at which the council enacted the local set-aside initiative contains numerous references to the 6-year-old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, *e.g.*, App. 14-16, 24 (remarks of City Attorney William H. Hefty); *id.*, at 14-15 (remarks of Councilmember William J. Leidinger); *id.*, at 18 (remarks of minority community task force president Freddie Ray); *id.*, at 25, 41 (remarks of Councilmember Henry L. Marsh III); *id.*, at 42 (remarks of City Manager Manuel Deese).

The city council's members also heard testimony that, although minority groups made up half of the city's population, only 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.*, at 43 (remarks of Councilmember Henry W. Richardson). They heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.[FN4] Finally, they heard testimony from city officials as to the exclusionary history of the local construction industry.[FN5] As the District Court noted, not a ***535** single person who testified before the city council denied that discrimination in

Richmond's construction industry had been widespread. Civ.Action No. 84-0021 (ED Va., Dec. 3, 1984) (reprinted in Supp.App. to Juris.Statement 164-165).[FN6] So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

FN4. According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27-28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.*, at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had 1 black member among its 60 Richmond members, *id.*, at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had 1 black member among its 45 members, *id.*, at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had 2 black members among its 81 Virginia members. *Id.*, at 34 (remarks of Mark Singer).

FN5. Among those testifying to the discriminatory practices of Richmond's construction industry was Councilmember Henry Marsh, who had served as mayor of Richmond from 1977 to 1982. Marsh stated:

> "I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.
>
> "I think the situation involved in the City of Richmond is the same.... I think the question of whether or not remedial action is required is not open to question." *Id.*, at 41.
>
> Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.*, at 42.

FN6. The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, *e.g.*, *id.*, at 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 301, 106 S.Ct. 1842, 1861, 90 L.Ed.2d 260 (1986) (MARSHALL, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those ****744** objectives" in order to withstand constitutional scrutiny. *University of California Regents v. Bakke*, 438 U.S. 265, 359, 98 S.Ct. 2733, 2783, 57 L.Ed.2d 750 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also *Wygant, supra*, 476 U.S., at 301-302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); *Fullilove*, 448 U.S., at 517-519, 100 S.Ct., at 2794-2795 ***536** MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Ful-*

lilove, supra, at 519, 100 S.Ct., at 2795-2796 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove,* six Members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the equal protection principles under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct." 448 U.S., at 478, 100 S.Ct., at 2774; see also *id.,* at 502-506, 100 S.Ct., at 2787-2789 (Powell, J., concurring); *id.,* at 520, 100 S.Ct., at 2796 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination in cases involving access to public education, *McDaniel v. Barresi,* 402 U.S. 39, 41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971); *University of California Regents v. Bakke,* 438 U.S., at 320, 98 S.Ct., at 2763 (opinion of Powell, J.); *id.,* at 362-364, 98 S.Ct., at 2784-2785 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), employment, *United States v. Paradise,* 480 U.S. 149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion); *id.,* at 186-189, 107 S.Ct., at 1074-1076 (Powell, J., concurring), and valuable government contracts, *Fullilove,* 448 U.S., at 481-484, 100 S.Ct., at 2776-2777 (opinion of Burger, C.J.); ***537***id.,* at 496-497, 100 S.Ct., at 2783-2784 (Powell, J., concurring); *id.,* at 521, 100 S.Ct., at 2797 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove,* 448 U.S., at 475, 100 S.Ct., at 2773 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.,* at 503, 100 S.Ct., at 2787 (Powell, J., concurring).

The majority pays only lipservice to this additional governmental interest. See *ante,* at 720-721, 726-727. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), we invalidated a program in which a State purchased textbooks ****745** and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.,* at 467, 93 S.Ct., at 2811-2812; see also *Gilmore v. City of Montgomery,* 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) (upholding federal-court order forbidding city to allow private segregated schools which allegedly discriminated on the basis of race to use public parks).

***538** The majority is wrong to trivialize the

continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination-an interest which this Court has repeatedly deemed compelling. See, *e.g.*, *New York State Club Assn. v. New York City*, 487 U.S. 1, 14, n. 5, 108 S.Ct. 2225, 2235, n. 5, 101 L.Ed.2d 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983); *Runyon v. McCrary*, 427 U.S. 160, 179, 96 S.Ct. 2586, 2598, 49 L.Ed.2d 415 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But see *North Carolina Bd. of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel, supra*, 402 U.S., at 41, 91 S.Ct., at 1288 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through ***539** its own decisionmaking, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States v. Paradise*, 480 U.S., at 166, and 166-167, n. 17, 107 S.Ct., at 1064, and 1064, n. 17 (plurality opinion); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." ****746***Fullilove v. Klutznick, supra*, 448 U.S., at 519, 100 S.Ct., at 2795 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant v. Jackson Bd. of Education*, a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S., at 277, 106 S.Ct., at 1849. Justice O'CONNOR's separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.*, at 293, 106 S.Ct., at 1857. The dissenting opinion I authored, joined by Justices BRENNAN and

BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.*, at 297, 303, 106 S.Ct., at 1859, 1862. Finally, Justice ***540** STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.*, at 315-316, 106 S.Ct., at 1868-1869. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents v. Bakke*, 438 U.S., at 387, 98 S.Ct., at 2797 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra*, at 741-743 Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that " 'present economic inequities' " in construction contracting resulted from " 'past discriminatory systems.' " *Supra*, at 741 (quoting H.R.Rep. No. 94-468, pp. 1-2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 0.67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present ***541** inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized "societal discrimination" which the majority decries as a basis for remedial action. *Ante*, at 723, 724-725, 727-728. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone," see, *e.g.*, *ante*, at 726, suffices to prove past discrimination. But items of evidence do not, of course, ****747** "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (0.67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante*, at 725. It is true that, when the factual predicate needed to be proved is one of *present* discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where

this contrast revealed "gross statistical disparities." *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741-2742, 53 L.Ed.2d 768 (1977) (Title VII case); see also *Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how miniscule the share of Richmond public***542** construction contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparit[y]." *Hazelwood School Dist., supra*, 433 U.S., at 307, 97 S.Ct., at 2741. There are roughly equal numbers of minorities and nonminorities in Richmond-yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds that other businesses receive. See *Teamsters, supra*, 431 U.S., at 342, n. 23, 97 S.Ct., at 1858, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers.... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' ") (citation omitted) (quoted in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 656-657, 107 S.Ct. 1442, 1465, 94 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring in judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from a historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson v. Transportation Agency, Santa Clara County, supra*, Justice O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." *Id.*, at 651, 107 S.Ct., at 1462; see also *Steelworkers v. Weber*, 443 U.S. 193, 198-199, and n. 1, 99 S.Ct. 2721, 2724-2725, and n. 1, 61 L.Ed.2d 480 (1979); *Teamsters, supra*, 431 U.S., at 339, n. 20, 97 S.Ct., at 1856, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force-here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments-is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante*, at 726, is thus entirely beside the ***543** point. If Richmond indeed has a monochromatic contracting community-a conclusion reached by the District Court, see Civ. Action No. 84-0021 (ED Va.1984) (reprinted in Supp.App. to Juris. Statement 164)-this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove*, 448 U.S., at 465, 100 S.Ct., at 2768. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely****748** to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials-including councilmembers, a former mayor, and the present city manager-asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante*, at 725. It similarly discounts as minimally probative the city council's designation of its set-aside plan as remedial. "[B]lind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal pro-

tection analysis." *Ibid.*

No one, of course, advocates "blind judicial deference" to the findings of the city council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does violence to the very principles of comity within our federal system which this ***544** Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, 104 S.Ct. 2321, 2331, 81 L.Ed.2d 186 (1984); see also *FERC v. Mississippi*, 456 U.S. 742, 777-778, 102 S.Ct. 2126, 2147, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's race-conscious measure.

Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at a time when the city's black population was nearing 50% because it was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.*, at 373, 95 S.Ct., at 2305; see also *id.*, at 382, 95 S.Ct., at 2309 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose ... to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted).[FN7]

FN7. For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing black political power, see J. Moeser & R. Dennis, The Politics of Annexation-Oligarchic Power in a Southern City 50-188 (1982).

In *Bradley v. School Board of Richmond*, 462 F.2d 1058, 1060, n. 1 (CA4 1972), aff'd by an equally divided Court, ***545**412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and the cases implementing its holding. The dissenting judge elaborated:

> "The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say ****749** that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I.* In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, *twelve years after the decision of Brown I.*" 462 F.2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley* used

equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.*, at 1065 (citing numerous public and private acts of discrimination).[FN8]

> FN8. Again the dissenting judge-who would have consolidated the school districts-elaborated:
>
> > "[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens without. These were principally in the area of residential development. Racially restrictive convenants were freely employed. Racially discriminatory practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation ... had been a discriminatory policy of school construction, i.e., the selection of school construction sites in the center of racially identifiable neighborhoods manifestly to serve the educational needs of students of a single race.
>
> "The majority does not question the accuracy of these facts." 462 F.2d, at 1075-1076 (Winter, J.) (emphasis in original) (footnote omitted).

***546** When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a State is an essential component of federalism," *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 588, 105 S.Ct. 1005, 1037, 83 L.Ed.2d 1016 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC v. Mississippi, supra,* 456 U.S., at 777, 102 S.Ct., at 2147 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant,* 476 U.S., at 277-278, 106 S.Ct., at 1848-1849 (plurality opinion), has *at no point* come forward with *any* direct evidence that the city council's motives were anything other than sincere.[FN9]

> FN9. Cf. *Fullilove v. Klutznick,* 448 U.S. 448, 541, 100 S.Ct. 2758, 2807, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings ***547** noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante,* at 727. The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inex-

plicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante,* at 728. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require ****750** cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government. See *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city ... to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers v. Weber,* 443 U.S., at 198, n. 1, 99 S.Ct., at 2724, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant, supra,* 476 U.S., at 296, 106 S.Ct., at 1858 (MARSHALL, J., dissenting) ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum").[FN10] Of course, Richmond could have built an even more ***548** compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon States and localities once the reality of past discrimination is apparent. See *infra,* at 753-757.

FN10. Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, American Constitutional Law 345 (2d ed. 1988). The principal opinion in *Fullilove* justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove v. Klutznick,* 448 U.S., at 478, 100 S.Ct., at 2774 (opinion of Burger, C.J.) ("Although the Act recites no preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"); see also *id.,* at 549-550, and n. 25, 100 S.Ct., at 2811-2812, and n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, Fullilove, 96 Yale L.J. 453, 465 (1987) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (citation and footnote omitted).

B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal set-aside provision upheld in *Fullilove.* 448 U.S., at 489, 100 S.Ct., at 2780. Like the federal provision, Richmond's is limited to five years in duration, *ibid.,* and was not renewed when it came up for reconsideration in 1988. Like the

federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demonstrate that they cannot comply with its provisions. *Id.*, at 483-484, 100 S.Ct., at 2777. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only ***549** 3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove, supra,* at 484, 100 S.Ct., at 2778 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested ****751** right of a contractor to a particular contract; instead it operates entirely prospectively. 448 U.S., at 484, 100 S.Ct., at 2777-2778. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors-here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant,* 476 U.S., at 283, 106 S.Ct., at 1852; see *Steelworkers v. Weber, supra,* 443 U.S., at 208, 99 S.Ct., at 2730.

These factors, far from "justify[ing] a preference of any size or duration," *ante,* at 728, are precisely the factors to which this Court looked in *Fullilove.* The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, *ante,* at 729, and the selection of a 30% set-aside figure. *Ante,* at 729. The majority's first criticism is flawed in two respects. First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors. See Richmond, Va., City Code § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, ***550** strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante,* at 729, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove,* 448 U.S., at 463-467, 100 S.Ct., at 2767-2769 (noting inadequacy of previous measures designed to give experience to minority businesses); see also *id.,* at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("By the time Congress enacted [the federal set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of Justice BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents v. Bakke,* 438 U.S., at 407, 98 S.Ct., at 2807-2808 (separate opinion).[FN11]

FN11. The majority also faults Richmond's ordinance for including within its defini-

> tion of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante,* at 728. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove, supra,* 448 U.S., at 454, 100 S.Ct., at 2762. Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

***551** As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante,* at 729. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring ****752** has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Fullilove, supra,* 448 U.S., at 513-514, 100 S.Ct., at 2792-2793 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante,* at 716-717; *ante,* at 735 (SCALIA, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, ***552** and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, *e.g.*, *Wygant v. Jackson Bd. of Education,* 476 U.S., at 301-302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); *Fullilove, supra,* 448 U.S., at 517-519, 100 S.Ct., at 2794-2795 (MARSHALL, J., concurring in judgment); *University of California Regents v. Bakke,* 438 U.S., at 355-362, 98 S.Ct., at 2781-2784 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.,* at 357-358, 98 S.Ct., at 2782. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove:* "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted

to avoid stigmatization, ... such programs should not be subjected to conventional 'strict scrutiny'-scrutiny that is strict in theory, but fatal in fact." *Fullilove, supra,* 448 U.S., at 518-519, 100 S.Ct., at 2795 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking,***553** the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

****753** B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante,* at 722. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks constitute approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine seats on the City Council are held by blacks." *Ante,* at 723.

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within ***554** the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante,* at 721. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist., supra,* 411 U.S., at 28, 93 S.Ct., at 1294, stand on extremely shaky ground. See *Castaneda v. Partida,* 430 U.S. 482, 504, 97 S.Ct. 1272, 1285, 51 L.Ed.2d 498 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante,* at 722, underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial dis-

crimination in virtually all walks of life-discrimination amply documented in the decisions of the federal judiciary. See *supra,* at 748-749. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy-and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante,* at 721.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond City Council elected a black man mayor in 1982, for example, his victory was won with the ***555** support of the city council's four white members. Richmond Times-Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely ****754** along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante,* at 725. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove.*

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy ***556** the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*-or alternatively, if it repealed that legislation altogether-the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.[FN12]

FN12. Although the majority purports to "adher[e] to the standard of review employed in *Wygant,* " *ante,* at 722, the

"prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) plurality, and the similar "firm basis" test endorsed by Justice O'CONNOR in her separate concurrence in that case. See *id.*, at 289, 106 S.Ct., at 1855; *id.*, at 286, 106 S.Ct., at 1853. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 632, 107 S.Ct. 1442, 1452, 94 L.Ed.2d 615 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

> The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant*, a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U.S., at 277-278, 106 S.Ct., at 1849; *id.*, at 286, 106 S.Ct., at 1853 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 305, 106 S.Ct., at 1863 (MARSHALL, J., dissenting). Justice O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.... [A] plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.*, at 286-287, 106 S.Ct., at 1853-1854. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, *e.g.*, *ante*, at 727 (States and localities "must identify that discrimination ... with some specificity"). Given that just three Terms ago this Court rejected the "specific victims" idea as untenable, I believe these references-and the majority's cryptic "identified discrimination" requirement-cannot be read to require States and localities to make such highly particularized showings. Rather, I take the majority's standard of "identified discrimination" merely to require some quantum of proof of discrimination within a given jurisdiction that exceeds the proof which Richmond has put forth here.

***557 **755** To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante*, at 720, 727, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision-or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments-was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.*, at 651, 86 S.Ct., at 1723 (emphasis added); see *id.*, at 653-656, 86 S.Ct., at 1725-1726; *South Carolina v. Katzenbach*,

383 U.S. 301, 326-327, 86 S.Ct. 803, 817-818, 15 L.Ed.2d 769 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implemen[t] the rights created" by its passage); see also ***558***City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 1559, 64 L.Ed.2d 119 (1980) (same). Indeed, we have held that Congress has this authority even where no constitutional violation has been found. See *Katzenbach v. Morgan*, *supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove*, 448 U.S., at 476, 100 S.Ct., at 2774 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States-or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)-from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does Justice SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification"-a "distinction" which, he states, "explains our school desegregation cases." *Ante*, at 738 (SCALIA, J., concurring in ****756** judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action) ***559** stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. Justice SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.*, but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel v. Barresi*, 402 U.S., at 41, 91 S.Ct., at 1288; see also *North Carolina Bd. of Education v. Swann*, 402 U.S., at 46, 91 S.Ct., at 1286 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations v. Carey*, 430 U.S. 144, 159-162, 97 S.Ct. 996, 1006-1008, 51 L.Ed.2d 229 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents v. Bakke:*

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5

of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing* ***560** *whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed.* Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 98, 65 S.Ct. 1483, 1489, 89 L.Ed. 2072 (Frankfurter, J., concurring)." 438 U.S., at 368, 98 S.Ct., at 2788 (footnote omitted; emphasis added).

In short, there is simply no credible evidence that the Framers of the Fourteenth Amendment sought "to transfer the security and protection of all the civil rights ... from the States to the Federal government." The *Slaughter-House Cases,* 16 Wall. 36, 77-78, 21 L.Ed. 394 (1873).[FN13] The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante,* at 720: they forbade state-sanctioned slavery, forbade the state-sanctioned denial of the right to vote, and (until the content of the Equal Protection Clause was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States to deny equal protection. ****757** The Amendments also specifically empowered the Federal Government to combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that ***561** States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

FN13. Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. *Ante,* at 720. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove,* 448 U.S., at 463, 100 S.Ct., at 2767. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

Justice BLACKMUN, with whom Justice BRENNAN joins, dissenting.

I join Justice MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion

of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. Justice MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who-though possibly innocent in themselves-benefit from the wrongs of past decades.

***562** So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights-a fulfillment that would make this Nation very special.

U.S.Va.,1989.
City of Richmond v. J.A. Croson Co.
488 U.S. 469, 109 S.Ct. 706, 53 Fair Empl.Prac.Cas. (BNA) 197, 48 Empl. Prac. Dec. P 38,578, 102 L.Ed.2d 854, 57 USLW 4132, 36 Cont.Cas.Fed. (CCH) P 76,005

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541 U.S. 752, 124 S.Ct. 2204, 58 ERC 1545, 26 ITRD 1097, Fed. Carr. Cas. P 84,339, 159 L.Ed.2d 60, 72 USLW 4445, 34 Envtl. L. Rep. 20,033, 04 Cal. Daily Op. Serv. 4846, 2004 Daily Journal D.A.R. 6655, 19 Fla. L. Weekly Fed. S 353

(Cite as: 541 U.S. 752, 124 S.Ct. 2204)

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, et al., Petitioners,

v.

PUBLIC CITIZEN et al.

No. 03-358.

Argued April 21, 2004.

Decided June 7, 2004.

Background: Various unions and environmental groups petitioned for review of order of Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA), regarding promulgation of three regulations. The United States Court of Appeals for the Ninth Circuit, Wardlaw, Circuit Judge, 316 F.3d 1002, granted petition and remanded matter to agency. Certiorari was granted.

Holding: The Supreme Court, Justice Thomas, held that: because FMCSA lacked discretion to prevent cross-border operations of Mexican motor carriers, neither National Environmental Policy Act (NEPA) nor Clean Air Act (CAA) required FMCSA to evaluate environmental effects of such operations.

Reversed and remanded.

West Headnotes

[1] Automobiles 48A 78

48A Automobiles
48AIII Public Service Vehicles
48AIII(B) License and Registration
48Ak78 k. Eligibility for and Vehicles Subject to License or Certificate. Most Cited Cases

Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases

Federal Motor Carrier Safety Administration (FMCSA) has only limited discretion regarding motor vehicle carrier registration; it must grant registration to all domestic or foreign motor carriers that are willing and able to comply with applicable safety, fitness, and financial-responsibility requirements, and FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety. Motor Carriers Safety Improvement Act of 1999, § 101(a), 113 Stat. 1750; 49 U.S.C.A. § 13902(a)(1).

[2] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases

Agency's decision not to prepare environmental impact statement (EIS) can be set aside only upon showing that it was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A); National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. § 1501.4.

[3] Environmental Law 149E 588

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek588 k. Impacting Human Environment. Most Cited Cases

A “but for” causal relationship is insufficient to make agency responsible for particular effect under NEPA and relevant regulations; NEPA requires reasonably close causal relationship between envir-

onmental effect and alleged cause. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1508.8, 1508.18.

[4] Environmental Law 149E 586

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek586 k. "Hard Look" Test; Reasoned Elaboration. Most Cited Cases

Inherent in NEPA and its implementing regulations is "rule of reason," which ensures that agencies determine whether and to what extent to prepare environmental impact statement (EIS) based on usefulness of any new potential information to decisionmaking process; where preparation of EIS would serve no purpose in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require agency to prepare EIS. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1500.1(b, c), 1508.8, 1508.9, 1508.18.

[5] Environmental Law 149E 583

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek580 Preliminary Assessment or Report
149Ek583 k. Sufficiency. Most Cited Cases

Causal connection between issuance by Federal Motor Carrier Safety Administration (FMCSA) of proposed regulations implementing variety of specific application and safety-monitoring requirements for Mexican carriers and entry of Mexican trucks was insufficient to make FMCSA responsible under NEPA to consider environmental effects of trucks' entry; such a requirement would fulfill neither of statutory purposes of ensuring that agency, in reaching its decision, would have available, and would carefully consider, detailed information concerning significant environmental impacts and of guaranteeing that relevant information would be made available to larger audience that might also play role in both decisionmaking process and implementation of that decision. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1500.1, 1500.2, 1502.1.

[6] Environmental Law 149E 583

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek580 Preliminary Assessment or Report
149Ek583 k. Sufficiency. Most Cited Cases

Where agency has no ability to prevent certain effect due to its limited statutory authority over relevant actions, agency cannot be considered legally relevant "cause" of effect; hence, under NEPA and implementing Council on Environmental Quality (CEQ) regulations, agency need not consider these effects in its environmental assessment (EA) when determining whether its action is "major Federal action." National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. §§ 1508.8, 1508.18.

[7] Environmental Law 149E 583

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek580 Preliminary Assessment or Report
149Ek583 k. Sufficiency. Most Cited Cases

Federal Motor Carrier Safety Administration (FMCSA) environmental assessment (EA) did not, under NEPA and implementing Council on Environmental Quality (CEQ) regulations, have to consider environmental effects arising from entry of Mexican trucks as result of President's lifting or modification of moratorium thereon; President, not FMCSA, could authorize or not authorize cross-border operations from Mexican motor carriers, and FMCSA has no discretion to prevent entry of Mexican trucks. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 49 U.S.C.(1994 Ed.) § 10922(*l*); 40 C.F.R. §§ 1508.8, 1508.18.

[8] Statutes 361 220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative Construction. Most Cited Cases

The "doctrine of ratification" states that Congress is presumed to be aware of judicial interpretation of statute and to adopt that interpretation when it reenacts statute without change.

[9] Environmental Law 149E 273

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek273 k. Mobile Sources; Motor Vehicles. Most Cited Cases

Federal Motor Carrier Safety Administration (FMCSA) did not act improperly by not performing full conformity analysis, pursuant to CAA and relevant regulations, when it considered only emissions that would occur from increased roadside inspections of Mexican trucks as result of President's lifting of moratorium, not any emissions attributable to increased presence of Mexican trucks within United States; emissions were not "direct emissions" because they would not occur at same time as promulgation of regulations, and they were not "indirect emissions" because FMCSA could not practicably control or maintain control over them. Clean Air Act, § 176(c)(1), as amended, 42 U.S.C.A. § 7506(c)(1); 40 C.F.R. §§ 93.150, 93.152, 93.153.

****2205** *Syllabus* [FN*]

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

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to analyze the environmental impact****2206** of their proposals and actions in an Environmental Impact Statement (EIS), but Council of Environmental Quality (CEQ) regulations allow an agency to prepare a more limited Environmental Assessment (EA) if the agency's proposed action neither is categorically excluded from the EIS production requirement nor would clearly require production of an EIS. An agency that decides, pursuant to an EA, that no EIS is required must issue a "finding of no significant impact" (FONSI). The Clean Air Act (CAA or Act) leaves States to develop "implementation plan [s]" to comply with national air quality standards mandated by the Act, and requires federal agencies' actions to "conform" to those state plans, 42 U.S.C. § 7506(c)(1). In 1982, Congress enacted a moratorium, prohibiting, *inter alia*, Mexican motor carriers from obtaining operating authority within the United States and authorizing the President to lift the moratorium. In 2001, the President announced his intention to lift the moratorium once new regulations were prepared to grant operating authority to Mexican motor carriers. The Federal Motor Carrier Safety Administration (FMCSA) published one proposed rule addressing the application form for such carriers and another addressing the establishment of a safety-inspection regime for carriers receiving operating authority. Congress subsequently provided, in § 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, that no funds appropriated could be obligated or expended to review or process any Mexican motor carrier's applications until FMCSA implemented specific application and safety-monitoring requirements. Acting pursuant to NEPA, FMCSA issued an EA for its proposed rules. The EA did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States, concluding that any such impact would be an effect of the moratorium's modification, not the regulations' implementation. Concluding that the regulations' issuance would have no significant environmental impact, FMCSA is-

sued a FONSI. In subsequent interim rules, FMCSA relied on the EA and FONSI to demonstrate compliance with NEPA, and determined ***753** that any emissions increase from the regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger a conformity review under the CAA. Before the moratorium was lifted, respondents sought judicial review of the proposed rules, arguing that their promulgation violated NEPA and the CAA. The Court of Appeals agreed, finding the EA deficient because it did not consider the environmental impact of lifting the moratorium, when that action was reasonably foreseeable at the time FMCSA prepared the EA and directing FMCSA to prepare an EIS and a full CAA conformity determination for the regulations.

Held: Because FMCSA lacks discretion to prevent cross-border operations of Mexican motor carriers, neither NEPA nor the CAA requires FMCSA to evaluate the environmental effects of such operations. Pp. 2213-2219.

(a) FMCSA did not violate NEPA or the relevant CEQ regulations. Pp. 2213-2217.

(1) An agency's decision not to prepare an EIS can be set aside only if it is arbitrary and capricious, see 5 U.S.C. § 706(2)(A). Respondents argue that the issuance of a FONSI was arbitrary and capricious because the EA did not take into account the environmental effects of an increase in cross-border operations of Mexican motor carriers. The relevant question, under NEPA, is whether that increase, and the correlative release of emissions, is an "effect," 40 CFR § 1508.8, of FMCSA's rules; if not, FMCSA's failure****2207** to address these effects in the EA did not violate NEPA, and the FONSI's issuance cannot be arbitrary and capricious. P. 2213.

(2) Respondents have forfeited any objection to the EA on the ground that it did not adequately discuss potential alternatives to the proposed action because respondents never identified in their comments to the rules any alternatives beyond those the EA evaluated. Pp. 2213-2214.

(3) Respondents argue that the EA must take the increased cross-border operations' environmental effects into account because § 350's expenditure bar makes it impossible for any Mexican truck to operate in the United States until the regulations are issued, and hence the trucks' entry is a "reasonably foreseeable" indirect effect of the issuance of the regulations. 40 CFR § 1508.8. Critically, that argument overlooks FMCSA's inability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican trucks from operating in the United States. While § 350 restricted FMCSA's ability to authorize such operations, FMCSA remains subject to 49 U.S.C. § 13902(a)(1) 's mandate that it register any motor carrier willing and ***754** able to comply with various safety and financial responsibility rules. Only the moratorium prevented it from doing so for Mexican trucks before 2001. Respondents must rest on "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534. Also, inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. The underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between the proposed regulations and the entry of Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of entry. Neither of the purposes of NEPA's EIS requirement-to ensure both that an agency has information to make its decision and that the public

receives information so it might also play a role in the decisionmaking process-will be fulfilled by requiring FMCSA to consider the environmental impact at issue. Since FMCSA has no ability to prevent such cross-border operations, it lacks the power to act on whatever information might be contained in an EIS and could not act on whatever input the public could provide. This analysis is not changed by the CEQ regulation requiring an agency to evaluate the "cumulative impact" of its action, 40 CFR § 1508.7, since that rule does not require FMCSA to treat the lifting of the moratorium itself or the consequences from that lifting as an effect of its rules promulgation. Pp. 2214-2217.

(b) FMCSA did not act improperly by not performing a full conformity analysis pursuant to the CAA and relevant regulations. To ensure that its actions are consistent with 42 U.S.C. § 7506, a federal agency must undertake "a conformity determination ... where the total of direct and indirect emissions in a nonattainment or maintenance area caused by [the] action would equal or exceed" certain threshold levels established by the EPA. ****2208**40 CFR § 93.153(b). "Direct emissions" "are caused or initiated by the Federal action and occur at the same time and place as the action," § 93.152; and "indirect emissions" are "caused by the Federal action" but may occur later in time, and may be practicably controlled or maintained by the federal agency, *ibid.* Some sort of "but for" causation is sufficient for evaluating causation in the conformity review process. See *ibid.* Because it excluded emissions attributable***755** to the increased presence of Mexican trucks within the United States, FMCSA concluded that its regulations would not exceed EPA thresholds. Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, such trucks' emissions are not "direct" because they will not occur at the same time or place as the promulgation of the regulations. And they are not "indirect" because FMCSA cannot practicably control or maintain control over the emissions: FMCSA has no ability to countermand the President's decision to lift the moratorium or to act categorically to prevent Mexican carriers from registering and Mexican trucks from entering the country; and once the regulations are promulgated, FMCSA will not be able to regulate any aspect of vehicle exhaust from those trucks. Pp. 2217-2219.

316 F.3d 1002, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

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For U.S. Supreme Court briefs, see:2004 WL 250237 (Pet.Brief)2004 WL 531744 (Resp.Brief)2004 WL 812719 (Reply.Brief)

Justice THOMAS delivered the opinion of the Court.

***756** In this case, we confront the question whether the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (codified, as amended, at 42 U.S.C. §§ 4321-4370f), and the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. Because FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement on FMCSA.

I

Due to the complex statutory and regulatory provisions implicated in this case, we begin with a brief overview of the relevant statutes. We then turn to the factual and procedural background.

A

1

Signed into law on January 1, 1970, NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. 42 U.S.C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses ***757** of the environmental impact of their proposals and actions. See *id.*, at 349-350, 109 S.Ct. 1835. At the heart of NEPA is a requirement that federal agencies

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

This detailed statement is called an Environmental Impact Statement (EIS). The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 CFR § 1500.3 (2003). The CEQ regulations allow an agency to prepare a more limited document, an Environmental ****2210** Assessment (EA), if the agency's proposed action neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS. See §§ 1501.4(a)-(b). The EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." § 1508.9(a). If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents ***758** the reasons why the proposed agency action will not have a significant impact on the human environment. See §§ 1501.4(e), 1508.13.

2

What is known as the CAA became law in 1963, 77 Stat. 392. In 1970, Congress substantially amended the CAA into roughly its current form. 84 Stat. 1713. The 1970 amendments mandated national air quality standards and deadlines for their attainment, while leaving to the States the development of "implementation plan[s]" to comply with the federal standards. *Ibid.*

In 1977, Congress again amended the CAA, 91 Stat. 749, to prohibit the Federal Government and its agencies from "engag[ing] in, support[ing] in any way or provid[ing] financial assistance for, licens[ing] or permit[ting], or approv [ing], any activity which does not conform to [a state] implementation plan." 42 U.S.C. § 7506(c)(1). The definition of "conformity" includes restrictions on, for instance, "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard ... in any area." § 7506(c)(1)(B). These safeguards prevent the Federal Government from interfering with the States' abilities to comply with the CAA's requirements.

3

[1] FMCSA, an agency within the Department of Transportation (DOT), is responsible for motor carrier safety and registration. See 49 U.S.C. § 113(f). FMCSA has a variety of statutory mandates, including "ensur[ing]" safety, § 31136, establishing minimum levels of financial responsibility for motor carriers, § 31139, and prescribing federal standards for safety inspections of commercial motor vehicles, § 31142. Importantly, FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers ***759** that are "willing and able to comply with" the applicable safety, fitness, and financial-responsibility requirements. § 13902(a)(1). FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

B

We now turn to the factual and procedural background of this case. Before 1982, motor carriers domiciled in Canada and Mexico could obtain certification to operate within the United States from the Interstate Commerce Commission (ICC). FN1 In 1982, Congress, concerned about discriminatory treatment of United States motor carriers in Mexico and Canada, enacted a 2-year moratorium on new grants of operating authority. Congress authorized****2211** the President to extend the moratorium beyond the 2-year period if Canada or Mexico continued to interfere with United States motor carriers, and also authorized the President to lift or modify the moratorium if he determined that doing so was in the national interest. 49 U.S.C. § 10922(*l*) (1982 ed.). Although the moratorium on Canadian motor carriers was quickly lifted, the moratorium on Mexican motor carriers remained, and was extended by the President.

FN1. In 1995, Congress abolished the ICC and transferred most of its responsibilities to the Secretary of Transportation. See ICC Termination Act of 1995, § 101, 109 Stat. 803. In 1999, Congress transferred responsibility for motor carrier safety within DOT to the newly created FMCSA. See Motor Carrier Safety Improvement Act of 1999, 113 Stat. 1748.

In December 1992, the leaders of Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA), 32 I.L.M. 605 (1993). As part of NAFTA, the United States agreed to phase out the moratorium and permit Mexican motor carriers to obtain operating authority within the United States' interior by January 2000. On NAFTA's effective date (January 1, 1994), the President began to lift the trade moratorium by allowing the licensing ***760** of Mexican carriers to provide some bus services in the United States. The President, however, did not continue to ease the moratorium on the timetable specified by NAFTA, as concerns about the adequacy of Mexico's regulation of motor carrier safety remained.

The Government of Mexico challenged the United States' implementation of NAFTA's motor carrier provisions under NAFTA's dispute-resolution process, and in February 2001, an international arbitration panel determined that the United States' "blanket refusal" of Mexican motor carrier applications breached the United States' obligations under NAFTA. App. 279, ¶ 295. Shortly thereafter, the President made clear his intention to lift the moratorium on Mexican motor carrier certification following the preparation of new regulations governing grants of operating authority to Mexican motor carriers.

In May 2001, FMCSA published for comment proposed rules concerning safety regulation of Mexican motor carriers. One rule (the Application Rule) addressed the establishment of a new application form for Mexican motor carriers that seek authorization to operate within the United States. Another rule (the Safety Monitoring Rule) addressed the establishment of a safety-inspection regime for all Mexican motor carriers that would receive operating authority under the Application Rule.

In December 2001, Congress enacted the Department of Transportation and Related Agencies Appropriations Act, 2002, 115 Stat. 833. Section 350 of this Act, *id.*, at 864, provided that no funds appropriated under the Act could be obligated or expended to review or to process any application by a Mexican motor carrier for authority to operate in the interior of the United States until FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers. Some of these requirements went beyond those proposed by FMCSA in the Application and Safety ***761** Monitoring Rules. Congress extended the § 350 conditions to appropriations for Fiscal Years 2003 and 2004.

In January 2002, acting pursuant to NEPA's mandates, FMCSA issued a programmatic EA for the proposed Application and Safety Monitoring Rules. FMCSA's EA evaluated the environmental impact associated with three separate scenarios: where the President did not lift the moratorium; where the President did but where (contrary to what was legally possible) FMCSA did not issue any new regulations; and the Proposed Action Alternative, where the President would modify the moratorium and where FMCSA would adopt the proposed regulations. The EA considered the environmental impact in the categories of traffic and congestion, public safety and health, air quality, ****2212** noise, socioeconomic factors, and environmental justice. Vital to the EA's analysis, however, was the assumption that there would be no change in trade volume between the United States and Mexico due to the issuance of the regulations. FMCSA did note that § 350's restrictions made it impossible for Mexican motor carriers to operate in the interior of the United States before FMCSA's issuance of the regulations. But, FMCSA determined that "this and any other associated effects in trade characteristics

would be the result of the modification of the moratorium" by the President, not a result of FMCSA's implementation of the proposed safety regulations. App. 60. Because FMCSA concluded that the entry of the Mexican trucks was not an "effect" of its regulations, it did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States.

The particular environmental effects on which the EA focused, then, were those likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. The EA concluded that these effects (such as a slight increase in emissions, noise from the trucks, and possible danger to passing motorists)***762** were minor and could be addressed and avoided in the inspections process itself. The EA also noted that the increase of inspection-related emissions would be at least partially offset by the fact that the safety requirements would reduce the number of Mexican trucks operating in the United States. Due to these calculations, the EA concluded that the issuance of the proposed regulations would have no significant impact on the environment, and hence FMCSA, on the same day as it released the EA, issued a FONSI.

On March 19, 2002, FMCSA issued the two interim rules, delaying their effective date until May 3, 2002, to allow public comment on provisions that FMCSA added to satisfy the requirements of § 350. In the regulatory preambles, FMCSA relied on its EA and its FONSI to demonstrate compliance with NEPA. FMCSA also addressed the CAA in the preambles, determining that it did not need to perform a "conformity review" of the proposed regulations under 42 U.S.C. § 7506(c)(1) because the increase in emissions from these regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger such a review.

In November 2002, the President lifted the moratorium on qualified Mexican motor carriers. Before this action, however, respondents filed petitions for judicial review of the Application and Safety Monitoring Rules, arguing that the rules were promulgated in violation of NEPA and the CAA. The Court of Appeals agreed with respondents, granted the petitions, and set aside the rules. 316 F.3d 1002 (C.A.9 2003).

The Court of Appeals concluded that the EA was deficient because it failed to give adequate consideration to the overall environmental impact of lifting the moratorium on the cross-border operation of Mexican motor carriers. According to the Court of Appeals, FMCSA was required to consider the environmental effects of the entry of Mexican trucks because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared***763** and the decision not to prepare an EIS was made." *Id.*, at 1022 (quoting 40 CFR §§ 1508.7, 1508.8(b) (2003)). Due to this perceived deficiency, the Court of Appeals remanded the case for preparation of a full EIS.

****2213** The Court of Appeals also directed FMCSA to prepare a full CAA conformity determination for the challenged regulations. It concluded that FMCSA's determination that emissions attributable to the challenged rules would be below the threshold levels was not reliable because the agency's CAA determination reflected the "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." 316 F.3d, at 1030.

We granted certiorari, 540 U.S. 1088, 124 S.Ct. 957, 157 L.Ed.2d 793 (2003), and now reverse.

II

[2] An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Kleppe v. Sierra*

Club, 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). Here, FMCSA based its FONSI upon the analysis contained within its EA; respondents argue that the issuance of the FONSI was arbitrary and capricious because the EA's analysis was flawed. In particular, respondents criticize the EA's failure to take into account the various environmental effects caused by the increase in cross-border operations of Mexican motor carriers.

Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n]," which "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under applicable CEQ regulations, "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." ***764**40 CFR § 1508.18 (2003). "Effects" is defined to "include: (a) Direct effects, which are caused by the action and occur at the same time and place," and "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." § 1508.8. Thus, the relevant question is whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by Mexican trucks, is an "effect" of FMCSA's issuance of the Application and Safety Monitoring Rules; if not, FMCSA's failure to address these effects in its EA did not violate NEPA, and so FMCSA's issuance of a FONSI cannot be arbitrary and capricious.

A

To answer this question, we begin by explaining what this case does *not* involve. What is not properly before us, despite respondents' argument to the contrary, see Brief for Respondents 38-41, is any challenge to the EA due to its failure properly to consider possible alternatives to the proposed action (*i.e.*, the issuance of the challenged rules) that would mitigate the environmental impact of the authorization of cross-border operations by Mexican motor carriers. Persons challenging an agency's compliance with NEPA must "structure their participation so that it ... alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged FMCSA ****2214** to consider alternatives. Because respondents did not raise these particular objections to the EA, FMCSA was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection***765** to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.

Admittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, see *ibid.*, and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action. But that situation is not before us. With respect to FMCSA's ability to mitigate, respondents can argue only that FMCSA could regulate emissions from Mexican trucks indirectly, through making the safety-registration process more onerous or by removing older, more polluting trucks through more effective enforcement of motor carrier safety standards. But respondents fail to identify any evidence that shows that any effect from these possible actions would be significant, or even noticeable, for air-quality purposes. The connection between enforcement of motor carrier safety and the environmental harms alleged in this case is also tenuous at best. Nor is it clear that FMCSA could, consistent with its limited statutory mandates, reasonably impose on Mexican carriers standards beyond those already required in its proposed regulations.

B

With this point aside, respondents have only

one complaint with respect to the EA: It did not take into account the environmental effects of increased cross-border operations of Mexican motor carriers. Respondents' argument that FMCSA was required to consider these effects is simple. Under § 350, FMCSA is barred from expending any funds to process or review any applications by Mexican motor carriers until FMCSA implemented a variety of specific application and safety-monitoring requirements for Mexican carriers. This expenditure bar makes it impossible for any Mexican motor carrier to receive authorization to operate within the United States until FMCSA issued the regulations challenged here. The promulgation of the regulations, ***766** the argument goes, would "caus[e]" the entry of Mexican trucks (and hence also cause any emissions such trucks would produce), and the entry of the trucks is "reasonably foreseeable." 40 CFR § 1508.8 (2003). Thus, the argument concludes, under the relevant CEQ regulations, FMCSA must take these emissions into account in its EA when evaluating whether to produce an EIS.

Respondents' argument, however, overlooks a critical feature of this case: FMCSA has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. To be sure, § 350 did restrict the ability of FMCSA to authorize cross-border operations of Mexican motor carriers, but Congress did not otherwise modify FMCSA's statutory mandates. In particular, FMCSA remains subject to the mandate of 49 U.S.C. § 13902(a)(1), that FMCSA " *shall* register a person to provide transportation ... as a motor carrier if [it] finds that the person is willing and able to comply with" the safety and financial responsibility requirements established by DOT. (Emphasis added.) Under FMCSA's entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial ****2215** responsibility contained in DOT regulations; only the moratorium prevented it from doing so for Mexican motor carriers before 2001. App. 51-55. Thus, upon the lifting of the moratorium, if FMCSA refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).

If it were truly impossible for FMCSA to comply with both § 350 and § 13902(a)(1), then we would be presented with an irreconcilable conflict of laws. As the later enacted provision, § 350 would quite possibly win out. See ***767***Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936). But FMCSA can easily satisfy both mandates: It can issue the application and safety inspection rules required by § 350, and start processing applications by Mexican motor carriers and authorize those that satisfy § 13902(a)(1)'s conditions. Without a conflict, then, FMCSA must comply with all of its statutory mandates.

[3] Respondents must rest, then, on a particularly unyielding variation of "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. As this Court held in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983), NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause. The Court analogized this requirement to the "familiar doctrine of proximate cause from tort law." *Ibid.* In particular, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.*, at 774, n. 7, 103 S.Ct. 1556. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-275 (5th ed.1984) (proximate cause analysis turns on

policy considerations and considerations of the "legal responsibility" of actors).

[4] Also, inherent in NEPA and its implementing regulations is a " 'rule of reason,' " which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. See *Marsh,* 490 U.S., at 373-374, 109 S.Ct. 1851. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS. See ***768***Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 422 U.S. 289, 325, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975); see also 40 CFR §§ 1500.1(b)-(c) (2003).

[5] In these circumstances, the underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry. The NEPA EIS requirement serves two purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson,* 490 U.S., at 349, 109 S.Ct. 1835. Second, it "guarantees ****2216** that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Ibid.* Requiring FMCSA to consider the environmental effects of the entry of Mexican trucks would fulfill neither of these statutory purposes. Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking-FMCSA simply lacks the power to act on whatever information might be contained in the EIS.

Similarly, the informational purpose is not served. The "informational role" of an EIS is to "giv[e] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' *Baltimore Gas & Electric Co. [v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)], and, perhaps more significantly, provid[e] a springboard for public comment" in the agency decisionmaking process itself, *ibid.* The purpose here is to ensure that the "larger audience," *ibid.,* can provide input as necessary to the agency making the relevant decisions. See 40 CFR § 1500.1(c) (2003) ("NEPA's purpose is not to generate paperwork-even excellent paperwork-but to foster excellent***769** action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment"); § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government"). But here, the "larger audience" can have no impact on FMCSA's decisionmaking, since, as just noted, FMCSA simply could not act on whatever input this "larger audience" could provide.[FN2]

FN2. Respondents are left with arguing that an EIS would be useful for informational purposes entirely outside FMCSA's decisionmaking process. See Brief for Respondents 42. But such an argument overlooks NEPA's core focus on improving agency decisionmaking. See 40 CFR §§ 1500.1, 1500.2, 1502.1 (2003).

It would not, therefore, satisfy NEPA's "rule of reason" to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform. Put another way, the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the ac-

tions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.

Consideration of the CEQ's "cumulative impact" regulation does not change this analysis. An agency is required to evaluate the "[c]umulative impact" of its action, which is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." § 1508.7. The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves, in the context of the President's lifting of the moratorium ***770** and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium****2217** (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of its Application and Safety Monitoring Rules.[FN3]

FN3. The Court of Appeals and respondents contend that the EA contained numerous other errors, but their contentions are premised on the conclusion that FMCSA was required to take into account the increased cross-border operations of Mexican motor carriers.

C

[6][7][8] We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.[FN4]

FN4. Respondents argue that Congress ratified the Court of Appeals' decision when it, after the lower court's opinion, reenacted § 350 in two appropriations bills. The doctrine of ratification states that "Congress is presumed to be aware of [a] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). But this case involves the interpretation of NEPA and the CAA, not § 350. Indeed, the precise requirements of § 350 were not below, and are not here, in dispute. Hence, congressional reenactment of § 350 tells us nothing about Congress' view as to the requirements of NEPA and the CAA, and so, on the legal issues involved in this case, Congress has been entirely silent.

***771** III

[9] Under the CAA, a federal "department, agency, or instrumentality" may not, generally, "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that violates an applicable state air-quality implementation plan. 42 U.S.C. § 7506(c)(1); 40 CFR § 93.150(a) (2003). Federal agencies must, in many circumstances, undertake a conformity determination with respect to a proposed action, to ensure that the action is consistent with § 7506(c)(1). See 40 CFR §§ 93.150(b), 93.153(a)-(b) . However, an agency is exempt from the general conformity determination under the CAA if its action would not cause new emissions to exceed cer-

tain threshold emission rates set forth in § 93.153(b). FMCSA determined that its proposed regulations would not cause emissions to exceed the relevant threshold amounts and therefore concluded that the issuance of its regulations would comply with the CAA.App. to Pet. for Cert. 65a-66a, 155a. Critical to its calculations was its consideration of only those emissions that would occur from the increased roadside inspections of Mexican trucks; like its NEPA analysis, FMCSA's CAA analysis did not consider any emissions attributable to the increased presence of Mexican trucks within the United States.

The EPA's rules provide that "a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" the threshold levels established by the EPA. 40 CFR § 93.153(b) (2003). "Direct emissions" are defined as those covered emissions "that ****2218** are caused or initiated by the Federal action and occur at the same time and place as the ***772** action." § 93.152. The term "[i]ndirect emissions" means covered emissions that

> "(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and
>
> "(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." *Ibid.*

Unlike the regulations implementing NEPA, the EPA's CAA regulations have defined the term "[c]aused by." *Ibid.* In particular, emissions are "[c]aused by" a federal action if the "emissions ... would not ... occur in the absence of the Federal action." *Ibid.* Thus, the EPA has made clear that for purposes of evaluating causation in the conformity review process, some sort of "but for" causation is sufficient.

Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, the emissions from these trucks are neither "direct" nor "indirect" emissions. First, the emissions from the Mexican trucks are not "direct" because they will not occur at the same time or at the same place as the promulgation of the regulations.

Second, FMCSA cannot practicably control, nor will it maintain control, over these emissions. As discussed above, FMCSA does not have the ability to countermand the President's decision to lift the moratorium, nor could it act categorically to prevent Mexican carriers from being registered or Mexican trucks from entering the United States. Once the regulations are promulgated, FMCSA would have no ability to regulate any aspect of vehicle exhaust from these Mexican trucks. FMCSA could not refuse to register Mexican motor carriers simply on the ground that their trucks would pollute excessively. FMCSA cannot determine ***773** whether registered carriers actually will bring trucks into the United States, cannot control the routes the carriers take, and cannot determine what the trucks will emit. Any reduction in emissions that would occur at the hands of FMCSA would be mere happenstance. It cannot be said that FMCSA "practicably control[s]" or "will maintain control" over the vehicle emissions from the Mexican trucks, and it follows that the emissions from the Mexican trucks are not "indirect emissions." *Ibid.;* see also Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed.Reg. 63214, 63221 (1993) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity").

The emissions from the Mexican trucks are neither "direct" nor "indirect" emissions caused by the issuance of FMCSA's proposed regulations.

Thus, FMCSA did not violate the CAA or the applicable regulations by failing to consider them when it evaluated whether it needed to perform a full "conformity determination."

IV

FMCSA did not violate NEPA or the relevant CEQ regulations when it did not consider the environmental effect of the increase in cross-border operations of Mexican motor carriers in its EA. Nor did FMCSA act improperly by not performing, pursuant to the CAA and relevant regulations, a full conformity review analysis for its proposed regulations. We therefore reject respondents' challenge to the procedures****2219** used in promulgating these regulations. Accordingly, 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.

U.S.,2004.
Department of Transp. v. Public Citizen
541 U.S. 752, 124 S.Ct. 2204, 58 ERC 1545, 26 ITRD 1097, Fed. Carr. Cas. P 84,339, 159 L.Ed.2d 60, 72 USLW 4445, 34 Envtl. L. Rep. 20,033, 04 Cal. Daily Op. Serv. 4846, 2004 Daily Journal D.A.R. 6655, 19 Fla. L. Weekly Fed. S 353

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Supreme Court of the United States
HINES, Secretary of Labor and Industry of Pennsylvania, et al.
v.
DAVIDOWITZ et al.

No. 22.
Argued Dec. 10, 11, 1940.
Decided Jan. 20, 1941.

On Appeal from the District Court of the United States for the Middle District of Pennsylvania.

Action by Bernard Davidowitz, as a resident, citizen, and taxpayer of and to the Commonwealth of Pennsylvania, and another, for themselves and on behalf of any and all others, residents, citizens, or taxpayers as may wish to join them as parties plaintiff, against Lewis G. Hines, Secretary of Labor and Industry of the Commonwealth of Pennsylvania, and others, for injunction against enforcement of Pennsylvania statute governing aliens. From a judgment granting a perpetual injunction, 30 F.Supp. 470, the defendants appeal.

Affirmed.

Mr. Justice STONE, Mr. Chief Justice HUGHES, and Mr. Justice McREYNOLDS dissenting.

West Headnotes

[1] Appeal and Error 30 ⚿1107

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(A) Decision in General
30k1107 k. Effect of Change in Law. Most Cited Cases

Where Congress enacted a federal alien registration act after federal three-judge district court had held Pennsylvania Alien Registration Act invalid, the Supreme Court on appeal was required to pass on the Pennsylvania act in the light of the congressional act. Alien Registration Law 1940, 8 U.S.C.A. §§ 1182(a)(20, 26), 1201(b), 1301 et seq.; 35 P.S.Pa. §§ 1801-1806.

[2] States 360 ⚿18.43

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.43 k. International Relations; Aliens. Most Cited Cases
(Formerly 360k4.8, 360k4)

Federal power in the general field of foreign affairs, including power over immigration, naturalization, and deportation, is supreme.

[3] States 360 ⚿18.1

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.1 k. In General. Most Cited Cases
(Formerly 360k4.12, 360k4)

Treaties 385 ⚿11

385 Treaties
385k11 k. Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions. Most Cited Cases

A federal treaty or statute establishing rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, is the supreme law of the land, and no state can add to or take from the force and effect thereof. U.S.C.A.Const. art. 6, cl. 2.

[4] States 360 ⚿18.43

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption

360k18.43 k. International Relations; Aliens. Most Cited Cases
(Formerly 360k4.9, 360k4)

Where the federal government has enacted a complete scheme for regulation of aliens, and has therein provided a standard for their registration, a state cannot, inconsistently with the purpose of Congress, interfere with, curtail, or complement the federal law, or enforce additional or auxiliary regulations.

[5] States 360 ⚿18.43

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.43 k. International Relations; Aliens. Most Cited Cases
(Formerly 360k4.9, 360k4)

The Supreme Court was not guided by any rigid formula in determining the validity of Pennsylvania Alien Registration Act in the light of federal alien registration act, but primary function of the court was to determine whether, under the circumstances, the Pennsylvania act stood as an obstacle to the accomplishment and execution of the full purposes of Congress, giving regard to the fact that the legislation was in a field affecting international relations, wherein any concurrent state power that might exist should be restricted to the narrowest of limits, and to the fact that the legislation dealt with the rights, liberties, and personal freedom of human beings as distinguished from state tax statutes or state pure food laws. Alien Registration Law 1940, 8 U.S.C.A. § 451 et seq.; 35 P.S.Pa. §§ 1808-1806.

[6] States 360 ⚿18.43

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.43 k. International Relations; Aliens. Most Cited Cases
(Formerly 360k4.10, 360k4)

The power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but whatever power a state may have is subordinate to supreme national law.

[7] Constitutional Law 92 ⚿3000

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)1 In General
92k3000 k. In General. Most Cited Cases
(Formerly 92k209)

The "equal protection of the laws" is a pledge of the protection of equal laws.

[8] States 360 ⚿18.1

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.1 k. In General. Most Cited Cases
(Formerly 360k4.9, 360k4)

The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligation imposed by the law, are important in determining whether supreme federal enactments preclude enforcement of state laws on the same subject.

[9] States 360 ⚿18.43

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.43 k. International Relations; Aliens. Most Cited Cases
(Formerly 360k4.9, 360k4)

The enactment of the Federal Alien Registration Act by which a standard for alien registration in a single integrated and all-embracing system is provided to obtain information deemed to be desirable in connection with aliens precludes enforcement of Pennsylvania Alien Registration Act under which aliens, with certain exceptions, are required

to register and to carry identification cards. Alien Registration Law 1940, 8 U.S.C.A. § 451 et seq., 35 P.S.Pa. §§ 1801-1806.

****400 *53** Mr. William S. Rial, of Greensburg, Pa., M. Louise Rutherford, of Philadelphia, Pa., and Claude T. Reno, of Allentown, Pa., for appellants.

***56** Mr. Isidor Ostroff, of Philadelphia, Pa., for appellees.

Francis Biddle, Sol. Gen., for the United States as amicus curiae, by special leave of Court.

Mr. Justice BLACK delivered the opinion of the Court.

This case involves the validity of an Alien Registration Act adopted by the Commonwealth of Pennsylvania.[FN1] The Act, passed in 1939, requires every alien 18 years or over, with certain exceptions,[FN2] to register once each year; provide such information as is required by the statute, plus any 'other information and details' that the Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for 'the purpose of ready reference', and furnishing a copy of the classification to the Pennsylvania Motor Police. Nonexempt aliens who fail to register are subject to a fine of not ***60** more than $100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than $10, or imprisonment for not more than 10 dyas, or both.

FN1 1 Pa.Stats.Ann., tit. 35, ss 1801-1806.

FN2 The exceptions are: aliens who are the 'father or mother of a son or daughter who has served in the service of the United States during any war'; aliens who have resided in the United States continuously since December 31, 1908, without acquiring a criminal record; and aliens who have filed their application for citizenship. The latter exception is qualified by the proviso that aliens in that category must still register if they 'shall not have become naturalized within a period of three years' after applying for citizenship. Since federal law requires five years residence before citizenship can be acquired (8 U.S.C. s 382, 8 U.S.C.A. s 382), this exception means that aliens may be exempt under the Pennsylvania statute for the first three years after their arrival but subject to the statute for the two years immediately preceding their eligibility for citizenship.

[1] A three-judge District Court enjoined enforcement of the Act, holding that it denied aliens equal protection of the laws, and that it encroached upon legislative powers constitutionally vested in the federal government.[FN3] It is that judgment we are here called upon to review.[FN4] But in 1940, after the court had held that Pennsylvania Act invalid, Congress enacted a federal Alien Registration Act.[FN5] We must therefore pass upon the state Act in the light of the Congressional Act.[FN6]

FN3 30 F.Supp. 470. One alien and one naturalized citizen joined in proceedings filed against certain state officials to enjoin enforcement of the Act. The answer of the defendants admitted the material allegations of the petition and defended the Act on the ground that it was within the power of the state. Plaintiffs moved for judgment on the pleadings under Rule 12(c), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The requested relief was denied as to the naturalized citizen but granted as to the alien.

FN4 The case is here on appeal under section 266 of the Judicial Code, as amended, 28 U.S.C. s 380, 28 U.S.C.A. s 380. We noted probable jurisdiction on March 25, 1940, 60 S.Ct. 718.

FN5 Public Act No. 670, 76th Cong., 3d Sess., c. 439, 8 U.S.C.A. s 451 et seq.

FN6 Cf. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327, decided January 6, 1941. And see United States v. Schooner Peggy, 1 Cranch 103, 110, 2 L.Ed. 49, and Carpenter v. Wabash Ry., 309 U.S. 23, 26, 27, 60 S.Ct. 416, 417, 418, 84 L.Ed. 558.

****401** The federal Act provides for a single registration of aliens 14 years of age and over; detailed information specified by the Act, plus 'such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General'; finger-printing of all registrants; and secrecy of the federal files, which can be 'made available only to such persons or agencies as may be designated by the Commissioner, with the approval of the Attorney General.' No requirement that aliens carry a registration card to be exhibited to police or ***61** others is embodied in the law, and only the wilful failure to register is made a criminal offense; punishment is fixed at a fine of not more than $1000, imprisonment for not more than 6 months, or both.

The basic subject of the state and federal laws is identical-registration of aliens as a distinct group. Appellants urge that the Pennsylvania law 'was constitutional when passed', and that 'The only question is whether the state act is in abeyance or whether the state and Federal Government have concurrent jurisdiction to register aliens for the protection of inhabitants and property.' Appellees, on the other hand, contend that the Pennsylvania Act is invalid, for the reasons that it (1) denies equal protection of the laws to aliens residing in the state; (2) violates section 16 of the Civil Rights Act of 1870; FN7 (3) exceeds Pennsylvania's constitutional power in requiring registration of aliens without Congressional consent. Appellees' final contention is that the power to restrict, limit, regulate and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that even if the state can legislate on this subject at all, its power is subordinate to supreme national law. Appellees conclude that by its adoption of a comprehensive, integrated scheme for regulation of aliens-including its 1940 registration act-Congress has precluded state action like that taken by Pennsylvania. FN8

FN7 16 Stat. 140, 144, 8 U.S.C. s 41, 8 U.S.C.A. s 41: 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'

FN8 Pennsylvania is not alone among the states in attempting to compel alien registration. Several states still have dormant on their statute books laws passed in 1917-18, empowering the governor to require registration when a state of war exists or when public necessity requires such a step. E.g., Conn. Gen.Stats. (1930) tit. 59, s 6042; Fla.Comp.Gen.Laws (1927) s 2078; Iowa Code (1939) s 503; La.Gen.Stats. (Dart, 1939) tit. 3, s 282, Acts La. No. 20 of 1917, Ex. Sess.; Me.Rev.Stats. (1930) ch. 34, s 3; N.H.Pub.Laws (1926) ch. 154; N.Y.Consol.Laws, c. 18, Executive Law, s 10. Other states, like Pennsylvania, have passed registration laws more recently. E.g., S.C.Acts (1940) No. 1014, s 9, p. 1939; N.C.Code (1939) ss 193(a) to

193(h). In several states, municipalities have recently undertaken local alien registration.

Registration statutes of Michigan and California were held unconstitutional in Arrowsmith v. Voorhies, D.C., 55 F.2d 310, and Ex parte Ah Cue, 101 Cal. 197, 35 P. 556.

***62** In the view we take it is not necessary to pass upon appellees' first, second, and third contentions, and so we pass immediately to their final question, expressly leaving open all of appellees' other contentions, including the argument that the federal power in this field, whether exercised or unexercised, is exclusive. Obviously the answer to appellees' final question depends upon an analysis of the respective powers of state and national governments in the regulation of aliens as such, and a determination of whether Congress has, by its action, foreclosed enforcement of Pennsylvania's registration law.

[2][3] First. That the supremacy of the national power in the general field of foreign affairs, including power over immigration,****402** naturalization and deportation, is made clear by the Constitution was pointed out by authors of The Federalist in 1787,[FN9] and has since been given continuous recognition by this Court.[FN10] When the national government by treaty or statute has established rules and ***63** regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.'[FN11] Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California ***64** statute burdening immigration: 'If (the United States) should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?'[FN12]

FN9 The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80.

FN10 E.g., Henderson v. Mayor of New York, 92 U.S. 259, 23 L.Ed. 543; People v. Compagnie Generale Transtlantique, 107 U.S. 59, 2 S.Ct. 87, 27 L.Ed. 383; Fong Yue Ting v. United States, 149 U.S. 698, 711, 13 S.Ct. 1046, 1021, 37 L.Ed. 905. Cf. Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470, 61 S.Ct. 351, 85 L.Ed. 288, this term, decided January 6, 1941.

FN11 The Chinese Exclusion Cases (Chae Chan Ping v. United States), 130 U.S. 581, 606, 9 S.Ct. 623, 630, 33 L.Ed. 1068. Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view in 1787: 'My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.' Memoir,

Correspondence and Miscellanies from the Papers of Thomas Jefferson (1829), vol. 2, p. 230, letter to Mr. Wythe. Cf. James Madison in Federalist paper No. 42: 'The second class of powers, lodged in the general government, consist of those which regulate in intercourse with foreign nations. * * * This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.'

FN12 Chy Lung v. Freeman, 92 U.S. 275, 279, 23 L.Ed. 550. Cf. Alexander Hamilton in Federalist paper No. 80: 'The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.' That the Congress was not unaware of the possible international repercussions of registration legislation is apparent from a study of the history of the 1940 federal Act. Congressman Coffee, speaking against an earlier version of the bill, said: 'Are we not guilty of deliberately insulting nations with whom we maintain friendly diplomatic relations? Are we not humiliating their nationals? Are we not violating the traditions and experiences of a century and a half?' 84 Cong.Rec. 9536.

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's****403** subjects inflicted, or permitted, by a government.[FN13] This country, like other nations, has entered into numerous treaties of amity and commerce since its inception-treaties entered into under express constitutional authority, and binding ***65** upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents-duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.[FN14] In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens. Concerning such treaties, this Court has said: 'While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other.'[FN15]

FN13 For a collection of typical international controversies that have arisen in this manner, see Dunn, The Protection of Nationals (1932), pp. 13 et seq. Cf. John Jay in Federalist paper No. 3: 'The number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether real or pretended, which provoke or invite them. If this remark be just, it becomes useful to inquire whether so many just causes of war are likely to be given by United America as by disunited America; for if it should turn out that United America will probably give the fewest, then it will follow that in this respect the Union tends most to preserve the people in a state of peace with other na-

tions.'

FN14 'In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien * * * must be afforded protection for his person and property. * * * Every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a State. Thus the police must not arrest him without just cause. * * *' 1 Oppenheim, International Law (5th ed., 1937), pp. 547-548. And see 4 Moore, International Law Digest, pp. 2, 27, 28; Borchard, The Diplomatic Protection of Citizens Abroad (1928), pp. 25, 37, 73, 104.

FN15 Todok v. Union State Bank, 281 U.S. 449, 454, 455, 50 S.Ct. 363, 365, 366, 74 L.Ed. 956.

[4][5] Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens-such as subjecting ***66** them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials-thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs. And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish an uniform Rule of Naturalization * * *.' It cannot be doubted that both the state and the federal registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' FN16 Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress, ****404** or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.' FN17 And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary***67** regulations. FN18 There is not-and from the very nature of the problem there cannot be-any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. FN19 But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. FN20 And in ***68** that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. FN21 And it is ****405** also of importance that this legislation deals with the rights, liberties, and

personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans. FN22

FN16 Henderson v. Mayor of New York, 92 U.S. 259, 273, 23 L.Ed. 543.

FN17 Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23; see Charleston & Western Carolina Railway Co. v. Varnville Furniture Co., 237 U.S. 597, 35 S.Ct. 715, 59 L.Ed. 1137. Cf. People v. Compagnie Generale Transatlantique, 107 U.S. 59, 63, 2 S.Ct. 87, 91, 27 L.Ed. 383, where the court, speaking of a state law and a federal law dealing with the same type of control over aliens, said that the federal law 'covers the same ground as the New York statute, and they cannot coexist.'

FN18 Cf. Nielsen v. Johnson, 279 U.S. 47, 49 S.Ct. 223, 73 L.Ed. 607; Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041; International Shoe Co. v. Pinkus, 278 U.S. 261, 265, 49 S.Ct. 108, 110, 73 L.Ed. 318; and cases there cited. And see Savage v. Jones, 225 U.S. 501, 539, 32 S.Ct. 715, 728, 56 L.Ed. 1182. Appellant relies on Gilbert v. Minnesota, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287, and Halter v. Nebraska, 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696, 10 Ann.Cas. 525, but neither of those cases is relevant to the issues here presented.

FN19 E.g., Hauenstein v. Lynham, 100 U.S. 483, 489, 25 L.Ed. 628; De Geofroy v. Riggs, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642; Asakura v. Seattle, 265 U.S. 332, 340, 342, 44 S.Ct. 515, 516, 68 L.Ed. 1041; Nielsen v. Johnson, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607; Todok v. Union State Bank, 281 U.S. 449, 454, 50 S.Ct. 363, 365, 74 L.Ed. 956; Santovincenzo v. Egan, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151; United States v. Belmont, 301 U.S. 324, 331, 57 S.Ct. 758, 761, 81 L.Ed. 1134 (but compare the affirmance by an equally divided Court in United States v. Moscow Fire Ins. Co., 309 U.S. 624, 60 S.Ct. 725, 84 L.Ed. 986); Kelly v. Washington, 302 U.S. 1, 10, 11, 58 S.Ct. 87, 92, 82 L.Ed. 3; Maurer v. Hamilton, 309 U.S. 598, 604, 60 S.Ct. 726, 729, 84 L.Ed. 969; Bacardi Corporation v. Domenech, 311 U.S. 150, 61 S.Ct. 219, 85 L.Ed. 98, this term decided December 9, 1940.

FN20 Cf. Savage v. Jones, 225 U.S. 501, 533, 32 S.Ct. 715, 726, 56 L.Ed. 1182: 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished-if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect-the state law must yield to the regulation of Congress within the sphere of its delegated power.'

FN21 Express recognition of the breadth of the concurrent taxing powers of state and nation is found in Federalist paper No. 32.

FN22 It is true that where the Constitution does not of itself prohibit state action, as in matters related to interstate commerce, and where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not. Kelly v. Washington, 302 U.S. 1, 9, 10, 11, 12, 13, 14, 58 S.Ct. 87, 91, 92, 93, 94, 82 L.Ed. 3 (inspection for seaworthiness of hull and machinery of

motor-driven tugs). And see Reid v. Colorado, 187 U.S. 137, 147, 23 S.Ct. 92, 96, 47 L.Ed. 108 (prohibition on introduction of diseased cattle or horses); Savage v. Jones, 225 U.S. 501, 529, 532, 32 S.Ct. 715, 724, 725, 56 L.Ed. 1182 (requirement that certain labels reveal package contents); Carey v. South Dakota, 250 U.S. 118, 121, 39 S.Ct. 403, 404, 63 L.Ed. 886 (prohibition of shipment by carrier of wild ducks); Dickson v. Uhlmann Grain Co., 288 U.S. 188, 199, 53 S.Ct. 362, 366, 77 L.Ed. 691, 83 A.L.R. 492 (prohibition of margin transactions in grain where there is no intent to deliver); Mintz v. Baldwin, 289 U.S. 346, 350-352, 53 S.Ct. 611, 613, 614, 77 L.Ed. 1245 (inspection of cattle for infectious diseases); Maurer v. Hamilton, 309 U.S. 598, 604, 614, 60 S.Ct. 726, 729, 734, 84 L.Ed. 969 (prohibition of car-over-cab trucking).

[6] Our conclusion is that appellee is correct in his contention that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. FN23 We proceed therefore***69** to an examination of Congressional enactments to ascertain whether or not Congress has acted in such manner that its action should preclude enforcement of Pennsylvania's law.

FN23 As supporting the contention that the state can enforce its alien registration legislation, even though Congress has acted on the identical subject, appellant relies upon a number of previous opinions of this Court. Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 395, 396, 47 S.Ct. 630, 631, 71 L.Ed. 1115; Frick v. Webb, 263 U.S. 326, 333, 44 S.Ct. 115, 116, 68 L.Ed. 323; Webb v. O'Brien, 263 U.S. 313, 321, 322, 44 S.Ct. 112, 113, 68 L.Ed. 318; Terrace v. Thompson, 263 U.S. 197, 223, 224, 44 S.Ct. 15, 20, 21, 68 L.Ed. 255; Heim v. McCall, 239 U.S. 175, 193, 194, 36 S.Ct. 78, 84, 60 L.Ed. 206, Ann.Cas.1917B, 287.

In each of those cases this Court sustained state legislation which applied to aliens only, against an attack on the ground that the laws violated the equal protection clause of the Constitution. In each case, however, the Court was careful to point out that the state law was not in violation of any valid treaties adopted by the United States, and in no instance did it appear that Congress had passed legislation on the subject. In the only case of this type in which there was an outstanding treaty provision in conflict with the state law, this Court held the state law invalid. Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041.

[7] Second For many years Congress has provided a broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported. Numerous treaties, in return for reciprocal promises from other governments, have pledged the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for the imposition of discriminatory burdens. Our Constitution and our Civil Rights Act have guaranteed to aliens 'the equal protection of the laws (which) is a pledge of the protection of equal laws.' FN24 With a view to limiting prospective residents from foreign lands to those possessing the qualities deemed essential to good and useful citizenship in America, carefully defined qualifications are required to be met before aliens may enter our country. These qualifications include rigid requirements as to health, education, integrity, character, and adaptability to our institutions. Nor is the alien left free from the ***70** application of federal ****406** laws after entry and before naturalization. If during the time he is residing here he should be found guilty

of conduct contrary to the rules and regulations laid down by Congress, he can be deported. At the time he enters the country, at the time he applies for permission to acquire the full status of citizenship, and during the intervening years, he can be subjected to searching investigations as to conduct and suitability for citizenship.[FN25] And in 1940 Congress added to this comprehensive scheme a complete system for alien registration.

FN24 Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220.

FN25 8 U.S.C. ss 152, 373, 377c, 382, 398, 399a, 8 U.S.C.A. ss 152, 373, 377c, 382, 398, 399a.

[8] The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.[FN26] Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history,[FN27] and champions of freedom for the individual have always vigorously opposed burdensome registration systems. The drastic requirements of the alien Acts of 1798[FN28] brought about a political upheaval in this country the repercussions from which have not even yet wholly subsided.[FN29] So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration ***71** act was passed. This second law, which required Chinese to register and carry identification cards with them at all times, was enacted May 5, 1892, 8 U.S.C.A. ss 263, 281 et seq. An opponent of this legislation, speaking in the Senate of the requirement that cards be carried, said: '(The Chinese covered by the Act) are here ticket-of-leave men. Precisely as, under the Australian law, a convict is allowed to go at large, upon a ticket-of-leave, these people are to be allowed to go at large, and earn their livelihood, but they must have their tickets-of-leave in their possession. * * * This inaugurates in our system of government a new departure; one, I believe, never before practiced, although it was suggested in conference that some such rules had been adopted in slavery times to secure the peace of society.'[FN30]

FN26 Cf. Prigg v. Pennsylvania, 16 Pet. 539, 622, 623, 10 L.Ed. 1060.

FN27 As early as 1641, in the Massachusetts 'Body of Liberties', we find the statement that 'Every person within this Jurisdiction, whether Inhabitant or forreiner, shall enjoy the same justice and law that is generall for the plantation * * *.'

FN28 1 Stat. 570; 1 Stat. 577, 50 U.S.C.A. ss 21-24.

FN29 See Field, J., dissenting in Fong Yue Ting v. United States, 149 U.S. 698, 746-750, 13 S.Ct. 1016, 1034-1036, 37 L.Ed. 905. Cf. 84 Cong.Rec. 9534.

FN30 Quoted in Fong Yue Ting v. United States, supra, 149 U.S. at page 743, 13 S.Ct. at page 1034, 37 L.Ed. 905.

For many years bills have been regularly presented to every Congress providing for registration of aliens. Some of these bills proposed annual registration of aliens, issuance of identification cards containing information about and a photograph of the bearer, exhibition of the cards on demand, payment of an annual fee, and kindred requirements.[FN31] Opposition to these bills was based upon charges that their requirements were at war with the fundamental principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual, and would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.[FN32]

FN31 E.g., H.R.9101 and H.R.9147, 71st

Cong., 2nd Session; see 72 Cong.Rec. 3886.

FN32 The requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation. Congressman Celler, speaking in 1928 of the repeated defeat of registration bills and of an attempt by the Secretary of Labor to require registration of incoming aliens by executive order, said: 'But here is the real vice of the situation and the core of the difficulty: 'The admitted alien,' as the order states, 'should be cautioned to present (his card) for inspection if and when subsequently requested so to do by an officer of the Immigration Service.'' 70 Cong.Rec. 190.

****407 *72** When Congress passed the Alien Registration Act of 1940, many of the provisions which had been so severely criticized were not included. FN33 The Congressional purpose, as announced by the chairman of the Senate subcommittee which drafted the final bill, was to 'work * * * the new provisions into the existing (immigration and naturalization) laws, so as to make a harmonious whole.' FN34 That 'harmonious whole' included the 'Uniform Rule of Naturalization' the Constitution empowered***73** the Congress to provide. FN35 And as a part of that 'harmonious whole', under the federal Act aliens need not carry cards, and can only be punished for wilful failure to register. FN36 Further, registration records and finger-prints must be kept secret and cannot be revealed except to agencies-such as a state-upon consent of the Commissioner and the Attorney General.

FN33 Congressman Smith, who introduced the original of the bill that as finally adopted became the 1940 Act, said in Committee: 'The drafting of the bill is * * * a codification of measures that have been offered from time to time. * * * I have tried to eliminate from the bills that have been offered on the subject those which seemed to me would cause much controversy.' Hearings before Subcommittee No. 3 of the House Judiciary Committee, H.R. 5138, April 12, 1939, p. 71.

FN34 Cong. Rec., June 15, 1940, p. 12620. Senator Connally made this statement in explaining why it had been found necessary to substitute a new bill for the bill originally sent to the Senate by the House. In detailing the care that had been taken in the drafting of the new measure, he said: 'We regretted very much that we had to discard entirely the bill passed by the House and substitute a new bill after the enacting clause. However, we called in Mr. Murphy, of the Drafting Service, who worked with us some 2 weeks every day. * * * We called on the Department of Justice, and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole.' This Senate version was substantially the Act as finally adopted; the alien registration provisions are title III of a broader Act dealing with deportable offenses and advocacy of disloyalty in the armed forces.

FN35 In Federalist paper No. 42, the reasons for giving this power to the federal government are thus explained: 'By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence, if such persons, by residence or

> otherwise, had acquired the character of citizens under the laws of another State * * *? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.'

FN36 That the Congressional decision to punish only wilful transgressions was deliberate rather than inadvertent is conclusively demonstrated by the debates on the bill. E.g., Cong. Rec., June 15, 1940, p. 12621. And see note 37, infra.

[9] We have already adverted to the conditions which make the treatment of aliens, in whatever state they may be located, a matter of national moment. And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable. The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to ***74** be secured. FN37 Having the constitutional****408** authority so to do, it has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced. Accordingly, the judgment below is

> FN37 Congressman Celler, ranking member of the House Judiciary Committee which reported out the bill, said in stating his intention of voting for the 1940 Act: 'Mr. Speaker, judging the temper of the Nation, I believe this compromise report is the best to be had under the circumstances and I shall vote for it * * *. Furthermore, I think the conferees have done a good job because the punishment is not too great * * *. There must be proof * * * that the alien wilfully refuses to register * * *. I drew the minority report against this bill originally, because it provided some very harsh provisions against aliens. Some of the harshness and some of the severity of the original bill have been eliminated * * *. I must admit that it is the best to be had under the circumstances.' Cong. rec., June 22, 1940, pp. 13468-9.

Affirmed.

Mr. Justice STONE.

In think the judgment below should be reversed.

Undoubtedly Congress, in the exercise of its power to legislate in aid of powers granted by the Constitution to the national government may greatly enlarge the exercise of federal authority and to an extent which need not now be defined, it may, if such is its will, thus subtract from the powers which might otherwise be exercised by ***75** the states. Assuming, as the Court holds, that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that

which Congress has failed to do.

At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. Cf. Graves v. O'keefe, 306 U.S. 466, 479, 480, 487, 59 S.Ct. 595, 597, 598, 601, 83 L.Ed. 927, 120 A.L.R. 1466. The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern.

The opinion of the Court does not deny, and I see no reason to doubt that the Pennsylvania registration statute, when passed, was a lawful exercise of the constitutional power of the state. With exceptions not now material it requires aliens resident in the state, who have not declared their intention to become citizens, to register annually, to pay a registration fee of $1.00, and to carry a registration identification card. It affords to the state a convenient method of ascertaining the number and whereabouts of aliens within the state, which it is entitled to know, and a means of their identification. It is an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitutional***76** validity has not been questioned, one of which has been held by this Court not to infringe the Fourteenth Amendment. Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539. FN1

FN1. Tit. 34, s 1311.1001, Purdon's Penn. Stat.Ann., prohibiting hunting by aliens, was sustained in the Patsone case, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539. Cf. Tit. 30 s 240. Other Pennsylvania statutes whose validity have not been passed upon regulate the activities of aliens: Tit. 63, setting forth license requirements for the practice of certain professions and occupations, make special requirements for aliens seeking to practice as certified public accountants (s 1), architects (s 22), engineers (s 137), nurses (s 202), physicians and surgeons (s 406), and undertakers (s 478c). The real property holdings of aliens are limited to 5000 acres of land or land producing net income of $20,000 or less (Title 68, ss 28, 32). Taxes are to be deducted from the wages of aliens by their employers when the tax collector requests (Tit. 72, s 5681).

****409** The national government has exclusive control over the admission of aliens into the United States, but after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state and, in the exercise of that power, state legislatures may pass laws applicable exclusively to aliens so long as the distinction taken between aliens and citizens is not shown to be without rational basis. Patsone v. Pennsylvania, supra; Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; Cockrill v. California, 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944; Ohio v. Deckebach, 274 U.S. 392, 396, 47 S.Ct. 630, 631, 71 L.Ed. 1115, and cases cited. The federal government has no general police power over aliens and, so far as it can exercise any control over them, it must be in the pursuance of a power granted to it by the Constitution.

The opinion of the Court does not support its conclusion upon the ground that in the absence of federal legislation on the subject there is any want of power in the state to pass the present statute. It does not suggest nor could it well do so that in the absence of Congressional action the Pennsylvania statute either by its own terms or in its operation in-

terferes with or obstructs the authority***77** conferred by the Constitution on the national government over the national defense, the conduct of foreign relations, its powers over immigration and deportation of aliens or their naturalization. The existence of the national power to conduct foreign relations and negotiate treaties does not foreclose state legislation dealing exclusively with aliens as such. This Court has consistently held that treaties of the United States for the protection of resident aliens do not supersede such legislation unless they conflict with it. See Ohio v. Deckebach, supra, 274 U.S. 395, 47 S.Ct. 631, 71 L.Ed. 1115, and cases cited; Todok v. Union State Bank, 281 U.S. 449, 454, 50 S.Ct. 363, 365, 74 L.Ed. 956 et seq.; cf. Nielson v. Johnson, 279 U.S. 47, 49 S.Ct. 223, 73 L.Ed. 607. It is not contended that the Pennsylvania statute conflicts with any term of any treaty.

The question presented here is a different one from that considered in Henderson et al. v. Mayor of New York et al., 92 U.S. 259, 273, 23 L.Ed. 543, where the state taxation and registration of all persons entering the United States through a port of the state was held to be a regulation of foreign commerce forbidden to the states by the Constitution, even though Congress had passed no similar legislation. The registration of aliens resident in a state is not a regulation of interstate or foreign commerce or of the entry or deportation of aliens and would seem to be no more an exercise of any power granted to the national government or an encroachment upon it than is a state census for local purposes an infringement of the national authority to take a national census for national purposes. It is the federal act alone which is pointed to as curtailing or withdrawing the reserved power of the state over its alien population.

Title I of the federal statute, 18 U.S.C.A. ss 9-13, penalizes certain acts of any persons intended to interfere with, impair or influence the loyalty, morale or discipline of the military or naval forces of the United States. Title II, 8 U.S.C.A. ss 137, 155, 156a, among other things, provides for the deportation of aliens after conviction***78** and service of sentence for violations of the provisions of Title I. And the evident purpose of the registration provisions of Title III, 8 U.S.C.A. s 451 et seq., is to aid in the enforcement of the other provisions of the Act and in the prevention of subversive activities of aliens resident within the United States. It requires the registration and ****410** fingerprinting of all aliens over fourteen years of age, with exceptions not now material, who are not registered and fingerprinted upon entering the country. Registered aliens resident in the United States are required to notify the Commissioner of Immigration of any change of residence and penalties are imposed for wilful noncompliance. As construed and applied by the opinion of the Court the federal act denies to the states the practicable means of identifying their alien residents and of recording their whereabouts and it withholds from the states the benefit of the information secured under the federal act except insofar as it may be made available to them on application to the Attorney General.

It is conceded that the federal act in operation does not at any point conflict with the state statute, and it does not by its terms purport to control or restrict state authority in any particular. But the government says that Congress by passing the federal act, has ‘occupied the field’ so as to preclude the enforcement of the state statute and that the administration of the latter might well conflict with Congressional policy to protect the civil liberty of aliens against the harassments of intrusive police surveillance.

Little aid can be derived from the vague and illusory but often repeated formula that Congress ‘by occupying the field’ has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover ***79** the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

Federal statutes passed in aid of a granted power obviously supersede state statutes with which they conflict. Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 459, 56 S.Ct. 556, 559, 80 L.Ed. 796. See Kelly v. Washington, 302 U.S. 1, 10, 58 S.Ct. 87, 92, 82 L.Ed. 3. But we are pointed to no such conflict here. In the exercise of such powers Congress also has wide scope for prohibiting state regulation of matters which Congress may, but has not undertaken to regulate itself. But no words of the statute or of any committee report, or any Congressional debate indicate that Congress intended to withdraw from the state any part of their constitutional power over aliens within their borders. We must take it that Congress was not unaware that some nineteen states have statutes or ordinances requiring some form of registration for aliens, seven of them dating from the last war. The repeal of this legislation is not to be inferred from the silence of Congress in enacting a law which at no point conflicts with the state legislation and is harmonious with it.

The exercise of the federal legislative power is certainly not more potent to curtail the exercise of state power over aliens than is the exercise of the treaty making power. Yet as we have seen no treaty has that effect unless it conflicts with a state statute. The passage of the National Pure Food and Drug Act, 21 U.S.C.A. s 1 et seq., did not preclude the states from supplementing it by like additional requirements not conflicting with those of the Congressional act. Savage v. Jones, 225 U.S. 501, 503, 32 S.Ct. 715, 56 L.Ed. 1182. The enactment of federal laws for the inspection, as a safety measure, of vessels plying navigable waters of the United States does not foreclose the states from like inspection of the hull and machinery of such vessels within the state, to insure safety and determine seaworthiness, demands ***80** which lie outside the federal requirements. Kelly v. Washington, supra. The passage of the National Draft and the National Espionage Acts, 50 U.S.C.A. Appendix, s 201 et seq., and s 31 et seq., with their penalties for violation, did not preclude a state from making it a misdemeanor for any person to advocate that citizens of the state refuse to aid or assist the United States in carrying on a war. Gilbert v. Minnesota, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287; cf. Halter v. Nebraska, 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696, 10 Ann.Cas. 525; see also Reid v. Colorado, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108; Carey v. South Dakota, 250 U.S. 118, 39 S.Ct. 403, 63 L.Ed. 886; Dickson v. Uhlmann Grain Co., 288 U.S. 188, 53 S.Ct. 362, 77 L.Ed. 691, 83 A.L.R. 492; Mintz v. Baldwin, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245; ****411**Maurer v. Hamilton, 309 U.S. 598, 614, 60 S.Ct. 726, 734, 84 L.Ed. 969. These are but a few of the many examples of the long established principle of constitutional interpretation that an exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be fairly reconciled or consistently stand together'. Sinnot v. Davenport, 22 How. 227, 243, 16 L.Ed. 243; Kelly v. Washington, supra, 302 U.S. 10, 58 S.Ct. 92, 82 L.Ed. 3. A federal registration act designed to aid in enforcing federal statutes and to prevent subversive activities against the national government can stand consistently with a like statute applicable to residents passed in aid of state laws and as a safeguard to property and persons within the state, as readily as the federal and state laws which annually demand two separate income tax returns of the citizen.

The Fourteenth Amendment guarantees the civil liberties of aliens as well as of citizens against infringement by state action in the enactment of laws and their administration as well. Again we are pointed to nothing in the Federal Alien Registration Act or in the records of its passage through Congress to indicate that Congress thought those guarantees inadequate or that in requiring registration of all aliens it undertook to prevent the states from passing any registration measure otherwise constitutional. True, it was careful to bring the new ***81** legislation into harmony with existing federal statutes and to avoid, so far as consistent with its pur-

poses, any harsh or oppressive requirements, but in all this there is to be found no warrant for saying that there was a Congressional purpose to curtail the exercise of any constitutional power of the state over its alien residents or to protect the alien from state action which the Constitution prohibits and which the federal courts stand ready to prevent. See Hague v. C.I.O., 307 U.S. 496, 518, 525, 59 S.Ct. 954, 965, 968, 83 L.Ed. 1423 et seq.

Here compliance with the state law does not preclude or even interfere with compliance with the act of Congress. The enforcement of both acts involves no more inconsistency, no more inconvenience to the individual, and no more embarrassment to either government than do any of the laws, state and national, such as revenue laws, licensing laws, or police regulations, where interstate commerce is involved, which are equally applied to the citizen because he is subject, as are aliens, to a dual sovereignty.

The CHIEF JUSTICE and Mr. Justice McREYNOLDS concur in this opinion.

U.S. 1941.
Hines v. Davidowitz
312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF ARIZONA; JANICE K. BREWER, Governor of the State of Arizona, in her official capacity, Defendants-Appellants.

No. 10-16645

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2011 U.S. App. LEXIS 7413

November 1, 2010, Argued and Submitted, San Francisco, California
April 11, 2011, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of Arizona. D.C. No. 2:10-cv-01413-SRB. Susan R. Bolton, District Judge, Presiding.
United States v. Arizona, 703 F. Supp. 2d 980, 2010 U.S. Dist. LEXIS 75558 (D. Ariz., 2010)

DISPOSITION: AFFIRMED; REMANDED.

COUNSEL: John J. Bouma, Robert A. Henry, Joseph G. Adams, Joseph A. Kanefield, Office of Governor Janice K. Brewer, for defendants-appellants State of Arizona, and Janice K. Brewer, Governor of the State of Arizona.

Edwin Kneedler, Deputy United States Solicitor General, Tony West, Assistant Attorney General, Dennis K. Burke, United States Attorney, Beth S. Brinkmann, Deputy Assistant Attorney General, Mark B. Stern, Thomas M. Bondy, Michael P. Abate, Daniel Tenny, Attorneys, Appellate Staff Civil Division, Department of Justice, for plaintiff-appellee United States of America.

JUDGES: Before: John T. Noonan, Richard A. Paez, and Carlos T. Bea, Circuit Judges. Opinion by Judge Paez; Concurrence by Judge Noonan; Partial Concurrence and Partial Dissent by Judge Bea.

OPINION BY: Richard A. Paez

OPINION

PAEZ, Circuit Judge:

In April 2010, in response to a serious problem of unauthorized immigration along the Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy. Support Our Law Enforcement and Safe Neighborhoods Act, as amended [*2] by H.B. 2162 ("S.B. 1070"), "make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers.

Before Arizona's new immigration law went into effect, the United States sued the State of Arizona in federal district court alleging that S.B. 1070 violated the *Supremacy Clause* on the grounds that it was preempted by the Immigration and Nationality Act ("INA"), and that it violated the *Commerce Clause*. Along with its complaint, the United States filed a motion for injunctive relief seeking to enjoin implementation of S.B. 1070 in its entirety until a final decision is made about its constitutionality. Although the United States requested that the law be enjoined in its entirety, it specifically argued facial challenges to only six select provisions of the law. *United States v. Arizona, 703 F. Supp. 2d 980, 992 (D. Ariz. 2010)*.

The district court granted [*3] the United States' motion for a preliminary injunction in part, enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6, on the basis that federal law likely preempts these provisions. *Id. at 1008*. Arizona appealed the grant of injunctive relief, arguing that these four sections are not likely preempted; the United States did not cross-appeal the partial denial of injunctive relief. Thus, the United States' likelihood of success on its federal preemption argument against these four sections is the central issue this appeal presents. [1]

> 1 A party seeking a preliminary injunction has the burden to demonstrate that (1) it is likely to succeed on the merits of the claim, (2) it will suffer irreparable harm absent injunctive relief, and (3) that the balance of the equities and the public interest favor granting the injunction. *Winter v. Natural Res. Def. Council Inc., 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)*. Our analysis here begins and focuses on the critical issue of the United States' likelihood of success on the merits of its preemption claim.

We have jurisdiction to review the district court's order under *28 U.S.C. § 1292(a)(1)*. We hold that the district court did not abuse its discretion [*4] by enjoining S.B. 1070 Sections 2(B), 3, 5(C), and 6. Therefore, we affirm the district court's preliminary injunction order enjoining these certain provisions of S.B. 1070.

Standard of Review

We review the district court's grant of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003)* (en banc). A preliminary injunction "should be reversed if the district court based 'its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009)* (*quoting FTC v. Enforma Natural Prods., Inc., 362 F.3d 1204, 1211-12 (9th Cir. 2004)*). We review de novo the district court's conclusions on issues of law, including "the district court's decision regarding preemption and its interpretation and construction of a federal statute." *Am. Trucking Ass'ns, Inc. v. Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)*.

Discussion

I. General Preemption Principles

The federal preemption doctrine stems from the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, and the "fundamental principle of the Constitution [ ] that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*. [*5] Our analysis of a preemption claim

> [M]ust be guided by two cornerstones of [the Supreme Court's] pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. . . . Second, [i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1194-95, 173 L. Ed. 2d 51 (2009) (internal quotation marks and citations omitted) (quoting *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996))*.

Even if Congress has not explicitly provided for preemption in a given statute, the Supreme Court "ha[s] found that state law must yield to a congressional Act in at least two circumstances." *Crosby, 530 U.S. at 372*. First, "[w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Id.* (quoting *California v. ARC America Corp., 490 U.S. 93, 100, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989))*. Second, "even if Congress has not occupied the field, state law is naturally preempted [*6] to the extent of any conflict with a federal statute." *Id.* Conflict preemption, in turn, has two forms: impossibility and obstacle preemption. *Id. at 372-373*. Impossibility preemption exists "where it is impossible for a private party to comply with both state and federal law." *Id*. Obstacle preemption exists "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id. at 373* (quoting *Hines v.*

Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). To determine whether obstacle preemption exists, the Supreme Court has instructed that we employ our "judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* [2]

2 The Supreme Court has recognized "that the categories of preemption are not "rigidly distinct." *Crosby, 530 U.S. at 372 n.6* (quoting *English v. Gen. Elec., Co., 496 U.S. 72, 79 n.5, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990))*.

We recently applied the facial challenge standard from *United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*, to a facial preemption case. *Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 579-80 (9th Cir. 2008)* [*7] (en banc). In Sprint, the appellant argued that a federal law "preclud[ing] state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" facially preempted a San Diego ordinance that imposed specific requirements on applications for wireless facilities. *Id. at 573-74*. We explained in *Sprint* that "[t]he Supreme Court and this court have called into question the continuing validity of the Salerno rule in the context of *First Amendment* challenges. . . . In cases involving federal pre-emption of a local statute, however, the rule applies with full force." *Id. at 579, n.3*. [3]

3 Although we use the *Salerno* standard in a preemption analysis, it is not entirely clear from relevant Supreme Court cases the extent to which the *Salerno* doctrine applies to a facial preemption challenge. *Crosby, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352*, and *American Insurance Association v. Garamendi, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)* are both facial preemption cases decided after Salerno and-- on this point--are the most analogous Supreme Court cases available to guide our review here. Neither case cites *Salerno* nor mentions [*8] its standard in the opinions, concurrences, or dissents. Indeed, the *only* Supreme Court preemption case that we have found which references the *Salerno* standard is *Anderson v. Edwards, 514 U.S. 143, 115 S. Ct. 1291, 131 L. Ed. 2d 178 (1995)*, which we cited in *Sprint*. But *Edwards* does not cite *Salerno* in the preemption section of the opinion. Rather, the Court references Salerno in the section of the Edwards opinion holding that "the California Rule does not violate any of the three federal regulations on which the Court of Appeals relied." *514 U.S. at 155* (emphasis added). *Edwards* continues on, in another section, to hold that the California regulation at issue is also not preempted by federal law; this analysis includes no mention of the *Salerno* standard.

Thus, under *Salerno*, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Sprint, 543 F.3d at 579* (quoting *Salerno, 481 U.S. at 745*). We stress that the question before us is not, as Arizona has portrayed, whether state and local law enforcement officials can *apply* the statute in a constitutional way. Arizona's framing of the *Salerno* issue assumes that S.B. 1070 is not preempted on its face, and then points out allegedly [*9] permissible applications of it. This formulation misses the point: there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the *Supremacy Clause*. [4]

4 Here, we conclude that the relevant provisions of S.B. 1070 facially conflict with Congressional intent as expressed in provisions of the INA. If that were not the case, as in *Sprint*, we would have next considered whether the statute could be applied in a constitutional manner.

II. Section 2(B) [5]

5 Section 2(B) of Arizona's law provides:

> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town [of] this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.

> Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration [*10] status shall be verified with the federal government pursuant to *8 United States Code section 1373(c)* . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:
>
> 1. A valid Arizona driver license.
>
> 2. A valid Arizona nonoperating identification license.
>
> 3. A valid tribal enrollment card or other form of tribal identification.
>
> 4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

S.B. 1070 Section 2(B) provides, in the first sentence, that when officers have reasonable suspicion that someone they have lawfully stopped, detained, or arrested is an unauthorized immigrant, they "shall" make "a reasonable attempt . . . when practicable, to determine the immigration status" of the person. *Ariz. Rev. Stat. Ann. § 11-1051(B)* (2010). Section 2(B)'s second and third sentences provide that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released," and "[t]he person's immigration [*11] status shall be verified with the federal government." *Id.* The Section's fifth sentence states that a "person is presumed to not be an alien who is unlawfully present in the United States if the person provides" a form of identification included in a prescribed list. [6]

> 6 We have carefully considered the dissent and we respond to its arguments as appropriate. We do not, however, respond where the dissent has resorted to fairy tale quotes and other superfluous and distracting rhetoric. These devices make light of the seriousness of the issues before this court and distract from the legitimate judicial disagreements that separate the majority and dissent.

A. Interpretation of Section 2(B)

To review the district court's preliminary injunction of Section 2(B), we must first determine how the Section's sentences relate to each other. Arizona argues that Section 2(B) does not require its officers to determine the immigration status of every person who is arrested. Arizona maintains that the language in the second sentence, "[a]ny person who is arrested shall have the person's immigration status determined," should be read in conjunction with the first sentence requiring officers to make "a reasonable [*12] attempt . . . when practicable, to determine the immigration status" of a person they have stopped, detained, or arrested, *if there is reasonable suspicion* the person is an unauthorized immigrant. That is, Arizona argues that its officers are only required to verify the immigration status of an arrested person before release if reasonable suspicion exists that the person lacks proper documentation.

On its face, the text does not support Arizona's reading of Section 2(B). The second sentence is unambiguous: "*Any* person who is arrested *shall* have the person's immigration status *determined* before the person is released." *Ariz. Rev. Stat. Ann. § 11-1051(B)* (2010) (emphasis added). The all-encompassing "any person," the mandatory "shall," and the definite "determined," make this provision incompatible with the first sentence's qualified "reasonable attempt . . . when practicable," and qualified "reasonable suspicion."

In addition, Arizona's reading creates irreconcilable confusion as to the meaning of the third and fifth sentences. The third sentence, which follows the requirement of determining status prior to an arrestee being released, provides that "[t]he person's immigration status shall [*13] be verified with the federal government." The fifth sentence enumerates several forms of identification that will provide a presumption that a person is lawfully documented. These two sentences must apply to different--and unrelated--status-checking requirements since one mandates contact with the federal government and a definite verification of status, while the other permits a mere unverified presumption of status, assuming the presumption is not rebutted by other facts. Arizona's reading would give law enforcement officers conflicting direction. That is, under Arizona's reading, if an officer arrests a person and reasonably suspects that the arrestee is undocumented, but the arrestee provides a valid Arizona driver's license, is the officer no longer bound by the third sentence's requirement that he or she "shall" verify the arrestee's status with the federal government?

We agree with the district court that the reasonable suspicion requirement in the first sentence does not modify the plain meaning of the second sentence. Thus, Section 2(B) requires officers to verify--with the federal government--the immigration status of *all* arrestees before they are released, regardless of whether [*14] or not reasonable suspicion exists that the arrestee is an undocumented immigrant. Our interpretation gives effect to "arrest" in the first sentence and "arrest" in the second sentence. The first and second sentences apply to different points in the sequential process of effecting an arrest, and at some later point, releasing the arrestee. The mandate imposed in the first sentence applies at the initial stage of an encounter or arrest, which is evident by the fact that the status-checking requirement does not override an officer's need to attend to an ongoing and immediate situation: "a reasonable attempt shall be made, *when practicable*, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation." (emphasis added). The mandatory directive in the second sentence applies at the end of the process: an arrestee's immigration status "shall . . . [be] determined before the person is released." [7]

> 7 The dissent claims that Section 2(B) "merely requires Arizona officers to inquire into the immigration status of suspected" undocumented immigrants; that "simply informing federal authorities of the presence of an [undocumented immigrant]. [*15] . . represents the full extent of Section 2(B)'s limited scope." Dissent at 4873-74. Section 2(B) requires much more than mere inquires--it requires that people be detained until those inquiries are settled, and in the event of an arrest, the person may not be released until the arresting agency obtains verification of the person's immigration status. Detention, whether intended or not, is an unavoidable consequence of Section 2(B)'s mandate.

B. Preemption of Section 2(B)

As the Supreme Court recently instructed, every preemption analysis "must be guided by two cornerstones." *Wyeth, 129 S. Ct. at 1194*. The first is that "the purpose of Congress is the ultimate touchstone." *Id*. The second is that a presumption against preemption applies when "Congress has legislated . . . in a field which the States have traditionally occupied." *Id*. The states have not traditionally occupied the field of identifying immigration violations so we apply no presumption against preemption for Section 2(B).

We begin with "the purpose of Congress" by examining the text of *8 U.S.C. § 1357(g)*. In this section of the INA, titled "Performance of immigration officer functions by State officers and employees," Congress [*16] has instructed under what conditions state officials are permitted to assist the Executive in the enforcement of immigration laws. Congress has provided that the Attorney General "may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function." *8 U.S.C. § 1357(g)(1)*. *Subsection (g)(3)* provides that "[i]n performing a function under this subsection, an officer . . . of a State . . . shall be subject to the direction and supervision of the Attorney General." *8 U.S.C. § 1357(g)(3)*. *Subsection (g)(5)* requires that the written agreement must specify "the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." *8 U.S.C.*

§ 1357(g)(5).

These provisions demonstrate that Congress intended for states to be involved [*17] in the enforcement of immigration laws under the Attorney General's close supervision. Not only must the Attorney General approve of each *individual* state officer, he or she must delineate which functions each individual officer is permitted to perform, as evidenced by the disjunctive "or" in *subsection (g)(1)*'s list of "investigation, apprehension, or detention," and by *subsection (g)(5).* An officer might be permitted to help with investigation, apprehension *and* detention; or, an officer might be permitted to help only with one or two of these functions. *Subsection (g)(5)* also evidences Congress' intent for the Attorney General to have the discretion to make a state officer's help with a certain function permissive or mandatory. In *subsection (g)(3),* Congress explicitly required that in enforcing federal immigration law, state and local officers "shall" be directed by the Attorney General. This mandate forecloses any argument that state or local officers can enforce federal immigration law as directed by a mandatory state law.

We note that in *subsection (g)(10),* Congress qualified its other *§ 1357(g)* directives:

> Nothing in this subsection shall be construed to require an agreement . [*18] . . in order for any officer or employee of a State . . . (A) to communicate with the Attorney General regarding the immigration status of any individual . . . or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present.

8 U.S.C. § 1357(g)(10). Although this language, read alone, is broad, we must interpret Congress' intent in adopting *subsection (g)(10)* in light of the rest of *§ 1357(g).* Giving *subsection (g)(10)* the breadth of its isolated meaning would completely nullify the rest of *§ 1357(g),* which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision. *Subsection (g)(10)* does not operate as a broad alternative grant of authority for state officers to systematically enforce the INA outside of the restrictions set forth in *subsections (g)(1)-(9).*

The inclusion of the word "removal" in *subsection (g)(10)(B)* supports our narrow interpretation of *subsection (g)(10).* Even state and local officers authorized under *§ 1357(g)* to investigate, apprehend, or detain immigrants do not have [*19] the authority to remove immigrants; removal is exclusively the purview of the federal government. By including "removal" in *§ 1357(g)(10)(B),* we do not believe that Congress intended to grant states the authority to remove immigrants. Therefore, the inclusion of "removal" in the list of ways that a state may "otherwise [ ] cooperate with the Attorney General," indicates that *subsection (g)(10)* does not permit states to opt out of *subsections (g)(1)-(9)* and systematically enforce the INA in a manner dictated by state law, rather than by the Attorney General. We therefore interpret *subsection (g)(10)(B)* to mean that when the Attorney General calls upon state and local law enforcement officers--or such officers are confronted with the necessity--to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for *systematic* and *routine* cooperation. [8] Similarly, we interpret *subsection (g)(10)(A)* to mean that state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of [*20] their regular state duties. But *subsection (g)(10)(A)* does not permit states to adopt laws dictating how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual. *Subsection (g)(10)* does not exist in a vacuum; Congress enacted it alongside *subsections (g)(1)-(9)* and we therefore interpret *subsection (g)(10)* as part of a whole, not as an isolated provision with a meaning that is unencumbered by the other constituent parts of *§ 1357(g).* [9]

> 8 In a footnote, the dissent constructs an imaginary scenario where officers in the Pima County Sheriff's Office are confused by our holding that they must have a *§ 1357(g)* agreement to cooperate with federal officials in immigration enforcement on a systematic and routine basis. Dissent at 4866, n.9. We trust that law enforcement officers will make good faith efforts to comply with our interpretation of federal law and will carry out their duties accordingly.
>
> 9 Our interpretation of *subsection (g)(10)* is also

> supported by *8 U.S.C. § 1103(a)(10)*, which states that "[i]n the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of [*21] the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service." If *subsection (g)(10)* meant that state and local officers could routinely perform the functions of DHS officers outside the supervision of the Attorney General, there would be no need for Congress to give the Attorney General the ability, in *§ 1103(a)(10)*, to declare an "actual or imminent mass influx of aliens," and to authorize "any State or local law enforcement officer" to perform the functions of a DHS officer.

In sum, *8 U.S.C. § 1357(g)* demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General--to whom Congress granted discretion in determining the precise conditions and direction of each state [*22] officer's assistance. We find it particularly significant for the purposes of the present case that this discretion includes the Attorney General's ability to make an individual officer's immigration-enforcement duties permissive or mandatory. *8 U.S.C. § 1357(g)(5)*. Section 2(B) sidesteps Congress' scheme for permitting the states to assist the federal government with immigration enforcement. Through Section 2(B), Arizona has enacted a mandatory and systematic scheme that conflicts with Congress' explicit requirement that in the "[p]erformance of immigration officer functions by State officers and employees," such officers "shall be subject to the direction and supervision of the Attorney General." *8 U.S.C. § 1357(g)(3)*. Section 2(B) therefore interferes with Congress' scheme because Arizona has assumed a role in directing its officers how to enforce the INA. We are not aware of any INA provision demonstrating that Congress intended to permit states to usurp the Attorney General's role in directing state enforcement of federal immigration laws.

Arizona argues that in another INA provision, "Congress has expressed a clear intent to *encourage* the assistance from state and local law enforcement [*23] officers," citing *8 U.S.C. § 1373(c)*. *Section 1373(c)* creates an obligation, on the part of the Department of Homeland Security ("DHS"), to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law."

We agree that *§ 1373(c)* demonstrates that Congress contemplated state assistance in the identification of undocumented immigrants. [10] We add, however, that Congress contemplated this assistance within the boundaries established in *§ 1357(g)*, not in a manner dictated by a state law that furthers a state immigration policy. Congress passed *§ 1373(c)* at the same time that it added *subsection (g) to § 1357*. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, §§ 133, 642 (1996). Thus, Congress directed the appropriate federal agency to respond to state inquiries about immigration status at the same time that it authorized the Attorney General to enter into *§ 1357(g)* agreements with states. Arizona and the dissent urge a very broad interpretation of *§ 1373(c)*: because DHS is obligated to respond to identity inquiries from state and local [*24] officers, they argue, Arizona must be permitted to direct its officers how and when to enforce federal immigration law in furtherance of the state's own immigration policy of attrition. This interpretation would result in one provision swallowing all ten subsections of *§ 1357(g)*, among other INA sections. Our task, however, is not to identify one INA provision and conclude that its text alone holds the answer to the question before us. Rather, we must determine how the many provisions of a vastly complex statutory scheme function together. Because our task is to interpret the meaning of many INA provisions as a whole, not *§ 1373(c)* and *§ 1357(g)(10)* at the expense of all others, we are not persuaded by the dissent's argument, which considers these provisions in stark isolation from the rest of the statute. [11]

> 10 We also agree with the dissent that "Congress envisioned, intended, and encouraged inter-governmental cooperation between state and federal agencies, at least as to information regarding a person's immigration status." Dissent at 4879. We are convinced, however, that this cooperation is to occur on the federal government's terms, not on those mandated by

Arizona. In light of [*25] the dissent's extensive discussion of the word "cooperate," we note what would seem to be fairly obvious: given that the United States has had to sue the State of Arizona to stop it from enforcing S.B. 1070, it is quite clear that Arizona is not "cooperating" with the federal government in any sense of the word. Arizona does not seek intergovernmental cooperation--it seeks to pursue its own policy of "attrition through enforcement." S.B. 1070 § 1.

11 Arizona also cites *8 U.S.C. §§ 1373(a)* and *1644* in support of its argument that "Congress has expressed a clear intent to *encourage* the assistance from state and local law enforcement officers." These sections are anti-sanctuary provisions. That the federal government prohibits States from *impeding* the enforcement of federal immigration laws does not constitute an invitation for states to affirmatively enforce immigration laws outside Congress' carefully constructed *§ 1357(g)* system.

In addition to providing the Attorney General wide discretion in the contents of each *§ 1357(g)* agreement with a state, Congress provided the Executive with a fair amount of discretion to determine how *federal* officers enforce immigration law. The majority of *§ 1357* [*26] grants powers to DHS officers and employees to be exercised within the confines of the Attorney General's regulations; this section contains few mandatory directives from Congress to the Attorney General or DHS. The Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement within DHS has explained the purpose of this Congressionally-granted discretion: "DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities" which "necessitates prioritization to ensure ICE expends resources most efficiently to advance the goals of protecting national security, protecting public safety, and securing the border."

By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement, turning Arizona officers into state-directed DHS agents. As a result, Section 2(B) interferes with Congress' delegation of discretion to the Executive branch in enforcing the INA. To assess the impact of this interference in our preemption analysis, we are guided by the Supreme Court's decisions in *Crosby, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352*, [*27] and *Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*. *In Crosby*, where the Court found that a state law was preempted because it posed an obstacle to Congress' intent, the Court observed that "Congress clearly intended the federal Act to provide the President with flexible and effective authority," and that the state law's "unyielding application undermines the President's intended statutory authority." *530 U.S. at 374, 377*. In *Buckman*, the Court found that state fraud-on-the-Food And Drug Administration claims conflicted with the relevant federal statute and were preempted, in part because "flexibility is a critical component of the statutory and regulatory framework" of the federal law, and the preempted state claims would have disrupted that flexibility. *531 U.S. at 349*. The Court observed that "[t]his flexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives." *Id*.

In light of this guidance, Section 2(B)'s interference with Congressionally-granted Executive discretion weighs in favor of preemption. Section 2(B)'s 'unyielding" mandatory directives to Arizona law enforcement officers [*28] "undermine[ ] the President's intended statutory authority" to establish immigration enforcement priorities and strategies. *Crosby, 530 U.S. at 377*. Furthermore, "flexibility is a critical component of the statutory and regulatory framework under which the" Executive "pursues [the] difficult (and often competing) objectives," *Buckman, 531 U.S. at 349*, of--according to ICE --"advanc[ing] the goals of protecting national security, protecting public safety, and securing the border." Through Section 2(B), Arizona has attempted to hijack a discretionary role that Congress delegated to the Executive.

In light of the above, S.B. 1070 Section 2(B) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the aforementioned INA provisions. *Hines, 312 U.S. at 67*. The law subverts Congress' intent that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General. Furthermore, the mandatory nature of Section 2(B)'s immigration status checks is inconsistent with the discretion Congress vested in the Attorney General to supervise and direct State officers in their immigration

work [*29] according to federally-determined priorities. *8 U.S.C. § 1357(g)(3)*.

In addition to Section 2(B) standing as an obstacle to Congress' statutorily expressed intent, the record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption. *See generally Garamendi, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376* (finding obstacle preemption where a State law impinged on the Executive's authority to singularly control foreign affairs); *Crosby, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352* (same). In *Garamendi*, the Court stated that "even . . . the *likelihood* that state legislation will produce something more than *incidental* effect in conflict with express foreign policy of the National Government would require preemption of the state law." *539 U.S. at 420* (emphasis added). [12]

> 12 The Court's decision in *Hines, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581*, demonstrates that the Court has long been wary of state statutes which may interfere with foreign relations. In *Hines*, the Court considered whether Pennsylvania's 1939 Alien Registration Act survived the 1940 passage of the federal Alien Registration Act. *Id. at 59-60*. The Court found that the Pennsylvania Act could not stand because Congress "plainly manifested [*30] a purpose . . . to leave [law-abiding immigrants] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations." *Id. at 74*.

The record before this court demonstrates that S.B. 1070 does not threaten a "*likelihood* . . . [of] produc[ing] something more than *incidental* effect;" rather, Arizona's law has created *actual* foreign policy problems of a magnitude far greater than incidental. *Garamendi, 539 U.S. at 419* (emphasis added). Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.

In addition to criticizing S.B. 1070, Mexico has taken affirmative steps to protest it. As a direct result of the Arizona law, at least five of the six Mexican [*31] Governors invited to travel to Phoenix to participate in the September 8-10, 2010 U.S.-Mexico Border Governors' Conference declined the invitation. The Mexican Senate has postponed review of a U.S.-Mexico agreement on emergency management cooperation to deal with natural disasters.

In *Crosby*, the Supreme Court gave weight to the fact that the Assistant Secretary of State said that the state law at issue "has complicated its dealings with foreign sovereigns." *530 U.S. at 383-84*. Similarly, the current Deputy Secretary of State, James B. Steinberg, has attested that S.B. 1070 "threatens at least three different serious harms to U.S. foreign relations." [13] In addition, the Deputy Assistant Secretary for International Policy and Acting Assistant Secretary for International Affairs at DHS has attested that Arizona's immigration law "is affecting DHS's ongoing efforts to secure international cooperation in carrying out its mission to safeguard America's people, borders, and infrastructure." The Supreme Court's direction about the proper use of such evidence is unambiguous: "statements of foreign powers necessarily involved[,] . . . indications of concrete disputes with those powers, and opinions [*32] of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act." *Crosby, 530 U.S. at 385*. [14] Here, we are presented with statements attributable to foreign governments necessarily involved and opinions of senior United States' officials: together, these factors persuade us that Section 2(B) thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs.

> 13 Arizona submitted a declaration from Otto Reich, who served in previous Administrations as, among other things, the U.S. Ambassador to Venezuela, former Assistant Administrator of USAID, and the Assistant Secretary of State for Western Hemisphere Affairs. Mr. Reich currently works in the private sector, and as a result, the district court could properly give little weight to his rebuttal of Mr. Steinberg's assertions about the impact of S.B. 1070 on current foreign affairs.
>
> 14 Thus, Arizona's extensive criticism of this

court for permitting foreign governments to file Amicus Curiae briefs is misguided. These briefs are relevant to our decision-making in this case insofar as they demonstrate the *factual* [*33] effects of Arizona's law on U.S. foreign affairs, an issue that the Supreme Court has directed us to consider in preemption cases.

Similarly, the dissent asserts that our reasoning grants a "heckler's veto" to foreign ministries and argues that a "foreign nation may not cause a state law to be preempted simply by complaining about the law's effects on foreign relations generally." Dissent at 4880. As a preliminary matter, we disagree with the dissent's characterization of our opinion, as we do not conclude that a foreign government's complaints *alone* require preemption. Our consideration of this evidence is consistent with the Supreme Court's concern that we not disregard or minimize the importance of such evidence. *Garamendi, 539 U.S. at 419*; *Crosby, 530 U.S. at 385-86*. Moreover, the dissent implies that S.B. 1070 is merely an internal affair, which is contrary to the Supreme Court's opinion in *Hines*. In striking down the Pennsylvania 1939 Alien Registration Act, the Court stated that:

> The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. [*34] "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.
>
> *Hines, 312 U.S. at 62* (quoting *The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606, 9 S. Ct. 623, 32 L. Ed. 1068 (1889))*.

Finally, the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption. In *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc., 475 U.S. 282, 288, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)*, where the Court found conflict preemption, the Court explained that "[e]ach additional [state] statute incrementally diminishes the [agency's] control over enforcement of the [federal statute] and thus further detracts from the integrated scheme of regulation created by Congress." (internal citations omitted). *See also Buckman, 531 U.S. at 350* ("[a]s a practical matter, complying with the [federal [*35] law's] detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants-burdens not contemplated by Congress in enacting the [federal laws]").

In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 2(B) would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

III. Section 3

S.B. 1070 Section 3 provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of *8 United States Code section 1304(e)* or *1306(a)*." [15] *Ariz. Rev. Stat. Ann. § 13-1509(A)* (2010). The penalty for violating Section 3 is a maximum fine of one hundred dollars, a maximum of twenty days in jail for a first violation, and a maximum of thirty days in jail for subsequent violations. *Ariz. Rev. Stat. Ann. § 13-1509(H)*. Section 3 "does not apply to a person who maintains authorization from the federal government to remain in the United States." *Ariz. Rev. Stat. Ann. § 13-1509(F)* [*36] (2010). Section 3 essentially makes it a state crime for unauthorized immigrants to violate federal registration laws.

> 15 *8 U.S.C. § 1304(e)* provides: "Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal

> possession any certificate of alien registration or alien registration receipt card issued to him pursuant to *subsection (d)* of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both."
>
> *8 U.S.C. § 1306(a)* further provides: "Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both."

Starting with the touchstones of preemption, punishing [*37] unauthorized immigrants for their failure to comply with federal registration laws is not a field that states have "traditionally occupied." *Wyeth, 129 S. Ct. at 1194* (internal quotations and citations omitted); *see generally Hines, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581*. Therefore, we conclude that there is no presumption against preemption of Section 3.

Determining Congress' purpose, and whether Section 3 poses an obstacle to it, first requires that we evaluate the text of the federal registration requirements in *8 U.S.C. §§ 1304* and *1306*. These sections create a comprehensive scheme for immigrant registration, including penalties for failure to carry one's registration document at all times, *8 U.S.C. § 1304(e)*, and penalties for willful failure to register, failure to notify change of address, fraudulent statements, and counterfeiting. *8 U.S.C. § 1306 (a)-(d)*. These provisions include no mention of state participation in the registration scheme. By contrast, Congress provided very specific directions for state participation in *8 U.S.C. § 1357*, demonstrating that it knew how to ask for help where it wanted help; it did not do so in the registration scheme.

Arizona argues that Section 3 is not preempted because [*38] Congress has "invited states to reinforce federal alien classifications." Attempting to support this argument, Arizona cites INA sections outside the registration scheme where Congress has expressly indicated how and under what conditions states should help the federal government in immigration regulation. *See 8 U.S.C. §§ 1621-25, 1324a(h)(2)*. The sections Arizona cites authorize states to limit certain immigrants' eligibility for benefits and to impose sanctions on employers who employ unauthorized immigrants. We are not persuaded by Arizona's argument. An authorization from one section does not--without more--carry over to other sections. Nothing in the text of the INA's registration provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules.

In addition, S.B. 1070 Section 3 plainly stands in opposition to the Supreme Court's direction: "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict [*39] or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines, 312 U.S. at 66-67*. In *Hines*, the Court considered the preemptive effect of a precursor to the INA, but the Court's language speaks in general terms about "a complete scheme of regulation,"--as to registration, documentation, and possession of proof thereof-- which the INA certainly contains. Section 3's state punishment for federal registration violations fits within the Supreme Court's very broad description of proscribed state action in this area--which includes "complement[ing]" and "enforc[ing] additional or auxiliary regulations." [16] *Id.*

> 16 We are also unpersuaded by Arizona's contention that our decision in *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492 (9th Cir. 2005)*, permits the State to impose a requirement that is the same as the federal standard. In *Air Conditioning*, we considered the effect of an express preemption provision in a federal statute that regulated activity in an area "where there is no history of significant federal presence." *Id. at 494-96*. Therefore, we applied a presumption against preemption which [*40] required us to give the express preemption provision "a narrow interpretation." *Id. at 496*. By contrast, there is a "history of significant federal presence" in immigration registration, so there is no presumption against preemption of Section 3.

> Moreover, there is no express preemption provision in the federal registration scheme for this court to interpret--narrowly or otherwise. Therefore, our decision in *Air Conditioning* is not relevant here.

The Supreme Court's more recent preemption decisions involving comprehensive federal statutory schemes also indicate that federal law preempts S.B. 1070 Section 3. In *Buckman*, the Supreme Court held that the Food Drug and Cosmetics Act ("FDCA") conflict preempted a state law fraud claim against defendants who allegedly made misrepresentations to the Food and Drug Administration ("FDA"). *531 U.S. at 343*. The Court explained that private parties could not assert state-fraud on the FDA claims because, "the existence of the[ ] federal enactments is a critical element in their case." *Id. at 353*. The same principle applies here to S.B. 1070 Section 3, which makes the substantive INA registration requirements "a critical element" of the state law.

By [*41] contrast, the Supreme Court found that state law claims were not preempted in *Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)* (holding that an express preemption provision in the federal Medical Device Amendments to the FDCA did not preclude a state common law negligence action against the manufacturer of an allegedly defective medical device), *Altria Grp., Inc. v. Good, 555 U.S. 70, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008)* (holding that the federal Labeling Act did not expressly preempt plaintiffs' claims under the Maine Unfair Trade Practices Act alleging that Altria's advertising of light cigarettes was fraudulent), or *Wyeth, 129 S. Ct. at 1193* (holding that the FDA's drug labeling judgments pursuant to the FDCA did not obstacle preempt state law products liability claims). In these cases, the state laws' "generality le[ft] them outside the category of requirements that [the federal statute] envisioned." *Medtronic, 518 U.S. at 502*. The state law claim in *Medtronic* was negligence, *518 U.S. at 502*, the state statute in *Altria* was unfair business practices, *129 S. Ct. at 541*, and the state law claim in *Wyeth* was products liability, *129 S. Ct. at 1193*. All of the state laws at issue in these cases had significantly wider [*42] applications than the federal statutes that the Court found did not preempt them. Here, however, Section 3's "generality" has no wider application than the INA.

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 3.

In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 3 would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

IV. Section 5(C)

S.B. 1070 Section 5(C) provides that it "is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." *Ariz. Rev. Stat. Ann. § 13-2928(C)* (2010). Violation of this provision is a class 1 misdemeanor, which carries a six month maximum term of imprisonment. *Ariz. Rev. Stat. Ann. §§ 13-2928(F),* [*43] *13-707(A)(1)* (2010). Thus, Section 5(C) criminalizes unauthorized work and attempts to secure such work.

We have previously found that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of nonpreemption applies here." *Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 865 (9th Cir. 2009), cert. granted, Chamber of Commerce of the U.S. v. Candelaria, 130 S. Ct. 3498, 177 L. Ed. 2d 1088 (2010)*. Therefore, with respect to S.B. 1070 Section 5(C), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth, 129 S. Ct. at 1194* (internal quotations and citations omitted) (quoting *Medtronic, 518 U.S. at 485*).

Within the INA, Congress first tackled the problem of unauthorized immigrant employment in the Immigration Reform and Control Act of 1986 ("IRCA"). We have previously reviewed IRCA's legislative history and Congress' decision not to criminalize unauthorized work. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S., 913 F.2d 1350 (9th Cir. 1990), rev'd on other grounds, 502 U.S. 183, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991)*. In [*44] this case, we are bound by our holding in *National Center* regarding Congressional intent.

In *National Center*, we considered whether the INA, through *8 U.S.C. § 1252(a)*, authorized the Immigration and Naturalization Service ("INS") to promulgate regulations which "imposed a condition against employment in appearance and delivery bonds of aliens awaiting deportation hearings." *Id. at 1351*. To decide this question, we carefully reviewed the history of employment-related provisions in the INA's legislative scheme--including the legislative history of the IRCA amendments. *Id. at 1364-70*. We concluded that "[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals . . . Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work." [17] *Id. at 1367-68*.

17 We find it particularly relevant here that during the hearings which shaped IRCA, the Executive Assistant to the INS Commissioner stated that the INS did "not expect the individual to starve in the United States while [*45] he is exhausting both the administrative and judicial roads that the [INA] gives him." *National Center, 913 F.2d at 1368*.

At oral argument, Arizona asserted that National Center does not control our analysis of Section 5(C) because it addressed the limited issue of whether the INS could require a condition against working in appearance and delivery bonds, which--according to Arizona--has no application to whether a state statute can criminalize unauthorized work. We agree that the ultimate legal question before us in *National Center* was distinct from the present dispute. Nonetheless, we do not believe that we can revisit our previous conclusion about Congress' intent simply because we are considering the effect of that intent on a different legal question. *See Overstreet v. United Bhd. of Carpenters and Joiners of America, Local Union No. 1506, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005)* ("Ordinarily, a three-judge panel 'may not overrule a prior decision of the court.'" (quoting *Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003)* (en banc)). Therefore, our decision in *National Center* requires us to conclude that federal law likely preempts S.B. 1070 Section 5(C), since the state law conflicts [*46] with what we have found was Congress' IRCA intent.

The text of the relevant IRCA statutory provision--*8 U.S.C. § 1324a*--also supports this conclusion. *Section 1324a* establishes a complex scheme to discourage the employment of unauthorized immigrants--primarily by penalizing employers who knowingly or negligently hire them. The statute creates a system through which employers are obligated to verify work authorization. [18] *8 U.S.C. § 1324a(b)*. The verification process includes a requirement that potential employees officially attest that they are authorized to work. *8 U.S.C. § 1324a(b)(2)*. The statute provides that the forms potential employees use to make this attestation "may not be used for purposes other than for enforcement of this chapter and" *18 U.S.C. §§ 1001, 1028, 1546* and *1621*. *8 U.S.C. § 1324a(b)(5)*. These sections of Title 18 criminalize knowingly making a fraudulent statement or writing; knowingly making or using a false or stolen identification document; forging or falsifying an immigration document; and committing perjury by knowingly making a false statement after taking an oath in a document or proceeding to tell the truth. This is the exclusive punitive provision against [*47] unauthorized workers in *8 U.S.C § 1324a*. All other penalties in the scheme are exacted on employers, reflecting Congress' choice to exert the vast majority of pressure on the employer side.

18 In *Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009), cert. granted sub nom., Chamber of Commerce of the U.S. v. Candelaria, 130 S. Ct. 3498, 177 L. Ed. 2d 1088 (2010)*, we held that IRCA did not preempt the Legal Arizona Workers Act, *Ariz. Rev. Stat. Ann. § 23-211 et seq*. IRCA contains an express preemption provision, as well as a savings clause: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." *8 U.S.C. § 1324a(h)(2)*. In *Chicanos*, we held that the Legal Arizona Workers Act --which targets employers who hire undocumented immigrants and revokes their state business licenses--fits within Congress' intended meaning of "licensing" law in IRCA's savings clause and is therefore not preempted. *558 F.3d at 864-66*. We also held that the INA, which makes the use of E-Verify voluntary, does not impliedly preempt Arizona from mandating that employers use the E-Verify [*48] system. *Id. at 866-67*. Although *Chicanos* and the present case both broadly concern the preemptive effect of IRCA, the specific issues in

> these cases do not overlap. The scope of "licensing" law in the savings clause of the express preemption provision in IRCA has no bearing on whether IRCA impliedly preempts Arizona from enacting sanctions against undocumented workers.

In addition, other provisions in *8 U.S.C. § 1324a* provide affirmative protections to unauthorized workers, demonstrating that Congress did not intend to permit the criminalization of work. *Subsection 1324a(d)(2)(C)* provides that "[a]ny personal information utilized by the [authorization verification] system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien." This provision would prohibit Arizona from using personal information in the verification system for the purpose of investigating or prosecuting violations of S.B. 1070 Section 5(C). *Subsection 1324a(d)(2)(F)* provides in even clearer language that "[t]he [verification] system may not be used for law enforcement purposes, other than for enforcement [*49] of this chapter or" the aforementioned Title 18 fraud sections.

Subsection 1324a(g)(1) demonstrates Congress' intent to protect unauthorized immigrant workers from financial exploitation--a burden less severe than incarceration. This section provides that "[i]t is unlawful for a person or other entity, in the hiring . . . of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring . . . of the individual." *Subsection 1324a(e)* provides for a system of complaints, investigation, and adjudication by administrative judges for employers who violate *subsection (g)(1)*. The penalty for a violation is "$1,000 for each violation" and "an administrative order requiring the return of any amounts received . . . to the employee or, if the employee cannot be located, to the general fund of the Treasury." *8 U.S.C. § 1324a(g)(2)*. Here, Congress could have required that employers repay only authorized workers from whom they extracted a financial bond. Instead, Congress required employers to repay any employee --including [*50] undocumented employees. Where Congress did not require undocumented workers to forfeit their bonds, we do not believe Congress would sanction the criminalization of work.

We therefore conclude that the text of *8 U.S.C. § 1324a*, combined with legislative history demonstrating Congress' affirmative choice not to criminalize work as a method of discouraging unauthorized immigrant employment, likely reflects Congress' clear and manifest purpose to supercede state authority in this context. We are further guided by the Supreme Court's decision in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988)*. There, the Court explained:

> [D]eliberate federal inaction could always imply preemption, which cannot be. There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn--not from federal inaction alone, but from inaction joined with action.

Id. at 503. Given the facts in *Isla*, the Court could not draw this preemptive inference because "Congress ha[d] withdrawn from all substantial [*51] involvement in petroleum allocation and price regulation." *Id. at 504*.

The present case, however, presents facts likely to support the kind of preemptive inference that the Supreme Court endorsed, but did not find, in *Isla*. Here, Congress' inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work. Far from the situation in *Isla*, Congress has not "withdrawn all substantial involvement" in preventing unauthorized immigrants from working in the United States. It has simply chosen to do so in a way that purposefully leaves part of the field unregulated.

We are also guided by the Supreme Court's recognition, even before IRCA, that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984)*. As Arizona states, "Section 5(C) clearly furthers the strong federal policy of prohibiting illegal aliens from seeking employment in the United States." The Supreme Court has cautioned, however, that "conflict in technique can be

fully as disruptive to the system Congress erected [*52] as conflict in overt policy." *Gould, 475 U.S. at 286* (quoting *Motor Coach Emps. v. Lockridge, 403 U.S. 274, 287, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971))*. *In Crosby*, the Court explained that "a common end hardly neutralizes conflicting means." *530 U.S. at 379-80*. Similarly, in *Garamendi*, the Court explained that a state law was preempted because "[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves." *539 U.S. at 427*. The problem with a state adopting a different technique in pursuit of the same goal as a federal law, is that "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions . . . undermines the congressional calibration of force." *Crosby, 530 U.S. at 380*.

In the context of unauthorized immigrant employment, Congress has deliberately crafted a very particular calibration of force which does not include the criminalization of work. By criminalizing work, S.B. 1070 Section 5(C) constitutes a substantial departure from the approach Congress has chosen to battle this particular problem. Therefore, Arizona's assertion that this provision "furthers the strong federal policy" does not advance [*53] its argument against preemption. Sharing a goal with the United States does not permit Arizona to "pull[ ] levers of influence that the federal Act does not reach." *Crosby, 530 U.S. at 376*. By pulling the lever of criminalizing work--which Congress specifically chose not to pull in the INA--Section 5(C) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, 312 U.S. at 67*. It is therefore likely that federal law preempts Section 5(C).

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 5(C).

In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 5(C) would not be preempted, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

V. Section 6

S.B. 1070 Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer [*54] has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." [19] *Ariz. Rev. Stat. Ann. § 13-3883(A)(5)* (2010).

> 19 Arizona law defines "public offense" as "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state." *Ariz. Rev. Stat. Ann. § 13-105(26)* (2009).

We first address the meaning of this Section. S.B. 1070 Section 6 added only *subsection 5 to Ariz. Rev. Stat. Ann. § 13-3883(A)*, which authorizes warrantless arrests. *Section 13-3883(A)* already allowed for warrantless arrests for felonies, misdemeanors, petty offenses, and certain traffic-related criminal violations. Therefore, to comply with Arizona case law that "[e]ach word, phrase, clause, and sentence . . . must be given meaning so that no part will be void, inert, *redundant*, [*55] or trivial," *Williams v. Thude, 188 Ariz. 257, 934 P.2d 1349, 1351 (Ariz. 1997)* (internal quotations omitted), we conclude, as the district court did, that Section 6 "provides for the warrantless arrest of a person where there is probable cause to believe the person *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States." *703 F. Supp. 2d at 1005* (emphasis in original). Section 6 also allows for warrantless arrests when there is probable cause to believe that an individual committed a removable offense in Arizona, served his or her time for the criminal conduct, and was released; and when there is probable cause to believe that an individual was arrested for a removable offense but was not prosecuted.

Thus, the question we must decide is whether federal law likely preempts Arizona from allowing its officers to effect warrantless arrests based on probable cause of removability. Because arresting immigrants for civil immigration violations is not a "field which the States have traditionally occupied," we do not start with a

presumption against preemption of Section 6. *Wyeth, 129 S. Ct. at 1194*.

We [*56] first turn to whether Section 6 is consistent with Congressional intent. As authorized by *8 U.S.C. § 1252c*, state and local officers may, "to the extent permitted by relevant State . . . law," arrest and detain an individual who:

> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, *but only after* the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual.

8 U.S.C. § 1252c (emphasis added). Nothing in this provision permits warrantless arrests, and the authority is conditioned on compliance with a mandatory obligation to confirm an individual's status with the federal government prior to arrest. Moreover, this provision only confers state or local arrest authority where the immigrant has been convicted of a felony. Section 6, by contrast, permits warrantless arrests if there is probable cause that a person has "committed any public offense that makes the person removable." Misdemeanors, not just felonies, can result in removablility. *See generally Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006)* [*57] (en banc). Thus, Section 6 authorizes state and local officers to effectuate more intrusive arrests than Congress has permitted in *Section 1252c*. [20] Moreover, none of the circumstances in which Congress has permitted federal DHS officers to arrest immigrants without a warrant are as broad as Section 6. Absent a federal officer actually viewing an immigration violation, warrantless arrests under *8 U.S.C. § 1357(a)* require a likelihood that the immigrant will escape before a warrant can be obtained. *8 U.S.C. §§ 1357(a)(2), (a)(4), (a)(5)*. Section 6 contains no such requirement and we are not aware of any INA provision indicating that Congress intended state and local law enforcement officers to enjoy greater authority to effectuate a warrantless arrest than federal immigration officials.

20 Arizona argues that we should "construe[ ] section 6 so as to require officers to confirm with federal authorities that an alien has committed a public offense that makes the alien removable before making a warrantless arrest under section 6." Even if we interpreted Section 6 as Arizona suggests, the provision would still permit more intrusive state arrests than Congress has sanctioned, because it permits [*58] arrests on the basis of misdemeanor removability, which Congress has not provided for in *8 U.S.C. § 1252c*. Further, even if a law enforcement officer confirmed with the federal government that an individual had been convicted of murder--a felony that would clearly result in removability, *see 8 U.S.C. § 1227(a)(2)(A)(iii)*--Section 6 would still expand the scope of *§ 1252c* by permitting warrantless arrests.

Thus, Section 6 significantly expands the circumstances in which Congress has allowed state and local officers to arrest immigrants. Federal law does not allow these officers to conduct warrantless arrests based on probable cause of *civil* removability, but Section 6 does. Therefore, Section 6 interferes with the carefully calibrated scheme of immigration enforcement that Congress has adopted, and it appears to be preempted. Arizona suggests, however, that it has the inherent authority to enforce federal *civil* removability without federal authorization, and therefore that the United States will not ultimately prevail on the merits. We do not agree. Contrary to the State's view, we simply are not persuaded that Arizona has the authority to unilaterally transform state and local law enforcement [*59] officers into a state-controlled DHS force to carry out its declared policy of attrition.

We have previously suggested that states do not have the inherent authority to enforce the civil provisions of federal immigration law. In *Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983), overruled on other grounds by Hodgers- Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999)*, we held that "federal law does not preclude local enforcement of the *criminal* provisions of the [INA]." (Emphasis added). There, we "assume[d] that the *civil* provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." *Id. at 474-75* (emphasis added). We are not aware of any binding authority holding that states possess

the inherent authority to enforce the civil provisions of federal immigration law--we now hold that states do not have such inherent authority. [21]

> 21 The dissent argues that "the Supreme Court explicitly recognized--in one of our California cases--that state police officers have authority to question a suspect regarding his or her immigration [*60] status." Dissent at 4887 (citing *Muehler v. Mena, 544 U.S. 93, 101, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005)).* The dissent mischaracterizes the issue in *Mena* and the facts of the case in order to make it appear relevant to the case before us now. The Court explained that "[a]s the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the *Fourth Amendment*. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status." *Id. at 101*. In summarizing the facts of the case, the Court explained that, "[a]ware that the West Side Locos gang was composed primarily of illegal immigrants, the officers had notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During their detention in the garage, an officer asked for each detainee's name, date of birth, place of birth, and immigration status. The INS officer later asked the detainees for their immigration documentation." *Id. at 96*. Thus, contrary to the dissent's contention, *Mena* did not recognize that state officers can enforce [*61] federal civil immigration law with no federal supervision or involvement.

The Sixth Circuit has come to the same conclusion. *United States v. Urrieta, 520 F.3d 569 (6th Cir. 2008).* [22] In *Urrieta*, the court explained that "[i]n its response to Urrieta's motion to suppress evidence, the government originally argued that Urrieta's extended detention was justified on the grounds that . . . [county] Deputy Young had reason to suspect that Urrieta was an undocumented immigrant. The government withdrew th[is] argument, however, after conceding that [it] misstated the law." *Id. at 574*. The Sixth Circuit cited *8 U.S.C. § 1357(g)*, which it summarized as "stating that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions." *Id*. Therefore, the court required that "[t]o justify Urrieta's extended detention [ ] the government must point to specific facts demonstrating that Deputy Young had a reasonable suspicion that Urrieta was engaged in some nonimmigration-related illegal activity." *Id*.

> 22 The dissent's characterization of our discussion of *Urrieta* [*62] is inaccurate. *See* Dissent at 4884-85. We do not "rely" on *Urrieta* to conclude that states do not have the inherent authority to enforce the civil provisions of federal immigration law. We cite this case in laying out the existing legal landscape on this issue.
>
> In addition, the dissent states that we "ignore clear Supreme Court precedent" in concluding states do not possess this inherent authority. Dissent at 4886. The dissent cites three Supreme Court cases dealing with state officers enforcing federal *criminal* laws. These cases are inapposite, as Section 6 concerns state enforcement of federal *civil* immigration laws. Although the dissent conflates federal criminal and civil immigration laws in this matter, this court has long recognized the distinction. *See Martinez-Medina v. Holder, F.3d , 2011 U.S. App. LEXIS 5341, 2011 WL 855791 *6 (9th Cir. 2011)* ("Nor is there any other federal criminal statute making unlawful presence in the United States, alone, a federal crime, although an alien's willful failure to register his presence in the United States when required to do so is a crime . . . and other criminal statutes may be applicable in a particular circumstance. Therefore, Gonzales's observation that [*63] 'an alien who is illegally present in the United States . . . [commits] only a civil violation,' and its holding that an alien's 'admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry,' always were, and remain, the law of the circuit, binding on law enforcement officers.") (quoting *Gonzales, 722 F.2d at 476-77 (9th Cir. 1983).*

We recognize that our view conflicts with the Tenth Circuit's. *See United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999)*. In *Vasquez-Alvarez*, the Tenth Circuit affirmed the denial of a motion to suppress where

the defendant's "arrest was based solely on the fact that Vasquez was an illegal alien." *Id. at 1295*. The arrest did not comply with the requirements of *8 U.S.C. § 1252c*, and the defendant argued that the evidence found as a result of that arrest should be suppressed. The Tenth Circuit disagreed, holding that *§ 1252c* "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal laws, including immigration laws." *Id. at 1295*. The Tenth Circuit based its conclusion on "*§ 1252c*'s legislative [*64] history and [ ] subsequent Congressional enactments providing additional nonexclusive sources of authority for state and local officers to enforce federal immigration laws." *Id. at 1299*. The legislative history to which the court refers consists of the comments of *§ 1252c*'s sponsor, Representative Doolittle. As the court recounts, Doolittle stated:

> With such a threat to our public safety posed by criminal aliens, one would think that we would give law enforcement all the tools it needs to remove these criminals from our streets, but unfortunately just the opposite is true. In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining *criminal aliens* whom they encountered through their routine duties
>
> . . .
>
> My amendment would also permit State and local law enforcement officials to assist the INS by granting them the authority in their normal course of duty to arrest and detain criminal aliens until the INS can properly take them into Federal [*65] custody.
>
> . . .
>
> My amendment is supported by our local law enforcement because they know that fighting illegal immigration can no longer be left solely to Federal agencies. Let us untie the hands of those we ask to protect us and include my amendment in H.R. 2703 today.

Id. at 1298 (citing 142 Cong. Rec. 4619 (1996) (comments of Rep. Doolittle)). Interpreting these comments, the Tenth Circuit stated: "As discussed at length above, *§ 1252c*'s legislative history demonstrates that the purpose of the provision was to eliminate perceived federal limitations . . . There is simply no indication whatsoever in the legislative history to *§ 1252c* that Congress intended to displace preexisting state or local authority to arrest individuals violating federal immigration laws." *Id. at 1299-1300*. [23]

> 23 The dissent alleges that we have improperly focused on a single Representative's comment in assessing the meaning of *§ 1252c*. Dissent at 4889-90. The dissent argues that we ought to follow the Tenth Circuit's example in *Vasquez-Alvarez* and hold that *§ 1252c* has no preemptive effect on a state's inherent ability to enforce the civil provisions of federal immigration law. Dissent at 4889-91. We note that the [*66] Tenth Circuit went to great lengths assessing and relying on the very legislative history that the dissent now chastises us for evaluating.

The Tenth Circuit's interpretation of this legislative history is not persuasive. *Section 1252c* was intended to grant authority to state officers to aid in federal immigration enforcement because Congress thought state officers lacked that authority. The Tenth Circuit's conclusion is nonsensical: we perceive no reason why Congress would display an intent "to displace preexisting . . . authority" when its purpose in passing the law was to grant authority it believed was otherwise lacking. *Id. at 1300*.

Vasquez-Alvarez also cited "subsequent Congressional enactments providing additional nonexclusive sources of authority for state and local officers to enforce federal immigration laws" in support of its conclusion that *§ 1252c* does not prevent state officers from making civil immigration-based arrests pursuant to state law. *Id. at 1299*. The court noted that "in the months following the enactment of *§ 1252c*, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal [*67] immigration

laws." *Id. at 1300* (citing *§ 1357(g)*). The court interpreted *§ 1357(g)(10)* to mean that "formal agreement [pursuant to *§ 1357(g) (1)-(9)*] is not necessary for state and local officers 'to cooperate with the Attorney General in identification, apprehension, detention, or removal of aliens.'" *Id. at 1300* (quoting *8 U.S.C. § 1357(g)(10)(B)*). To reason that the enactment of *§ 1357(g)* means that Congress did not intend to limit state and local officers' alleged inherent authority to make civil immigration arrests in *§ 1252c*, requires a broad reading of *§ 1357(g)(10)*; we explain above in II.B. the reasons why we reject such a broad reading of this provision.

Subsection (g)(10) neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision. If such authority existed, all of *8 U.S.C. § 1357(g)*--and *§ 1252c* for that matter--would be superfluous, and we do not believe that Congress spends its time passing unnecessary laws. [24]

> 24 The U.S. Department of Justice's Office of Legal Counsel ("OLC") issued a memorandum in 2002--at which time OLC was headed by then Assistant Attorney General Jay S. Bybee, now a [*68] United States Circuit Judge, as Arizona emphasizes--concluding that (1) the authority to arrest for violation of federal law inheres in the states, subject only to preemption by federal law; (2) a 1996 OLC memo incorrectly concluded that state police lack the authority to arrest immigrants on the basis of civil deportability; and (3) *8 U.S.C. § 1252c* does not preempt state arrest authority. To conclude that *§ 1252c* does not preempt inherent state arrest authority, the OLC memo relies entirely on the Tenth Circuit's decision in *Vasquez-Alvarez*--the logic of which we have already rejected.
>
> The dissent quotes from the 2002 OLC memo in claiming that *§ 1252c* is not made superfluous by interpreting it to have no preemptive effect. Dissent at 4893. We are neither persuaded, nor bound by the arguments in this memo. It is an axiomatic separation of powers principle that legal opinions of Executive lawyers are not binding on federal courts. The OLC memo itself demonstrates why this is: the OLC's conclusion about the issue in the 2002 memo was different in 1996 under the direction of President Clinton, and was different in 1989, under the direction of President George H.W. Bush.
>
> The dissent also [*69] claims that "Congress has authority to enact legislation which is designed merely to clarify, without affecting the distribution of power." Dissent at 4893. The dissent cites language from the Reaffirmation--Reference to One Nation Under God in the Pledge of Allegiance, stating, "An Act to reaffirm the reference to one Nation under God." Pub. L. No. 107-293 (2002). The dissent's argument is unavailing, as *§ 1252c* contains no reference to anything remotely related to a "reaffirmation" of a state's alleged inherent authority to enforce the civil provisions of federal immigration law.

In sum, we are not persuaded that Arizona has the inherent authority to enforce the *civil* provisions of federal immigration law. Therefore, Arizona must be federally-authorized to conduct such enforcement. Congress has created a comprehensive and carefully calibrated scheme--and has authorized the Executive to promulgate extensive regulations --for adjudicating and enforcing civil removability. S.B. 1070 Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the civil provisions of federal immigration law. Section 6 interferes with the federal government's prerogative [*70] to make removability determinations and set priorities with regard to the enforcement of civil immigration laws. Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress.

In addition, as detailed with respect to Section 2(B) above, S.B. 1070's detrimental effect on foreign affairs, and its potential to lead to 50 different state immigration schemes piling on top of the federal scheme, weigh in favor of the preemption of Section 6.

In light of the foregoing, we conclude that the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 6 would be valid, and it is likely to succeed on the merits of its challenge. The district court did not abuse its discretion by concluding the same.

VI. Equitable Factors

Once a party moving for a preliminary injunction has

demonstrated that it is likely to succeed on the merits, courts must consider whether the party will suffer irreparable harm absent injunctive relief, and whether the balance of the equities and the public interest favor granting an injunction. *Winter v. Natural Res. Def. Council Inc., 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008).*

We have "stated that an alleged [*71] constitutional infringement will often alone constitute irreparable harm." *Assoc. Gen. Contractors v. Coal. For Econ. Equity, 950 F.2d 1401, 1412 (9th Cir. 1991)* (internal quotation marks omitted). We have found that "it is *clear that it would not be equitable or in the public's interest to allow the state* . . . to violate the requirements of federal law, especially when there are no adequate remedies available . . . . In such circumstances, the interest of preserving the *Supremacy Clause* is paramount." *Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852-53 (9th Cir. 2009)* (emphasis added); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1059-60 (9th Cir. 2009)* (recognizing that the balance of equities and the public interest weighed in favor of granting a preliminary injunction against a likely-preempted local ordinance).

Accordingly, we find that as to the S.B. 1070 Sections on which the United States is likely to prevail, the district court did not abuse its discretion in finding that the United States demonstrated that it faced irreparable harm and that granting the preliminary injunction properly balanced the equities and was in the public interest.

Conclusion

For [*72] the foregoing reasons, we AFFIRM the preliminary injunction enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6.

AFFIRMED; REMANDED.

CONCUR BY: John T. Noonan; Carlos T. Bea (In Part)

CONCUR

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court. I write separately to emphasize the intent of the statute and its incompatibility with federal foreign policy.

Consideration of the constitutionality of the statute begins with Section 1 of the law, which in entirety, reads as follows:

> Sec. 1. Intent
>
> The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

This section of the act constitutes an authoritative statement of the legislative purpose. The purpose is "attrition," a noun which is unmodified but which can only refer [*73] to the attrition of the population of immigrants unlawfully in the state. The purpose is to be accomplished by "enforcement," also unmodified but in context referring to enforcement of law by the agencies of Arizona. The provisions of the act are "intended to work together." Working together, the sections of the statute are meant "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

It would be difficult to set out more explicitly the policy of a state in regard to aliens unlawfully present not only in the state but in the United States. The presence of these persons is to be discouraged and deterred. Their number is to be diminished. Without qualification, Arizona establishes its policy on immigration.

As Section 1 requires, each section of the statute must be read with its stated purpose in mind. Section 2 might, in isolation from Section 1, be read as requiring information only. Such a reading would ignore the intent established in Section 1, to secure attrition through enforcement. As the United States observes, Arizona already had the capability of obtaining information on immigrants by consulting [*74] the federal database maintained by the federal government. Section 2 of the statute provides for more -- for the detention of

immigrants to achieve the purpose of the statute. Section 2 is not intended as a means of acquiring information. It is intended to work with the other provisions of the act to achieve enforcement.

As the opinion of the court makes clear, Sections 3, 5 and 6 are unconstitutional. Section 2 is equally unconstitutional in its function as their support.

Section 1's profession of "cooperative" enforcement of federal immigration laws does not alter Arizona's enactment of its own immigration policy distinct from the immigration policy and the broader foreign policy of the United States.

Federal foreign policy is a pleonasm. What foreign policy can a federal nation have except a national policy? That fifty individual states or one individual state should have a foreign policy is absurdity too gross to be entertained. In matters affecting the intercourse of the federal nation with other nations, the federal nation must speak with one voice.

That immigration policy is a subset of foreign policy follows from its subject: the admission, regulation and control of foreigners within [*75] the United States. By its subject, immigration policy determines the domestication of aliens as American citizens. It affects the nation's interactions with foreign populations and foreign nations. It affects the travel of foreigners here and the trade conducted by foreigners here. It equally and reciprocally bears on the travel and trade of Americans abroad. As the declarations of several countries or governmental bodies demonstrate in this case, what is done to foreigners here has a bearing on how Americans will be regarded and treated abroad.

That the movement of the people of one nation into the boundaries of another nation is a matter of national security is scarcely a doubtful or debatable matter. Almost everyone is familiar with how the movement of the Angles and the Saxons into Roman Britain transformed that country. The situation of the United States is less precarious. Nonetheless, an estimated 10.8 million foreigners have illegally taken up residence in our country. U.S. Dept. of Homeland Sec., Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010* at 2. True, at the maximum, their number is less than [*76] 4% of our population. They are not about to outnumber our citizens. Still, in individual towns and areas those illegally present can be a substantial presence. In the state of Arizona, their esti- mated number is 470,000, or seven percent of the population of the state. *Id*. at 4.

The local impact appears to call for local response. Yet ineluctably the issue is national. The people of other nations are entering our nation and settling within its borders contrary to our nation's stated requirements. We must deal with people of other nations and so must deal with other nations. The problems are local but our whole nation is affected. Reasonably, the nation has made enforcement of criminal sanctions against aliens criminally present in the United States the top priority of the federal government. United States Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2009* at 1.

Against this background, the following propositions are clear:

The foreign policy of the United States preempts the field entered by Arizona. Foreign policy is not and cannot be determined by the several states. Foreign policy is determined by the nation as the nation interacts with other nations. Whatever [*77] in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field.

Federal foreign policy is determined by Congress when Congress exercises the power to declare war conferred upon it by Article I, Section 8 of the Constitution. Foreign policy is also determined by the Senate when it exercises the power to ratify a treaty, the power conferred upon it by Article II, Section 2. Congress also determines foreign policy when it lays excise taxes upon foreign imports under Article I, Section 8. Congress further determines foreign policy when it authorizes sanctions against a nation, e.g., *Crosby v. National Foreign Trade Council, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*.

The foreign policy of the nation consists in more than a declaration of war, the making of a treaty, the imposition of a tax, and the imposition of sanctions. The foreign policy of the nation is also established by acts of executive power -- among others, executive agreements with foreign nations; the appointment of ambassadors to foreign nations; the exchange of information with foreign governments; the encouragement of trade with foreign

countries; and the facilitation [*78] of the travel abroad of Americans and of travel within the United States by foreigners. In these several ways a federal foreign policy is forged that is as palpable and durable as that expressed by a particular act of legislation or by the ratification of a particular treaty.

Less than eight years ago the Supreme Court reviewed and reaffirmed the position of the Executive Branch in forming foreign policy preemptive of legislation by a state. *Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)*. Strong humanitarian considerations supported California's legislation to provide a remedy against insurance companies that had profited from the Nazi treatment of Jewish victims of the Holocaust. Recognizing that "the iron fist" of California might be more effective than the gentler approach taken by the Executive Branch, the Supreme Court assembled cases showing the President's "unique responsibility" for the conduct of foreign policy. *Id. at 415*. Noting that no express text in the Constitution conferred this authority, the Court quoted both Hamilton and Madison in *The Federalist* on the structure of the nation being designed. Structure was stronger than text. The Supreme Court demonstrated that [*79] strength in an unbroken line of decisions acknowledging presidential leadership in foreign affairs. *Id. at 413-415*. Presidential power to preempt states from acting in matters of foreign policy is beyond question.

To take one example from our relations to our nearest neighbor to the South, it is an expression of federal foreign policy that the State Department issues passports by whose use approximately twenty million American citizens enter Mexico annually, while the State Department annually issues approximately one million visas which enable citizens of Mexico to enter this country. U.S. Dep't of Commerce, Int'l Trade Admin., *2009 United States Resident Travel Abroad* 3 (2010); *U.S. Dep't of State, Report of the Visa Office 2010* at Table XVII (2011).

The foreign policy of the United States is further established by trade agreements made between this country and Mexico manifesting the desire to permit the importation of a variety of goods from Mexico and the desire to export goods from the United States into Mexico.

An objective assessment of the foreign policy of the United States toward Mexico would pronounce that policy to be one of cordiality, friendship and cooperation. The tangible [*80] expression of this policy is the export of $14.8 billion in goods in January 2011 and the importation of $19.7 billion in goods from Mexico in the same month. News Release, U.S. Census Bureau, U.S. Bureau of Economic Analysis, U.S. Int'l Trade in Goods and Services 16 (March 10, 2011).

Understandably, the United States finds such a policy preemptive of a single state's uninvited effort to enter the field of immigration law.

The Arizona statute before us has become a symbol. For those sympathetic to immigrants to the United States, it is a challenge and a chilling foretaste of what other states might attempt. For those burdened by unlawful immigration, it suggests how a state could tackle that problem. It is not our function, however, to evaluate the statute as a symbol. We are asked to assess the constitutionality of five sections on their face integrated by the intent stated in Section 1. If we read Section 1 of the statute, the statute states the purpose of providing a solution to illegal immigration into the United States. So read, the statute is a singular entry into the foreign policy of the United States by a single state. The district court properly enjoined implementation of [*81] the four sections of the statute.

DISSENT BY: Carlos T. Bea (In Part)

DISSENT

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

I quite agree with the majority that "[t]he purpose of Congress is the ultimate touchstone" in determining whether Arizona's S.B. 1070 is preempted under the *Supremacy Clause*. *Retail Clerks v. Schermerhorn, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963)*. Thus, this court is tasked with determining whether Congress intended to fence off the states from any involvement in the enforcement of federal immigration law. It is *Congress*'s intent we must value and apply, not the intent of the Executive Department, the Department of Justice, or the United States Immigration and Customs Enforcement. Moreover, it is the *enforcement* of

immigration laws that this case is about, not whether a state can decree who can come into the country, what an alien may do while here, or how long an alien can stay in this country.

By its very enactment of statutes, Congress has provided important roles for state and local officials to play in the enforcement of federal immigration law. First, the states are free, even without an explicit agreement with the federal government, "to communicate with the Attorney General regarding the immigration [*82] status of any individual." *8 U.S.C. § 1357(g)(10)(A)*. Second, to emphasize the importance of a state's involvement in determining the immigration status of an individual, Congress has commanded that federal authorities "*shall* respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual." *Id. § 1373(c)* (emphasis added). Third, putting to one side communications from and responses to a state regarding an individual's immigration status, no agreement with the federal government is necessary for states "otherwise [than through communications regarding an individual's immigration status] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id. § 1357(g)(10)(B)*. Finally, Congress has even provided that state officers are authorized to arrest and detain certain illegal aliens. *Id. § 1252c*. Recognizing the important role of states in enforcing immigration law, the record shows that the federal government has welcomed efforts by New Jersey [1] and Rhode Island, [2] efforts which Arizona attempts to mirror [*83] with S.B. 1070. The record is bereft of any evidence that New Jersey's or Rhode Island's efforts have in any way interfered with federal immigration enforcement. To the contrary, the federal government embraced such programs and increased the number of removal officers to handle the increased workload.

1 In August 2007, the attorney general of New Jersey issued a directive which stated:

> When a local, county, or State law enforcement officer makes an arrest for any indictable crime, or for driving while intoxicated, the arresting officer or a designated officer, as part of the booking process, shall inquire about the arrestee's citizenship, nationality and immigration status. If the officer has reason to believe that the person may not be lawfully present in the United States, the officer shall notify [ICE] during the arrest booking process.

Anne Milgram, Attorney General Law Enforcement Directive No. 2007-3.

2 Rhode Island Executive Order 08-01, "Illegal Immigration Control Order," issued March 27, 2008, states at paragraph 6:

> It is urged that all law enforcement officials, including state and local law enforcement agencies take steps to support the enforcement of federal immigration laws [*84] by investigating and determining the immigration status of all non-citizens taken into custody, incarcerated, or under investigation for any crime and notifying federal authorities of all illegal immigrants discovered as a result of such investigations.

Nonetheless, the United States has here challenged Arizona S.B. 1070 before it went into effect and, thus, made a *facial* challenge to the legislation. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*. As the Supreme Court stated:

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. . . . Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional

application might be cloudy.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). [*85] Further:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Id. at 450-51 (internal quotation marks and citations omitted). [3]

> 3 "While some Members of the [Supreme] Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.' " *Wash. State Grange, 552 U.S. at 449* (quoting *Wash. v. Glucksberg, 521 U.S. 702, 739-40, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* [*86] & n.7 (Stevens, J., concurring in judgments)). The high facial challenge standard was reaffirmed just last term. *See United States v. Stevens, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010)*.

Our task, then, is--*or should be*--to examine the Arizona legislation and relevant federal statutes to determine whether, under the United States' facial challenge, S.B. 1070 has applications that do not conflict with Congress's intent. I respectfully dissent from the majority opinion as to Sections 2(B) (entitled "Cooperation and assistance in enforcement of immigration laws; indemnification") and 6 (entitled "Arrest by officer without warrant"), finding their reasoning as to Congress's intent without support in the relevant statutes and case law. As to Sections 3 and 5(C), I concur in the result and the majority of the reasoning, although I dissent to the portion of the majority's reasoning which allows complaining foreign countries to preempt a state law. I address S.B. 1070's sections in numerical order, as the majority did.

I. Section 2(B)

I dissent from the majority's determination that Section 2(B) of Arizona S.B. 1070 [4] is preempted by federal law and therefore is unconstitutional on its face. As I see it, Congress [*87] has clearly expressed its intention that state officials *should* assist federal officials in checking the immigration status of aliens, *see 8 U.S.C. § 1373(c)*, and in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *8 U.S.C. § 1357(g)(10)(B)*. The majority comes to a different conclusion by minimizing the importance of *§ 1373(c)* and by interpreting *§ 1357(g)(10)* precisely to invert its plain meaning "*Nothing* in this subsection shall be construed to require an agreement . . . to communicate with the Attorney General regarding the immigration status of any individual" (emphasis added) to become "*Everything* in this subsection shall be construed to require an agreement." [5] Further, the majority mischaracterizes the limited scope of Section 2(B), misinterprets the Supreme Court's cases on foreign relations preemption to allow any complaining foreign country to preempt a state law, and holds that the prospect of all 50 states assisting the federal government in identifying illegal aliens is--to Congress--an unwanted burden. I discuss each one of these errors in turn below.

> 4 Section 2(B) of S.B. 1070 provides in relevant part:
>
> > For any [*88] lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present

in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to *8 United States Code section 1373(c)* . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

> 1. A valid Arizona driver license.
>
> 2. A valid Arizona nonoperating identification license.
>
> 3. A valid tribal enrollment card or other form of tribal identification.
>
> 4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local [*89] government issued identification.

Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

5 The majority has apparently mastered its Lewis Carroll:

> "I don't know what you mean by 'glory,' " Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't-- till I tell you. I meant 'there's a nice knock-down argument for you!' "
>
> "But 'glory' doesn't mean 'a nice knockdown argument,' " Alice objected.
>
> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master --that's all."

Lewis Carroll, *Through the Looking Glass and What Alice Found There, in* THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers) (2000).

I am disappointed the majority does not take Lewis Carroll's humorous example of word traducing seriously to explain how the majority's use of "nothing" in *8 U.S.C. § 1357(g)(10)* could be made to mean "everything."

> 'Twas the saying of an ancient sage that humour was the only test of gravity, and gravity of humour. For a subject which would not bear [*90] raillery was suspicious; and a jest which would not bear a serious examination was certainly false wit.

Anthony Cooper, Earl of Shaftesbury, *Essay on the Freedom of Wit and Humour, sec.* 5 (1709).

However, it is not accurate to imply that

recourse to the estimable Humpty-Dumpty is to slip the bounds of judicial argument. A quick Westlaw search shows six mentions in Supreme Court opinions of Humpty Dumpty's views as to how the meanings of words can be changed, and another dozen in this court--including one case in which the author of the majority here concurred. *See Scribner v. Worldcom, Inc., 249 F.3d 902 (9th Cir. 2001).*

The district court found that Section 2(B) resulted in an unconstitutional invasion of the province of federal immigration law for a variety of reasons. But there seems little point to examine and rebut the district court's findings, because the majority opinion does not adopt any of them. [6] Rather, the majority opinion rests its case solely on its inverted reading of *§ 1357(g)*, which prescribes the process by which Congress intended state officers to play a role in the enforcement of federal immigration laws.

6 It is curious the majority opinion spends as much time as it [*91] does interpreting the language of Section 2(B) to be a mandate of immigration status checks of every arrestee, regardless whether there is reasonable suspicion he is an illegal alien--contrary to Arizona's interpretation of its own statute. Maj. Op. at 4816-18. That interpretation was *used* by the district court to conclude state actions would result in invasion of the federal province of immigration enforcement, by over-burdening federal immigration status checking resources. The majority adopts the district court's statutory analysis of Section 2(B)--violating a slew of canons of statutory construction along the way--but fails to arrive at the district court's findings, findings thought necessary by the district court to conclude Section 2(B) was preempted. The district court incorrectly analyzed the Arizona statute to make its incorrect point that immigration inquiries will overburden federal resources. But at least it made a point. The majority trudges the same analytical trail, but goes nowhere. It rather gives the impression that a portion of the majority opinion has been left at the printer.

Of course, it is awkward indeed to argue that immigration status inquiries by state officials [*92] *can* "overburden" federal officials when *8 U.S.C. § 1373(c)* reads so plainly ("The Immigration and Naturalization Service *shall* respond . . . ." (emphasis added)). Had Congress wanted to give federal immigration officers *discretion* as to whether to answer such inquiries, it could have used "may" rather than "shall," as it does in *8 U.S.C. § 1357(g)(1)* regarding federal officials' discretion to enter into written agreements with the states regarding enforcement of immigration laws.

A. *8 U.S.C. § 1373(c)*

As noted above, Congress has clearly stated its intention to have state and local agents assist in the enforcement of federal immigration law, at least as to the identification of illegal aliens, in two federal code sections. First is *8 U.S.C. § 1373(c)*, which reads:

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1373(c). The title of *§ 1373(c)* is "Obligation to respond to inquiries." Thus, [*93] *§ 1373(c) requires* that United States Immigration and Customs Enforcement ("ICE") [7] respond to an inquiry by *any* federal, state, or local agency seeking the immigration status of any person. The Report of the Senate Judiciary Committee accompanying the Senate Bill explained that the "acquisition, maintenance, and *exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. No. 104-249, at 19-20 (1996) (emphasis added).

7 The statute has not been amended to reflect that the Immigration and Naturalization Service ceased to exist in 2003. ICE, an agency within the Department of Homeland Security, now performs the immigration-related functions.

Section 1373(c) does not limit the number of inquiries that state officials can make, limit the circumstances under which a state official may inquire, nor allow federal officials to limit their responses to the state officials. [8] Indeed, as established by the declaration of the United States' own Unit Chief for the Law Enforcement Support [*94] Center ("LESC"), the LESC was established "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." *Section 1373(c)* demonstrates Congress's clear intent for state police officials to communicate with federal immigration officials in the first step of immigration enforcement--identification of illegal aliens.

> 8 Another example of federal authorization for state inquiries into an alien's immigration status is *8 U.S.C. § 1644*, part of the 1996 Welfare Reform Act. This section states "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." *8 U.S.C. § 1644*. The House Conference Report accompanying the Welfare Reform Act explained: "The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens . . . . The conferees believe that immigration law enforcement is as high a priority as [*95] other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2649, 2771. The title and placement of the statute seems to have more to do with helping states administer benefits than to achieve removals of illegal aliens. But the statute does reflect Congress's repeatedly stated intention to provide for the free flow of immigration status information between the states and the federal immigration establishment.

The majority misstates my interpretation of *§ 1373(c)*'s scope. Neither I, nor Arizona, claim *§ 1373(c)* allows Arizona to pursue its "own immigration policy." Maj. Op. at 4823. Instead, *§ 1373(c)* demonstrates Congress's intent for Arizona to help enforce *Congress's* immigration policy, but in a way with which the Executive cannot interfere. Congress has *required* that the federal government respond to state and local inquires into a person's immigration status, *8 U.S.C. § 1373(c)*, which allows states to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of [illegal] aliens," [*96] *id. § 1357(g)(10)(B)*.

B. *8 U.S.C. § 1357(g)*

The second federal code section which states Congress's intention to have state authorities assist in identifying illegal aliens is *8 U.S.C. § 1357(g)*, entitled "Performance of immigration officer functions by State officers and employees." *Subsections (g)(1)-(9)* provide the precise conditions under which the Attorney General may "deputize" state police officers (creating, in the vernacular of the immigration field, "287(g) officers") for immigration enforcement pursuant to an explicit written agreement. For example, *§ 1357(g)(1)* defines the scope of any such agreement, *§ 1357(g)(3)* provides that the Attorney General shall direct and supervise the deputized officers, *§ 1357(g)(6)* prohibits the Attorney General from deputizing state officers if a federal employee would be displaced, and *§ 1357(g)(7)-(8)* describe the state officers' liability and immunity. *Section 1357(g)(9)* clarifies that no state or locality shall be required to enter into such an agreement with the Attorney General. Finally, *§ 1357(g)(10)* explains what happens if *no* such agreement is entered into: it recognizes the validity of certain conduct by state and local officers, and [*97] explicitly excepts such conduct from a requirement there be a written agreement between the state and federal authorities:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

The majority's error is to read *§ 1357(g)(1)-(9),* which provides the precise conditions under which the Attorney General *may* enter into written agreements to "deputize" officers, as the *exclusive* authority which Congress intended state officials to have in the field of immigration enforcement. That reading is made somewhat awkward in view of *§ 1357(g)(10),* which explicitly carves out certain immigration activities by state and local officials as *not* requiring a written agreement. But, the majority opinion reasons [*98] that since state officials cannot themselves *remove* illegal aliens, the natural reading of *§ 1357(g)(10)* is that state officials cannot *act at all* in immigration enforcement matters, absent an explicit written agreement, unless:

> 1. They are "called upon" by the Attorney General; OR
>
> 2. There is a "necessity"; AND
>
> 3. Such cooperation is "incidental," rather than "systematic and routine."

Maj. Op. at 4820-21. I concede the majority's insertion of the quoted terms into *§ 1357(g)(10)* is quite original, which perhaps explains why no legal basis is cited for any of it. Neither does the majority opinion give us any clue from statute, regulations, or case authority as to the genesis of the key conditioning phrases "calls upon," "necessity," "routine," or "systematic," which--in their opinion--*would* legitimate agreement-less state intervention. Needless to say, anyone who actually reads *§ 1357(g)(10)* will observe that none of the quoted words appear in *that* statute, nor indeed in any part of the Immigration and Naturalization Act ("INA"). [9] *8 U.S.C. § 1101 et seq.* Alas, the majority opinion does not point us where to look. [10]

9 We strive to read Congress's enactments in a reasonable manner. *Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982)* [*99] ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Is the majority's reading of *§ 1357(g)(10)* reasonable? Imagine, for a moment, its implementation. Morning dawns at the Pima County (Tucson) Sheriff's Office. The watch commander assembles the deputies: "Officers, in your patrols and arrests today, please remember the Ninth Circuit has told us that if you encounter aliens you suspect are illegally present in this country, you may check their immigration status with federal immigration officers, and cooperate with federal agents in their identification, apprehension, detention and removal, but only (1) if called upon by the federal authorities to assist, or (2) absent such request, where necessary, but (3) then only on an incidental basis, and (4) not in a routine or systematic basis." Officer Smith responds: "Commander, does that mean that, unless asked by the federal officers, we cannot determine immigration status of suspected illegal aliens from federal immigration officers or cooperate to help in their removal in each case in which we have reasonable suspicion, but, on the other hand, that we can do so when necessary, [*100] but then only once in a while? When will it be 'necessary'? Second, for every ten suspicious persons we run across, in how many cases are we allowed to request immigration checks and cooperate with the federal authorities without our immigration checks becoming 'systematic' and 'routine,' rather than merely 'incidental'?"

Rather than explain the content of the conditions which it invents-- "called upon," "necessity," "systematic," and "routine"--the majority turns up its nose at a scenario made all-too-probable by its vague limitations; limitations themselves bereft of structure for lack of citation of authority. As in the case of its refusal to refute its traducing of statutory language (*see* footnote 5, *supra*). the majority declaims the impropriety of my criticisms, rather than discuss why they are wrong. But that does not shed any light on the question likely to be asked by the Sheriff's Deputy: "When *can* I detain

a suspect to check his immigration status?"

10 The majority contends its interpretation of *§ 1357(g)(10)* is supported by *8 U.S.C. § 1103(a)(10)*. *Section 1103(a)(10)* empowers the Attorney General, in the event of a mass influx of aliens, to authorize state and local officers "to [*101] perform or exercise *any* of the powers, privileges, or duties" of a federal immigration officer. *8 U.S.C. § 1103(a)(10)* (emphasis added). That the Attorney General may designate state officers to exercise the *full* scope of federal immigration authority in such emergency situations-- *alone* and not in cooperation with federal immigration officials-- does not affect or limit state officers' otherwise inherent authority under *non-emergency* circumstances "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of [illegal] aliens," *8 U.S.C. § 1357(g)(10)(B)*, especially by seeking immigration status information which federal authorities are obligated to provide, *8 U.S.C. § 1373(c)*. Nothing in the text of *§ 1357(g)(10)*, nor of *§ 1373(c)*, requires a prior "mass influx of aliens" to allow state officers to act. No case authority is cited for this peculiar instance of statutory interpretation.

To determine Congress's intent, we must attempt to read and interpret Congress's statutes on similar topics together. *Wachovia Bank v. Schmidt, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)* ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject [*102] matter generally should be read as if they were one law." (internal quotations omitted)). In light of this, I submit that a more natural reading of *§ 1357(g)(10)*, together with *§ 1373(c)*, leads to a conclusion that Congress's intent was to provide an important role for state officers in the enforcement of immigration laws, especially as to the *identification* of illegal aliens.

Unless the state officers are subject to a written agreement described in *§ 1357(g)(1)-(9)*, which would otherwise control their actions, the state officers are independently authorized by Congressional statute "to communicate with the Attorney General regarding the immigration status of any individual." *8 U.S.C. § 1357(g)(10)(A)*. Moreover, state officers are authorized "to cooperate with the Attorney General in the *identification*, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id. § 1357(g)(10)(B)* (emphasis added). [11] Of course, the majority is correct that state officers cannot themselves *remove* illegal aliens from the United States. The majority would read that inability as evidence of congressional intent that state officers cannot act at all with respect to other [*103] aspects of immigration enforcement that lead to removal, save on the orders of federal officers pursuant to the provisions of written agreements as set forth in *1357(g)(1)-(9)*. Maj. Op. at 4820. Were that so, *§ 1357(g)(10)* would be redundant and a dead letter, save for the vague and uncertain powers which the majority limits by its newly-crafted terms "calls upon," "necessity," "systematic" and "routine." We must interpret statutes in a manner to give each part of the statute meaning, if at all reasonable. *See, e.g., U.S. v. Lopez, 514 U.S. 549, 589, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)* ("An interpretation of [the *Commerce Clause*] that makes the rest of [Article I,] § 8 superfluous simply cannot be correct."); *see also Williams v. Thude, 188 Ariz. 257, 934 P.2d 1349, 1351 (Ariz. 1997)* ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, *redundant*, or trivial." (internal quotation marks omitted, alteration and emphasis in original)).

11 It is ironic that while construing Section 2 (B) so as to make the second sentence thereof an independent mandate to run immigration checks on all arrestees, the majority does not apply the same canon to make *§ 1357(g)(10)* independent, [*104] especially since *§ 1357(g)(10)* begins with the classic language of a stand-alone, independent provision: "Nothing in this subsection shall be construed to require an agreement . . . ."

Further, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)*. *Section 1357(g)(10)* need not be interpreted at all--its plain language states that "Nothing in this subsection [*8 U.S.C. § 1357(g)*] shall be construed to require an agreement under this subsection in order for any officer . . . to communicate with the Attorney General regarding the immigration status of any individual." There is no need to place restrictions on this meaning, through terms

such as "calls upon," "necessity," "systematic," and "routine," because the statute's meaning is clear and includes no such limitations.

I agree with the majority that "we must determine how the many provisions of [the] vastly complex [INA] function together." Maj. [*105] Op. at 4823. However, the majority opinion's interpretation of *§ 1357(g)(10)*, which requires the Attorney General to "call upon" state officers in the absence of "necessity" for state officers to have any immigration authority, makes *§ 1373(c)* a dead letter. Congress would have little need to obligate federal authorities to respond to state immigration status requests if it is those very same federal officials who must call upon state officers to identify illegal aliens. Further, there is no authority for the majority's assertion that *§ 1357(g)* establishes the "boundaries" within which state cooperation pursuant to *§ 1373(c)* must occur. Maj. Op. at 4822-23. Indeed, "communicat[ions] with the Attorney General regarding the immigration status of any individual" were explicitly excluded from *§ 1357(g)*'s requirement of an agreement with the Attorney General. *8 U.S.C. § 1357(g)(10)(A)*. Congress intended the free flow of immigration status infor- mation to continue despite the passage of *§ 1357(g)*, and so provided in *subsection (g)(10)*. The majority's interpretation turns *§ 1357(g)(10)* and *§ 1373(c)* into: "Don't call us, we'll call you," when what Congress enacted was "When the state and [*106] local officers ask, give them the information."

The majority's attempt to straight-jacket local and state inquiries as to immigration status to what "terms" the "federal government" dictates reveals the fundamental divide in our views. The majority finds the intent of "the government" decisive; I look to Congress's intent--as required by Supreme Court preemption law.

Further, to "cooperate" means, I submit, "to act or operate jointly, with another or others, to the same end; to work or labor with mutual efforts to promote the same object." *Webster's New Twentieth Century Dictionary of the English Language Unabridged* (Jean L. McKechnie ed., 1979). It does not mean that each person cooperating need be capable of doing all portions of the common task by himself. We often speak of a prosecution's "cooperating witness," but it doesn't occur to anyone that the witness himself cannot be "cooperating" unless he is able to prosecute and convict the defendant himself. Hence, the inability of a state police officer to "remove" an alien from the United States does not imply the officer is unable to cooperate with the federal authorities to achieve the alien's removal.

The provision of authority whereby [*107] the Attorney General may "deputize" state police officers allows the Attorney General to define the scope and duration of the state officers' authority, as well as "direct[ ] and supervis[e]" the state officers in performing immigration functions. *8 U.S.C. § 1357(g)(1)-(9)*. However, this is merely *one of two forms* of state participation in federal immigration enforcement provided for by Congress in *§ 1357(g)*. Congress provided for *another* form of state participation, for which no agreement is required--states are free "to communicate with the Attorney General regarding the immigration status of any individual," *id. § 1357(g)(10)(A)*, and are also free "otherwise [than by communication] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *id. § 1357(g)(10)(B)*.

This conclusion is confirmed by a close comparison of the language in each part of *§ 1357(g)*. As to the authority of the Attorney General to enter explicit written agreements, these agreements are limited to deputizing state officers to perform immigration-related functions "in relation to the investigation, apprehension, or detention [*108] of aliens in the United States." *Id. § 1357(g)(1)*. Notably absent from this list of functions is the "identification" of illegal aliens. However, Congress recognized state officers' authority even in the absence of a written agreement with federal authorities both "to communicate with the Attorney General regarding the immigration status of any individual" and "to cooperate with the Attorney General in the *identification* . . . of aliens not lawfully present in the United States." *Id. § 1357(g)(10)* (emphasis added). "We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)*. The exclusion of illegal alien identification from the restraints of explicit written agreements under *§ 1357(g)(1)-(9)*, and the inclusion of this identification function in the state's unrestrained rights under *§ 1357(g)(10)*, leads to the conclusion that Congress intended that state officers be free to inquire of the federal officers into the immigration status of any person,

without any direction or supervision of such federal officers--and the federal officers [*109] "*shall* respond" to any such inquiry. *8 U.S.C. § 1373(c)* (emphasis added).

Another limitation of authority inferred by the majority from *§ 1357(g)(10)* seems to be that state authorities cannot order their officers to enforce immigration laws in every case where they have reasonable suspicion to believe the laws are being violated. The argument seems to be that while "incidental" investigation--motivated solely by the individual officer's discretion--might be permissible and not an invasion of federal immigration turf, any systematic and mandatory order to identify illegal aliens would be an incursion into a preempted area. See Maj. Op. at 4020-21; *see also* Oral Argument at 46:15-46:35 ("[T]he mandatory application [of Section 2(B)] is impermissible, because it takes away the discretion of the local law enforcement officer to decide whether to pursue a particular line of inquiry rather than mandated."). This reading of the statute is as original, and therefore, problematic as is utilizing the words "calls upon," "necessity," "systematic," and "routine" to circumscribe an otherwise clear statute. First, by what authority can the federal government tell a state government what orders it is [*110] to give state police officers as to the intensity with which they should investigate breaches of federal immigration law? Other than pursuant to the provisions of written agreements, *8 U.S.C. § 1357(g)(1)-(9)*, I see no statutory basis for allowing the federal government to limit the effort the state can command of its officers. Rather, Congress intended the Attorney General to cooperate with state officers, *8 U.S.C. § 1357(g)*, and commanded him to answer their requests for immigration status checks, *8 U.S.C. § 1373(c)*. Second, how practical is it for a watch commander to instruct his deputies that it is up to their whims as to when they can enforce federal immigration law?

C. Section 2(B)'s limited scope

Next, the majority seems to believe that when a state officer (1) initiates the identification of an illegal alien by checking the alien's immigration status with federal officials pursuant to *§ 1373(c)*, and (2) has the alien identified to him by federal authorities, the state officer has somehow *usurped* the federal role of immigration enforcement. Maj. Op. at 4821-22. Section 2(B)'s scope, however, is not so expansive. Section 2(B) does not purport to authorize Arizona officers to remove [*111] illegal aliens from the United States--Section 2(B) merely requires Arizona officers to inquire into the immigration status of suspected illegal aliens during an otherwise lawful encounter. *See* Section 2(B). Section 2(B) does not govern any other action taken by Arizona officers once they discover an alien is illegally present in the United States. Further, Section 2(B) does not require that ICE accept custody or initiate removal of the illegal alien from the United States. Federal authorities are merely obligated to respond to the immigration status inquiry pursuant to *§ 1373(c)*. Once this occurs, federal authorities are free to refuse additional cooperation offered by the state officers, and frankly to state their lack of interest in removing the illegal alien. The federal authorities can stop the illegal alien removal process at any point after responding to the state immigration status request. [12]

> 12 Of course, were the federal authorities to do just that--turn away the cooperation of state officials--they might be subject to criticism for not enforcing federal immigration law by failing to remove identified illegal aliens. Worse, since police departments tend to keep pesky records [*112] of communications, the exact amount of refusals of state assistance, and the future consequences of failing to remove illegal aliens, might make it into the Press, with perhaps embarrassing or impolitic results. These considerations, of course, should not affect the preemption analysis.

Although it is true that Section 2(B) requires Arizona officers to detain an arrestee suspected of being an illegal alien before releasing the alien, this does little to broaden Section 2(B)'s scope. First, because this is a facial challenge, we must assume that Arizona police officers will comply with federal law and the Constitution in executing Section 2(B). Second, Arizona has built a safeguard into Section 2 which requires that Section 2(B)'s immigration status checking mechanisms be executed in a manner consistent with federal law. *See* Section 2(L) ("This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."). Finally, it would be absurd to assume that Congress would permit states to check a person's immigration status, *see 8 U.S.C. § 1373(c)*, [*113] but would not allow the state to hold the suspected illegal

alien until a response were received.

The majority also finds that state officers reporting illegal aliens to federal officers, Arizona would interfere with ICE's "priorities and strategies." Maj. Op. at 4824. It is only by speaking in such important-sounding abstractions--"priorities and strategies"--that such an argument can be made palatable to the unquestioning. How can simply informing federal authorities of the presence of an illegal alien, which represents the full extent of Section 2(B)'s limited scope of state-federal interaction, possibly interfere with federal priorities and strategies--unless such priorities and strategies are to avoid learning of the presence of illegal aliens? What would we say to a fire station which told its community not to report fires because such information would interfere with the fire station's "priorities and strategies" for detecting and extinguishing fires?

The internal policies of ICE do not and cannot change this result. The power to preempt lies with Congress, not with the Executive; as such, an agency such as ICE can preempt state law only when such power has been delegated to it by [*114] Congress. *See North Dakota v. United States, 495 U.S. 423, 442, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990)* ("It is Congress--not the [Department of Defense]-- that has the power to pre-empt otherwise valid state laws . . . ."). Otherwise, evolving changes in federal "priorities and strategies" from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action. Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy. Although Congress *did* grant some discretion to the Attorney General in entering into agreements pursuant to *§ 1357(g)*, Congress explicitly withheld any discretion as to immigration status inquiries by "obligat[ing]" the federal government to respond to state and local inquiries pursuant to *§ 1373(c)* and by excepting communication regarding immigration status from the scope of the explicit written agreements created pursuant to *§ 1357(g)(10)*. Congress's statutes provide for calls and order the calls be returned.

D. Supreme Court preemption cases

The Supreme Court's decisions in *Crosby v. National Foreign Trade Council, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*, and *Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)*, [*115] are in accord with the view that Section 2(B) is not preempted by federal law. As the majority points out, in each of those cases, the Supreme Court concluded that Congress intended to provide the Executive with flexibility when it enacted federal law, and that state law encroached on that flexibility. That is not the situation we face here. The majority errs by reading the flexibility Congress provided to the Attorney General in entering agreements pursuant to *§ 1357(g)* as providing universal flexibility as to all immigration matters. Congress did just the opposite. As discussed above, Congress explicitly withheld administrative discretion and flexibility as to responses to state officers' immigration status inquiries in both *§ 1373(c)* and *§ 1357(g)(10)*. Federal authorities have no discretion whether they may respond to immigration status inquiries from state officials. *8 U.S.C. § 1373(c)*. State officials need not enter into a written agreement to communicate with the Attorney General regarding the immigration status of any individual. *8 U.S.C. § 1357(g)(10)*. Section 2(B) does not encroach on federal flexibility because Congress did not intend federal authorities to have any flexibility [*116] in providing states with properly requested immigration status information.

Neither does the Supreme Court's preemption jurisprudence in the field of foreign relations change the conclusion that Section 2(B) is not preempted. In *Crosby*, Massachusetts passed a law which restricted state entities from buying goods or services from those doing business with Burma. *530 U.S. at 366-68*. Three months later, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. *Id. at 368*. The Court found that the Massachusetts law conflicted with several identified Congressional objectives. "First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma." *Id. at 374*. Second, "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range." *Id. at 377*. "Finally, . . . the President's intended authority to speak for the United States among the world's nations in developing a 'comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.' " *Id. at 380*. Thus, the Court concluded:

> Because [*117] the state Act's provisions conflict with Congress's specific delegation to the President of

> flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the *Supremacy Clause*.

Id. at 388.

In *American Insurance Ass'n v. Garamendi, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)*, President Clinton entered into an agreement with the German Chancellor in which Germany agreed to establish a foundation to compensate victims of German National Socialist companies. *Id. at 405*. In exchange, the U.S. government agreed to discourage Holocaust-era claims in American courts and encourage state and local governments to respect the foundation as the exclusive mechanism for resolving these claims. *Id. at 405-06*. Meanwhile, California passed legislation which required insurance companies doing business in the state to disclose the details of insurance policies issued to people in Europe between 1920 and 1945. *Id. at 409*. The Court explained that "even . . . the likelihood that state legislation will produce something more than incidental effect [*118] in conflict with express foreign policy of the National Government would require preemption of the state law." *Id. at 420*. The Court held California's law was preempted: "[T]he evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.' " *Id. at 427* (quoting *Crosby, 530 U.S. at 386*). That is, California's law conflicted with *specific* foreign-relations objectives of the Executive, as "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." *Id. at 421*.

Thus, as *Crosby* and *Garamendi* demonstrate, it is not simply *any effect* on foreign relations generally which leads to preemption, as the majority asserts. *See* Maj. Op. at 4825-28. Instead, a state law is preempted because it conflicts with federal law only when the state law's effect on foreign relations conflicts with federally *established* foreign relations goals. In *Crosby*, the state law conflicted with the degree of trade Congress decided to allow with Burma, and the discretion explicitly given to the Executive to make trade decisions. In *Garamendi*, the state law imposed an investigatory and litigation [*119] burden inconsistent with the rules the Executive Agreement had created. Here, however, there is *no established* foreign relations policy goal with which Section 2(B) may be claimed to conflict. The majority contends that Section 2(B) "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." Maj. Op. at 4828.

First, the majority fails to identify a federal foreign relation policy which establishes the United States must avoid "spillover effects," if that term is meant to describe displeasure by foreign countries with the United States' immigration policies. The majority would have us believe that Congress has provided the Executive with the power to veto any state law which happens to have some effect on foreign relations, as if Congress had not weighed that possible effect in enacting laws permitting state intervention in the immigration field. To the contrary, here Congress *has* established--through its enactment of statutes such as *8 U.S.C. §§ 1357(g)(10), 1373(c),* and *1644*--a policy which encourages the free flow of immigration status information between federal and local governments. Arizona's law embraces and furthers [*120] this federal policy; any negative effect on foreign relations caused by the free flow of immigration status information between Arizona and federal officials is due not to Arizona's law, but to the laws of Congress. Second, the Executive's desire to appease foreign governments' complaints cannot override Congressionally-mandated provisions--as to the free flow of immigration status information between states and federal authorities--on grounds of a claimed effect on foreign relations any more than could such a foreign relations claim override Congressional statues for (1) who qualifies to acquire residency in the United States, *8 U.S.C. § 1154*, or (2) who qualifies to become a United States citizen, *8 U.S.C. § 1421 et seq.*

Finally, the majority errs in finding that the threat of all 50 states layering their own immigration rules on top of federal law weighs in favor of preemption. In *Buckman*, the Supreme Court stated: "As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants *burdens not contemplated by Congress in enacting the FDCA and the MDA*." *531 U.S. at 350* [*121] (emphasis added). I fail to see how Congress could have failed to contemplate that states would make

use of the very statutory framework that Congress itself enacted. Congress created the Law Enforcement Support Center "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." Congress also obligated ICE to respond to all immigration status inquiries from state and local authorities. *8 U.S.C. § 1373(c)*. In light of this, all 50 states enacting laws for inquiring into the immigration status of suspected illegal aliens is *desired* by Congress, and weighs against preemption.

Conclusion

As demonstrated above, Congress envisioned, intended, and encouraged inter-governmental cooperation between state and federal agencies, at least as to information regarding a person's immigration status, for the proper and efficient enforcement of federal immigration law. While *§ 1357(g)(1)-(9)* grants the Attorney General discretion to enter into written agreements deputizing and supervising state officers, *§ 1357(g)(10)* explicitly recognizes an alternative to that regime, so as to encourage and facilitate the free flow of immigration [*122] status information provided for in *§ 1373(c)*. The majority's arguments regarding how any of the state officers' actions spelled out in Section 2(B) could interfere with federal immigration enforcement is consistent with only one premise: the complaining federal authorities do not *want* to enforce the immigration laws regarding the presence of illegal aliens, and do not *want* any help from the state of Arizona that would pressure federal officers to have to enforce those immigration laws. With respect, regardless what may be the intent of the Executive, I cannot accept this premise as accurately expressing the intent of Congress.

II. Sections 3 and 5(C)

I concur with the majority that Section 3, which penalizes an alien's failure to carry documentation as required by federal immigration statutes, impermissibly infringes on the federal government's uniform, integrated, and comprehensive system of registration which leaves no room for its enforcement by the state. I also concur with the majority that Section 5(C), which penalizes an illegal alien for working or seeking work, conflicts with Congress's intent to focus on employer penalties, an intent determined by this court in *National Center for Immigrants' Rights, Inc. v. I.N.S., 913 F.2d 1350 (9th Cir. 1990)*, [*123] *rev'd on other grounds, 502 U.S. 183, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991)*. As a three-judge panel, we may not re-examine the conclusions reached in *National Center. Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003)* (en banc); *see also Newdow v. Lefevre, 598 F.3d 638, 644 (9th Cir. 2010)* (holding that *Establishment Clause* challenge to the placement of "In God We Trust" on coins and currency was foreclosed by *Aronow v. United States, 432 F.2d 242 (9th Cir. 1970))*.

However, for the reasons discussed above as to Section 2, I disagree with the majority's foreign-relations rationale. The majority fails to identify a foreign relations policy, established by Congress, with which Sections 3 and 5 conflict; a foreign nation may not cause a state law to be preempted simply by complaining about the law's effects on foreign relations generally. We do not grant other nations' foreign ministries a "heckler's veto."

III. Section 6

The majority's analysis of S.B. 1070 Section 6 [13] will come as a surprise to all parties involved in this case. It ignores the contentions in the filings before the district court, the district court's rationale, the briefs filed in this court, and what was said by the well-prepared counsel, questioned at [*124] our oral argument. Indeed, it is an argument and conclusion volunteered by the majority, but carefully avoided by the United States-- probably because it conflicts with the present policy of the Department of Justice's Office of Legal Counsel. First, let us examine what I thought the parties put before us for decision.

> 13 S.B. 1070 Section 6 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." *Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010)*.

The only contention made by the United States in this liti- gation with respect to Section 6 is that, due to the complexity inherent in determining whether a specific crime makes an alien removable, Arizona police officers will ineluctably burden legal aliens through erroneous warrantless arrests. Not a very strong contention at that, since counsel for the United States all but conceded this argument's flaw as to this facial challenge at oral argument by admitting that Arizona police officers could very easily determine that some crimes, such as murder, would make [*125] an alien removable. Thus, the

analysis of this section should have been simple--Section 6 was facially constitutional because a "set of circumstances" existed under which no "complexity" existed: an Arizona police officer comes across an alien convicted of murder; he is removable; he can be lawfully arrested. *See Salerno, 481 U.S. at 745*. So, Section 6 was not preempted. End of story.

Instead, the majority misrepresents Arizona's attempt to assist the federal government as "unilaterally transform[ing] state and local law enforcement officers into a state-controlled DHS force to carry out its declared policy of attrition." Maj. Op. at 4842. Section 6 is not, and could not, be so broad. Instead, Section 6 merely authorizes Arizona police officers to make warrantless arrests when they cooperate in the enforcement of federal immigration law--as invited to do by Congress. *See 8 U.S.C. § 1357(g)(10)*.

For its newly-minted-but-not-argued position, the majority relies extensively on *8 U.S.C. § 1252c*--a code section not cited in support by the United States [14] --misinterpreting its meaning and putting this circuit in direct conflict with the Tenth Circuit. The majority also ignores clear Supreme Court [*126] precedent and concludes that *8 U.S.C. § 1357(a)*'s limitations as to *federal* warrantless arrest power implies a limitation on state officers. As I discuss below, the majority erred in concluding that state police officers have no authority to enforce the civil provisions of federal immigration law.

> 14 Indeed, the total treatment of *§ 1252c* in the briefs consists of a one-sentence citation in Arizona's brief arguing *against* Section 6's preemption, and the United States' citation, without argument, in a string cite in its statement of facts.

As noted by the majority opinion, Section 6 applies to three different scenarios: (1) when there is probable cause to believe a person committed a removable offense in a state other than Arizona; (2) when there is probable cause to believe that an individual committed a removable offense in Arizona, served his or her time for the crime, and was released; and (3) when there is probable cause to believe an individual committed a removable offense, but was not prosecuted. The question before us is whether warrantless arrests by state police officers in these three scenarios conflict with Congress's intent.

A. Inherent authority of state officers to enforce [*127] *federal immigration law*

As an initial matter, it is notable that the United States never once asserted, either at oral argument or in its briefs, that Arizona officers are without the power to enforce the civil provisions of immigration law. Indeed, counsel for the United States at oral argument actually *confirmed* state officers' authority to arrest aliens on the basis of civil removability. See Oral Argument at 58:40-59:40 (stating that Section 6 would be constitutional if it required Arizona officers to contact ICE regarding whether a crime renders an alien removable). [15] The United States' argument against Section 6's constitutionality was limited to the "burden" that would be imposed on *wrongfully* arrested legal aliens due to the complexity of determining whether a certain crime makes an alien eligible for removal. Indeed, as the 2002 Department of Justice's Office of Legal Counsel Opinion ("2002 OLC Opinion") concludes, "the authority to arrest for violation of federal law inheres in the state, subject only to preemption by federal law." *See also Marsh v. United States, 29 F.2d 172 (2d Cir. 1928)* ("[I]t would be unreasonable to suppose that [the United States'] purpose was to deny [*128] to itself any help that the states may allow."). [16]

> 15 Actual text from oral argument:
>
> > DEPUTY SOLICITOR GENERAL KNEEDLER: No, I think [Section 6] continues to present the problems that the [District] Court identified because there's no requirement in Section 6 that the state or local officer contact ICE in order to find whether an offense is removable. The individual with, the officer would have to make a judgment as to whether the public offense in the other state was also a public offense in Arizona, and then determine whether it would in turn lead to a removal--
> >
> > JUDGE NOONAN: But the response is like Judge Paez suggested earlier, second-degree murder is the crime.

> DEPUTY SOLICITOR GENERAL KNEEDLER: *Well, in some, in that situation, it would probably, you know, it would probably be possible to make that determination*.
>
> JUDGE NOONAN: Then why, so it doesn't, you have a Salerno problem with respect to Section 6?
>
> DEPUTY SOLICITOR GENERAL KNEEDLER: Well, I don't think so because there's no requirement to check with ICE, first of all, and the INA, that's that responsibility for making removability determinations in the Federal Government. *There may be some situations in which something could be* [*129] *done otherwise*.

(emphases added).

16 The United States likely did not adopt the majority's *§ 1252c* argument because the Department of Justice is required to comply with Opinions from the Office of Legal Counsel. Congressional Research Service, Authority of State and Local Police to Enforce Federal Immigration Law, Sept. 17, 2010, *available* at http://www.ilw.com/immigrationdaily/news / 2010,1104-crs.pdf ("[Office of Legal Counsel] opinions are generally viewed as providing binding interpretive guidance for executive agencies and reflecting the legal position of the executive branch . . . .").

The majority rejects the existence of this inherent state authority by citing one case from this court in which we "assumed" states lacked such authority. In *Gonzales v. City of Peoria*, this court held state police officers could enforce criminal provisions of the INA. *722 F.2d 468, 475 (9th Cir. 1983)*, rev'd on other grounds, *Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999)* (en banc). During its analysis, this court stated in dicta:

> We *assume* that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory [*130] scheme, as would be consistent with the exclusive federal power over immigration. *However, this case does not concern that broad scheme*, but only a narrow and distinct element of it--the regulation of criminal immigration activity by aliens.

Id. at 474-75 (emphasis added). The majority erred in simply accepting *Gonzales*'s assumption, in dicta, without performing any additional inquiry into whether it was indeed correct. [17]

17 *Gonzales*' dicta is not binding on this panel. In *United States v. Johnson, 256 F.3d 895 (9th Cir. 2001)* (en banc), this court stated:

> Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.

Id. at 915. Here, the *Gonzales* panel's statement regarding the civil provisions was "made casually and without analysis"; indeed, the panel even admitted they "assume[d]" the conclusion. It takes no analysis to assume. Further, the statement on INA's civil provisions was "merely a prelude to another legal issue." Immediately [*131] after making the statement, the panel noted that the "case d[id] not concern" the civil provisions. Therefore, this panel is not bound by the Gonzales court's assumption, in dicta, regarding the INA's civil provisions.

The majority also missteps in relying on an abbreviated analysis in *United States v. Urrieta, 520 F.3d 569 (6th Cir. 2008)*. There, Urrieta moved to suppress items found in his car during an extended search by local police. *Id. 572-73*. Urrieta had been detained by a local police officer following the issuance of a traffic citation.

Id. at 571-72. During the detention related to the traffic violation, the police officer attempted to determine whether Urrieta was an illegal alien. *Id*. The court concluded that suspicion of Urrieta's illegal presence was insufficient to extend Urrieta's detention. *Id. at 574*. In doing so, the court characterized *8 U.S.C. § 1357(g)* as "stating that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions that are not applicable in the present case." *Id*.

This conclusion, however, completely ignored [*132] the existence and effect of *§ 1357(g)(10)*. As discussed fully throughout this dissent, *subsection (g)(10)* envisions state cooperation in the enforcement of federal immigration law outside the context of a specific agreement with the Attorney General by "identification, apprehension, detention, or removal" in cooperation with federal immigration authorities. Further, *§ 1357(g)(10)* makes no distinction between criminal and civil provisions--indeed, it refers to "aliens not lawfully present in the United States." *8 U.S.C. § 1357(g)(10)(B)*. The Sixth Circuit's truncated conclusion may be based on the fact that the government withdrew the argument that Urrieta's extended detention was justified on suspicion that he was an "undocumented immigrant" as "misstat[ing] the law." *Id*. Thus, the majority should not have relied on the Sixth Circuit's language in concluding that state officers lack inherent authority to enforce the civil provisions of immigration law any more than it should have relied on the language in *Gonzales*, and for the same reason: the issue whether a state officer had inherent authority to arrest a person for violation of a federal civil violation was simply not before either [*133] court.

Moreover, the majority ignores clear Supreme Court precedent in concluding that state officers cannot make warrantless arrests because federal immigration officers cannot make warrantless arrests under the same circumstances pursuant to *8 U.S.C. § 1357(a)*. Maj. Op. at 4842. In *United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948)*, state officers arrested Di Re for knowingly possessing counterfeit gasoline ration coupons in violation of *§ 301* of the Second War Powers Act of 1942, a federal law. *Id. at 582*. Di Re challenged the search incident to the arrest. *Id*. The Supreme Court upheld the arrest, stating "that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id. at 589*; *accord Miller v. United States, 357 U.S. 301, 305, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958)* (holding that when state peace officers arrest a person for violation of federal narcotics law, "the lawfulness of the arrest without warrant is to be determined by reference to state law"); *Johnson v. United States, 333 U.S. 10, 15 n.5, 68 S. Ct. 367, 92 L. Ed. 436 (1948)* (holding that when state peace officers arrest a person for violation of federal narcotics law, "[s]tate law determines the validity of arrests [*134] without warrant"). Thus, the authority of states to authorize warrantless arrests for violations of federal law is well established. [18]

> 18 Although it is true that the federal laws in these cases were criminal, rather than civil, the Supreme Court was careful to couch its holdings in terms of "federal laws" generally, without reference to whether such laws were criminal in nature. This court's holding in Gonzales that illegal presence, alone, is not a crime--recently reaffirmed by this court in *Martinez- Medina v. Holder, F.3d , 2011 U.S. App. LEXIS 5341, 2011 WL 855791, at *6 (9th Cir. 2011)* --is inapposite. As discussed above, the question whether state and local officers could enforce civil immigration laws was not before the court in Gonzales, and therefore its "distinction" between criminal and civil immigration laws is inexistent. *See Maj*. Op. at 4843-44 n.22.

The conclusion that state police officers have the inherent authority to enforce the civil provisions of federal immigration law is supported by *Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003)*. There, a police officer questioned a woman about her immigration status. *Id. at 1262*. This court stated that "it [was] doubtful that the police [*135] officer had any authority to question Mena regarding her citizenship." *Id. at 1265 n.15*. The Supreme Court overruled this court and stated:

> As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the *Fourth Amendment*. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or *immigration status*.

Muehler v. Mena, 544 U.S. 93, 101, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (emphasis added). Thus, the Supreme Court explicitly recognized--in one of our California cases--that state police officers have authority to question a suspect regarding his or her immigration status, directly contradicting the majority's conclusion that state officers possess no inherent authority to enforce the civil provisions of immigration law. [19]

> 19 The majority contends "*Mena* did not recognize that state officers can enforce federal civil immigration law with no federal supervision or involvement." Maj. Op. at 4843 n.21. It is true that an INS officer was present when the state and local officers questioned Mena regarding her immigration status. However, the actions of the INS officer were not before the Court; it [*136] was the conduct of the state and local officers which the Court scrutinized. *See Mena, 544 U.S. at 100-01*. Moreover, the Supreme Court did not state that the presence of an INS officer was *required* for the state and local officers to question Mena regarding her immigration status. Indeed, the Court in *Mena* did not even mention the presence of the INS officer in the portion of the opinion recognizing the state and local officers' questioning was permissible. *See id*. So, the officer conduct the Court approved was the state and local officer conduct. For aught that appears, the federal officer was a bystander, not one who "called upon" the state officers for help. *See supra* pages 4865-69.

B. Non-preemption of states' inherent enforcement authority

Next, the majority errs in finding that *8 U.S.C. § 1252c* preempts this inherent state arrest authority. Despite *§ 1252c*'s lack of *any* language which indicates an intent to *limit* state powers, the majority holds that *§ 1252c* represents the *full extent* of the arrest power Congress intended--a contention the Tenth Circuit previously rejected. *See United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999)*, cert. denied, *528 U.S. 913, 120 S. Ct. 264, 145 L. Ed. 2d 221 (1999)*; *see* [*137] *also United States v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001)*. *8 U.S.C. § 1252c* provides, in relevant part:

> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who--
>
> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,
>
> but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

8 U.S.C. § 1252c(a). The majority concludes that because Section 6 would allow warrantless arrests in a broader set of circumstances than described in *§ 1252c*, it therefore conflicts with Congress's intent.

The Tenth Circuit persuasively rejected this contention over a decade ago. In *United States v. Vasquez-Alvarez*, "Vasquez claimed that *8 U.S.C. § 1252c* [*138] limit[ed] the authority of state and local police officers, allowing such an officer to arrest an illegal alien only when the INS has confirmed, before the arrest, that the alien has previously been convicted of a felony and has, since that conviction, been deported or left the United States." *176 F.3d at 1295*. [20]

> 20 Again, Vasquez claimed that in his case. The United States has made no such claim here. *See supra* footnote 14.

Unable to cite any text in *§ 1252c* which would expressly or impliedly state an intention that *§ 1252c* was meant to be the *only* authority for state police to arrest an alien for his unlawful presence in this country, nor any canon of statutory interpretation that would come to its aid--and ignoring a later statute's recognition of the authority to detain (*1357(g)(10)*) --the majority appeals to

legislative history. As noted by the majority, the only legislative history as to *§ 1252c* is the floor debate that accompanied Representative Doolittle's introduction of *§ 1252c*. The Tenth Circuit analyzed the plain language of *§ 1252c* as well as this legislative history, and rejected Vasquez's claim:

> This legislative history does not contain the slightest indication that Congress [*139] intended to displace any preexisting enforcement powers already in the hands of state and local officers. Accordingly, neither the text of the statute nor its legislative history support Vasquez's claim that *§ 1252c* expressly preempts state law.

Id. at 1299.

The majority takes a single Representative's comment-- that states lacked the authority to arrest illegal aliens and that *§ 1252c* was needed to authorize such arrests--to conclude that Congress *as a whole* intended *§ 1252c* to represent the limit of state arrest authority. Like the Tenth Circuit, however, I cannot conclude that Congress intended *§ 1252c* to represent the outer bounds of state officers' authority to arrest illegal aliens based solely on the comments of one Representative. As stated by the Tenth Circuit:

> Representative Doolittle did not identify which "current Federal law" prohibited "State and local law enforcement officials from arresting and detaining criminal aliens." Neither the United States nor Vasquez has identified any such preexisting law. Furthermore, this court has not been able to identify any pre-*§ 1252c* limitations on the powers of state and local officers to enforce federal law.

Id. at 1299 n.4; *see also United States v. Anderson, 895 F.2d 641, 647 (9th Cir. 1990)* [*140] (Kozinski, J., dissenting) ("[Legislative] history . . . is seldom, if ever, even seen by most of the legislators at the time they cast their votes."). [21] Further supporting this conclusion is the text of *§ 1252c*, which does not provide even the slightest indication that Congress intended to preempt otherwise inherent state arrest powers.

21 The majority contends it is hypocritical that I criticize the majority's reliance on a single representative's comments while supporting the Tenth Circuit's approach in *Vasquez-Alvarez*--which also relied on this representative's comments. To the extent the Tenth Circuit relied affirmatively on Rep. Doolittle's comments, I agree with the majority that such reliance was misguided. Nonetheless, the Tenth Circuit also noted what the legislative history *failed* to demonstrate: an intent to displace preexisting state arrest authority. *See Vasquez-Alvarez, 176 F.3d at 1299 & n.4*. Conflict preemption requires a determination that Congress's intent conflicts with the state law in question. This requires, first, determining Congress's intent. Was it Congress's intent not to remove aliens illegally present in this country? The inability to discern an incompatible [*141] intent is fatal to the United States' preemption claim.

The Tenth Circuit went on to note that Congress subsequently "passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Vasquez-Alvarez, 176 F.3d at 1300*. Notably, Congress passed *8 U.S.C. § 1357(g)*, discussed at length above, just five months later. [22] The Tenth Circuit found this code section "evince[d] a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." Id. The majority states that the Tenth Circuit erred in "*interpret[ing] § 1357(g)(10)* to mean that [a] 'formal agreement [pursuant to *§ 1357(g)(1)-(9)*] is not necessary for state and local officers "to cooperate with the Attorney General in identification, apprehension, detention, or removal of aliens." ' " Maj. Op. at 4847 (emphasis added). It is no wonder that the Tenth Circuit so "interpreted" *§ 1357(g)(10)*, when that is what the statute *explicitly* says:

> *Nothing in this subsection [1357(g)] shall be construed to require an agreement* under this subsection in order for any officer or employee of [*142] a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of

> aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10)(B) (emphasis added). I cannot join the majority in criticizing the Tenth Circuit for merely reading the statute's words. [23]

> 22 *8 U.S.C. § 1644* was passed four months after *§ 1252c*, and one month before *§ 1357(g)*. *Section 1373(c)* was passed at the same time as *§ 1357(g)*.
> 23 But I can criticize the majority for initiating a needless circuit split between our court and the Tenth Circuit, contrary to our own declared preference to avoid such circuit splits. *See, e.g., United States v. Alexander, 287 F.3d 811 (9th Cir. 2002)* ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits." (quoting *United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987)*)).

The majority contends that *§ 1357(g)(10)* "neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision." Maj. Op. at 4847. What, then, does *§ 1357(g)(10)* do? We must read *1357(g)(10)* in [*143] context of *§ 1357(g)* as a whole. *Section 1357(g)* created, for the first time, the authority of the Attorney General to enter into agreements with states and localities to deputize their officers as 287(g) immigration officers. *Subsections (g)(1)-(9)* set out the specifics of the explicit written agreements--state officers are paid by the state, trained by the federal government, supervised by the Attorney General, and should be treated as federal employees for purposes of liability and immunity. However, *§ 1357(g)(10)* states clearly that this new method of state involvement--287(g) deputized officers--is not the *only* way state officers may cooperate in the enforcement of federal immigration law. *Subsection (g)(10)* preserves the preexisting authority of state officers to participate in enforcing immigration law, without the requirement of any formal, written agreement as envisioned by *§ 1357(g)(1)-(9)*.

Absent *subsection (g)(10)*, one might argue that the authority created by *§ 1357(g)(1)-(9)* to deputize state officers represents the *full* extent of state officer immigration enforcement. [24] Instead, *(g)(10)* makes clear that state officers' authority "otherwise to cooperate" in enforcing federal [*144] immigration law remained intact after the creation of the new "deputy track" of enforcement. This reading does not make *§ 1357(g)* superfluous, as the majority contends. *See* Maj. Op. at 4847. Indeed, this interpretation makes each part of *§ 1357(g)* necessary--*subsections (g)(1)-(9)* are necessary to authorize the Attorney General to deputize 287(g) officers, and *subsection (g)(10)* is necessary to preserve state officers' preexisting communication and arrest authority. The majority cannot explain how state officers may "otherwise cooperate" pursuant to *§ 1357(g)(10)*--in such concrete areas as the "identification, apprehension, detention, [and] removal" of suspects-- if they possess no inherent authority to enforce civil immigration law. The reason for this inconsistency is the majority's antecedent error--finding state officers lack such inherent authority.

> 24 Indeed, this is what the majority does even with the presence of *§ 1357(g)(10)*.

Neither does this interpretation render *§ 1252c* superfluous, as the majority contends. *See* Maj. Op. at 4847. *Section 1252c*'s "notwithstanding" language acts as a safeguard against other provisions of *federal* law, preventing any other provision from being construed [*145] to preempt state arrest authority to arrest certain illegal aliens. As stated by the 2002 OLC Opinion:

> If, for example, a court were otherwise inclined (per the Ninth Circuit's dicta in *Gonzales[v. City of Peoria, 722 F.2d 468 (9th Cir. 1983)])* to misconstrue the provisions of the INA as preempting state authority to arrest for civil deportability, *section 1252c* would operate to ensure that state police at least retained the authority to make such arrests of aliens who had previously been convicted of a felony and had been deported or had left the United States after such conviction.

2002 OLC Opinion at 11. Moreover, Congress has authority to enact legislation which is designed merely to clarify, without affecting the distribution of power. See, e.g., Reaffirmation--Reference to One Nation Under God in the Pledge of Allegiance, Pub L. No. 107-293 (2002) ("An Act To *reaffirm* the reference to one Nation under God in the Pledge of Allegiance." (emphasis added)). Thus, *§ 1252c* does not become "superfluous" merely because it does not enlarge or shrink the arrest power provided to state police officers. [25]

25 The majority criticizes my use of the 2002 OLC Opinion. Maj. Op. at 4847 n.24. I agree [*146] with the majority's assertion that the OLC Opinion does not bind this court. I quote it, however, not for its authority, but to rebut the majority's contention that *§ 1252c* is superfluous.

The majority is correct that the legislative history accompanying *§ 1252c* does not contain reaffirming language like that found in Reaffirmation--Reference to One Nation Under God in the Pledge of Allegiance, Pub L. No. 107-293 (2002). Indeed, *§ 1252c*'s legislative history contains nothing more than the floor debate discussed previously. Again, the point of this citation is simply to demonstrate the various, nonsuperfluous motivations for Congressional action which do not explicitly alter the status quo.

Conclusion

In conclusion, Section 6 is not preempted and is constitutional. The United States all but conceded the only argument it made in this court and the court below. On the merits of the majority's *sua sponte* suggestion that state officers can act in the immigration enforcement field pursuant only to *8 U.S.C. § 1252c*, familiar principles of dual sovereignty, as recognized by the Supreme Court, provide states with the inherent authority to enforce federal immigration law. In passing *8 U.S.C. § 1252c*, [*147] a statement by the bill's sponsor of what he thought was the preexisting state of the law is insufficient to establish that Congress as a whole intended to displace this preexisting authority vested in the states. Finally, *8 U.S.C. § 1357(g)(10)*, enacted *after § 1252c*, explicitly recognizes an authority reserved to the states to enforce federal immigration law *outside* the confines of a written agreement with the Attorney General. Section 6 does not conflict with the intent of Congress, and thus is not conflict preempted.

IV. Conclusion

The majority misreads the meaning of the relevant federal statutes to ignore what is plain in the statutes--Congress intended state and local police officers to participate in the enforcement of federal immigration law. Sections 2 and 6 do not conflict with this intent, and thus are constitutional.

208 F.3d 1122, 00 Cal. Daily Op. Serv. 2774, 2000 Daily Journal D.A.R. 3733
(Cite as: 208 F.3d 1122)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
German Espinoza MONTERO-CAMARGO, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Lorenzo Sanchez-Guillen, Defendant-Appellant.

Nos. 97-50643, 97-50645.
Argued and Submitted Dec. 10, 1998
Filed May 13, 1999
Amended Aug. 25, 1999
Rehearing En Banc Granted and Opinion Withdrawn Oct. 25, 1999
Argued and Submitted Dec. 16, 1999
Filed April 11, 2000

First defendant was convicted, following guilty plea, of conspiracy to possess and possession of marijuana with intent to distribute, and second defendant was convicted, following jury trial, of same offenses, as well as offense of being illegal alien in possession of ammunition, by the United States District Court for the Southern District of California, Irma E. Gonzalez, J. Defendants appealed. The Court of Appeals affirmed, 177 F.3d 1113. Rehearing en banc was granted. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) defendants' Hispanic appearance was not proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop them, in light of large number of Hispanics in area; overruling *United States v. Rodriguez-Sanchez* and *United States v. Franco-Munoz*; (2) fact that automobile passenger picked up newspaper after glancing at patrol car in rear-view mirror could not be considered in determining whether reasonable suspicion existed; (3) that drivers made U-turns when approaching checkpoint was appropriate factor to consider in determining whether reasonable suspicion existed; (4) facts that automobiles were being driven in tandem and had Mexicali license plates were entitled to some weight in analysis of whether investigatory stop was supported by reasonable suspicion; and (5) investigatory stop was supported by reasonable suspicion.

Affirmed.

Kozinski, Circuit Judge, filed concurring opinion in which T. G. Nelson, Kleinfeld, and Silverman, Circuit Judges, joined.

West Headnotes

[1] Arrest 35 ⚿63.5(1)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(1) k. In General. Most Cited Cases

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest; accordingly, the Fourth Amendment requires that such seizures be, at a minimum, reasonable. U.S.C.A. Const.Amend. 4.

[2] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

To satisfy the Fourth Amendment's strictures, an investigatory stop by the police may be made only if the officer in question has a reasonable suspicion supported by articulable facts that criminal

activity may be afoot. U.S.C.A. Const.Amend. 4.

[3] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Like probable cause determinations, the reasonable suspicion analysis applicable to an investigatory stop is not readily, or even usefully, reduced to a neat set of legal rules, and, also like probable cause, takes into account the totality of the circumstances. U.S.C.A. Const.Amend. 4.

[4] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Although the level of suspicion required for a brief investigatory stop is less demanding than that for probable cause, the Fourth Amendment nevertheless requires an objective justification for such a stop. U.S.C.A. Const.Amend. 4.

[5] Arrest 35 ⚿63.5(5)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(5) k. Particular Cases. Most Cited Cases

An officer making an investigatory stop must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity. U.S.C.A. Const.Amend. 4.

[6] Arrest 35 ⚿63.5(5)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(5) k. Particular Cases. Most Cited Cases

A reasonable suspicion exists supporting an investigatory stop when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion. U.S.C.A. Const.Amend. 4.

[7] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The requirement of particularized suspicion supporting an investigatory stop encompasses two elements, which are, first, that the assessment must be based upon the totality of the circumstances, and, second, that the assessment must arouse a reasonable suspicion that the particular person being stopped has committed or is about to commit a crime. U.S.C.A. Const.Amend. 4.

[8] Arrest 35 ⚿63.5(4)

35 Arrest

35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

An investigatory stop may only be justified by reference to factors that were present up to the time the stop was made. U.S.C.A. Const.Amend. 4.

[9] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Totality-of-the-circumstances approach to question whether investigatory stops were justified was required due to police officers' testimony that they relied on a number of factors in making the stops. U.S.C.A. Const.Amend. 4.

[10] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Determinations whether investigatory stops are supported by reasonable suspicion are not readily, or even usefully, reduced to single determinative factors. U.S.C.A. Const.Amend. 4.

[11] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Conduct that may be entirely innocuous when viewed in isolation may properly be considered in arriving at a determination that reasonable suspicion to support an investigatory stop exists. U.S.C.A. Const.Amend. 4.

[12] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Conduct that is not necessarily indicative of criminal activity may, in certain circumstances, be relevant to the calculus for determining whether reasonable suspicion exists to support an investigatory stop. U.S.C.A. Const.Amend. 4.

[13] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Innocuous conduct does not justify an investigatory stop unless there is other information or surrounding circumstances of which the police are

aware, which, when considered along with the otherwise innocuous conduct, tend to indicate criminal activity has occurred or is about to take place. U.S.C.A. Const.Amend. 4.

[14] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

A police officer's experience may furnish the background against which to assess facts relevant to whether reasonable suspicion exists to support an investigatory stop, as long as the inferences the officer draws are objectively reasonable; but experience does not in itself serve as an independent factor in the reasonable suspicion analysis. U.S.C.A. Const.Amend. 4.

[15] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

Hispanic appearance of drivers was not proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop them after they made U-turns where view of agents manning southern California checkpoint was obstructed, in light of agent's testimony that majority of persons passing through checkpoint were Hispanic, and data indicating that county in which checkpoint was located was 73% Hispanic and that five southern California counties were home to more than one-fifth of nation's Hispanic population; overruling *United States v. Rodriguez-Sanchez,* 23 F.3d 1488; *United States v. Franco-Munoz,* 952 F.2d 1055. U.S.C.A. Const.Amend. 4.

[16] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Where the majority or any substantial number of people share a specific characteristic, that characteristic is of little or no probative value in the particularized and context-specific analysis of whether reasonable suspicion exists to support an investigatory stop. U.S.C.A. Const.Amend. 4.

[17] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The likelihood that in an area in which the majority, or even a substantial part, of the population is Hispanic, any given person of Hispanic ancestry is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the calculus of whether reasonable suspicion exists to support an investigatory stop. U.S.C.A. Const.Amend. 4.

[18] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation

35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law when determining whether officer had reasonable suspicion. U.S.C.A. Const.Amend. 4.

[19] Courts 106 92

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k92 k. Dicta. Most Cited Cases

The Court of Appeals does not treat considered dicta from the United States Supreme Court lightly; rather, the Court of Appeals accords it appropriate deference.

[20] Courts 106 92

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k92 k. Dicta. Most Cited Cases

United States Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold, and, accordingly, the Court of Appeals does not blandly shrug them off because they were not a holding.

[21] Arrest 35 63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The use of factors such as dress or haircut, when those factors are relevant, is not precluded when determining whether a person is an alien, for purposes of determining whether a reasonable suspicion exists to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

[22] Arrest 35 63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The use of racial or ethnic appearance as one factor relevant to reasonable suspicion for making an investigatory stop or probable cause is not precluded when a particular suspect has been identified as having a specific racial or ethnic appearance, be it Caucasian, African-American, Hispanic or other; however, a stop based solely on the fact that the racial or ethnic appearance of an individual matches the racial or ethnic description of a specific suspect would not be justified. U.S.C.A. Const.Amend. 4.

[23] Arrest 35 63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

In an area in which a large number of people share a specific characteristic, that characteristic

casts too wide a net to play any part in a determination whether a particularized reasonable suspicion exists to support an investigatory stop. U.S.C.A. Const.Amend. 4.

[24] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Hispanic appearance, or any other racial or ethnic appearance, including Caucasian, may be considered in determining whether reasonable suspicion exists to make investigatory stop, when suspected perpetrator of specific offense has been identified as having such appearance; even in such circumstances, however, persons of a particular racial or ethnic group may not be stopped and questioned because of such appearance, unless there are other individualized or particularized factors which, together with racial or ethnic appearance identified, rise to level of reasonable suspicion or probable cause. U.S.C.A. Const.Amend. 4.

[25] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor in determining whether reasonable suspicion exists to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

[26] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

Fact that automobile passenger picked up newspaper after glancing at Border Patrol agent's patrol car in rear-view mirror could not be considered in determining whether reasonable suspicion existed to make investigatory stop; agent did not suggest that passenger attempted to conceal her face, and it was difficult to imagine what passenger could have done after glancing at patrol car that would not have appeared suspicious to agent. U.S.C.A. Const.Amend. 4.

[27] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

In general, eye contact, or the lack thereof, may be considered as a factor establishing reasonable suspicion to make an investigatory stop. U.S.C.A. Const.Amend. 4.

[28] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

That drivers made U-turns on highway when approaching Border Patrol checkpoint was appropriate factor to consider in determining whether reasonable suspicion existed supporting investigatory stops; drivers immediately stopped upon mak-

ing U-turns in isolated, desert area frequently used to drop off or pick up undocumented aliens or contraband, U-turns occurred just after sign indicating that upcoming checkpoint had been re-opened, and it was highly unlikely that drivers had accidentally passed their exit point, given that there was only one turn-off in area and it led to private road. U.S.C.A. Const.Amend. 4.

[29] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

An individual's presence in a high crime area is not enough to support reasonable, particularized suspicion that the individual in question has committed or is about to commit a crime, and thus does not justify investigatory stop. U.S.C.A. Const.Amend. 4.

[30] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The citing of an area as "high-crime," for purposes of determining whether an investigatory stop in the area is based on reasonable suspicion, requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity. U.S.C.A. Const.Amend. 4.

[31] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

District courts must carefully examine the testimony of police officers in determining whether an area is "high-crime," for purposes of determining whether an investigatory stop in the area is based on reasonable suspicion, and must make a fair and forthright evaluation of the evidence they offer, regardless of the consequences. U.S.C.A. Const.Amend. 4.

[32] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

In determining whether an investigatory stop is supported by reasonable suspicion, courts must be particularly careful to ensure that a "high crime" area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity. U.S.C.A. Const.Amend. 4.

[33] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

Facts that two automobiles were being driven in tandem and had Mexicali license plates were en-

titled to some weight in analysis of whether investigatory stop was supported by reasonable suspicion, given that they turned around in tandem in middle of highway when approaching Border Patrol checkpoint but then pulled off and stopped where criminal activity often took place, and given that the suspected criminal act involved border-crossing, but they did not constitute substantial factors, either singly or collectively. U.S.C.A. Const.Amend. 4.

[34] Arrest 35 ⚿63.5(4)

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

The circumstances of the tandem driving at issue will in the end determine whether that factor is relevant to determining whether an investigatory stop is supported by reasonable suspicion. U.S.C.A. Const.Amend. 4.

[35] Customs Duties 114 ⚿126(2)

114 Customs Duties
114XV Violations of Customs Laws
114k126 Searches and Seizures
114k126(2) k. Grounds or Cause for Stop, Search, or Seizure. Most Cited Cases

Investigatory stop of two drivers was supported by reasonable suspicion, where they made U-turns on highway while driving in tandem, at place where view of border officials was obstructed, and stopped at locale historically used for illegal activities, U-turn occurred where it was unlikely that drivers would have reversed directions because they had missed exit, vehicles bore Mexicali license plates, and U-turn occurred just after sign indicating that Border Patrol checkpoint that had been closed for some time was now open. U.S.C.A. Const.Amend. 4.

***1126** Stephen Hubachek, Assistant Federal Public Defender, San Diego, California, for defendant-appellant Lorenzo Sanchez-Guillen. Harold G. Murray, San Diego, California, for defendant-appellant German Espinoza Montero-Camargo.

Bruce Castetter, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

Appeals from the United States District Court for the Southern District of California; Irma E. Gonzalez, District Judge, Presiding. D.C. No. CR-96-02233-2-IEG.

Before: HUG, Chief Judge, BROWNING, PREGERSON, REINHARDT, KOZINSKI, T. G. NELSON, KLEINFELD, HAWKINS, THOMAS, SILVERMAN, and McKEOWN, Circuit Judges.

REINHARDT, Circuit Judge:

The question before us is whether Border Patrol agents had reasonable suspicion to stop German Espinoza Montero-Camargo and Lorenzo Sanchez-Guillen. The defendants, who were driving separate automobiles in tandem, made U-turns on a highway at the only place where the view of the agents manning a permanent stationary checkpoint was obstructed. Following the turns, the two cars, both bearing Mexicali license plates, stopped briefly in an area that is often used as a drop-off and pick-up point for undocumented aliens and contraband. The U-turns occurred shortly after the cars passed a sign stating that the previously closed Border Patrol facility was now open. Based on these and other factors, the district court concluded that the stop, which occurred some fifty miles north of the Mexican border, was justified, as did the majority of the three judge panel that considered the question. We took the case en banc to reconsider the reasonable suspicion question. Although we affirm the result reached by both the district court and the panel majority, we reject some of the factors on which they relied.

FACTS

On the afternoon of October 15, 1996, a passing driver told border patrol agents at the Highway 86 permanent stationary checkpoint in El Centro, California, that two cars heading north, with Mexicali license plates,[FN1] had just made U-turns on the highway shortly before the checkpoint. Upon receiving the tip, two Border Patrol Agents, Brian Johnson[FN2] and Carl Fisher,[FN3] got into separate marked patrol cars and headed south to investigate. Approximately one minute later (and about one mile from the checkpoint), the two agents saw a blue Chevrolet Blazer and a red Nissan sedan, both with Mexicali plates, pull off the shoulder and re-enter the highway heading south.[FN4]

FN1. Border Patrol Agent Brian Johnson testified that Baja California or Mexicali plates are distinctive orange plates with a darker letter background and "Front BC" embossed on the bottom of the plate.

FN2. Johnson testified at the suppression hearing that he had worked at the El Centro station for the eight and a half years he had worked for the Border Patrol. He also testified that he had more than four years experience at the Highway 86 checkpoint.

FN3. Like Agent Johnson, Fisher testified that he had worked at the El Centro station for the duration of his employment with the Border Patrol, in this case, also over eight years.

FN4. The agents had seen only one vehicle pass the checkpoint heading south in the ten minutes or so before the tip was received. That vehicle, the agents testified, was a semi tractor-trailer.

***1127** According to the agents, the area where they first observed the cars is used by lawbreakers to drop off and pick up undocumented aliens and illegal drugs, while evading inspection. Its use for such purposes is due in part to the fact that the view of that part of the highway area from the Border Patrol checkpoint is blocked. The location, according to Agent Johnson, is the only place where it is feasible to turn around both safely and with impunity. After that point, the road narrows and is in plain view of the checkpoint. The highway itself runs through the open desert and there is a fence on either side.

Both agents testified that almost all of the stops made by the Border Patrol at the turnaround site resulted in the discovery of "a violation of some sort ..." involving either illegal aliens or narcotics.[FN5] In contrast, Agent Johnson said that similar stops made in connection with turnarounds near other checkpoints did not result in arrests nearly as frequently. He attributed the difference to the fact that travelers routinely miss their turnoffs to camping sites near those other checkpoints. Before the northbound Highway 86 checkpoint, however, there are no exits, driveways, or roads nearby that a driver might accidentally pass by. In fact, the only exit off of Highway 86 in that area is a private driveway to the Elmore Ranch, some two miles from the turnaround point.[FN6]

FN5. According to Agent Johnson, he had been personally involved in some 15 to 20 stops based on turnarounds at that spot over the past eight years. Agent Fisher testified that he had been involved in approximately twelve stops, only one of which did not turn up either undocumented aliens or contraband.

FN6. Agent Fisher testified that only one turnaround of which he was aware was the result of the driver missing the Elmore Ranch driveway.

The place where the agents saw that the vehicles had stopped following the U-turn was a deserted area on the side of the southbound highway located opposite the large sign on the northbound side advising drivers that the checkpoint was

open. As Agent Johnson testified, the sign was the first indication to northbound drivers that the Border Patrol's facility was operational. The checkpoint in question had been closed for some time and had reopened only a day or two earlier.

At the suppression hearing, Agent Johnson testified that the majority of people going through the El Centro checkpoint are Hispanic. This demographic makeup is typical of the larger region of which the city El Centro is a part. In Imperial County, where El Centro is located, Hispanics make up roughly 73% of the population. *See* U.S. Census Bureau, "Population Estimates for Counties by Race and Hispanic Origin: July 1, 1999." Agent Johnson also testified that as he pulled behind the Blazer, he noted that both the driver and the passenger appeared to be Hispanic. Johnson stated that when the driver and passenger noticed him behind them, the passenger picked up a newspaper and began reading. This, according to Agent Johnson, further aroused his suspicions. Johnson then stopped the Blazer, identified himself as a Border Patrol agent, and asked about the citizenship of the two occupants. In response to Johnson's inquiries, the driver, Lorenzo Sanchez-Guillen, and his passenger, Sylvia Renteria-Wolff, showed Agent Johnson I-586 cards, which allow Mexican citizens to travel up to 25 miles inside the United States for no longer than 72 hours at a time. As the Blazer had been stopped approximately 50 miles from the border, Johnson then brought the two occupants to the checkpoint for processing.

In the meantime, Agent Fisher continued to follow the second car, a red Nissan sedan. According to Fisher, when he and Agent Johnson first drew near the two cars, the Nissan began to accelerate. As Fisher caught up with the vehicle, he could see that the second driver also appeared to be Hispanic. Fisher ultimately pulled the ***1128** Nissan over after following it for approximately four miles. Appellant German Espinoza Montero-Camargo was the driver. After stopping the car, Agent Fisher, with the aid of Agent Johnson, who had returned to help him, searched the trunk and found two large bags of marijuana. A subsequent search of the Blazer back at the checkpoint turned up a loaded .32 caliber pistol in the glove compartment and an ammunition clip that fit the pistol in the passenger's purse.

Montero-Camargo, Sanchez-Guillen, and Renteria-Wolff were charged with conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1), as well as possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Sanchez-Guillen was also charged with being an illegal alien in possession of ammunition in violation of 18 U.S.C. § 922(g)(5) and § 924(a)(2) and aiding and abetting the carrying of a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) and (2). The three defendants filed a pretrial motion to suppress on the ground that the vehicle stop was not based on reasonable suspicion. When the district court denied the motion, Montero-Camargo entered a conditional guilty plea to conspiracy to possess and possession of marijuana with the intent to distribute; he reserved the right to challenge on appeal two of the district court's determinations, including the denial of the motion to suppress.[FN7] Sanchez-Guillen went to trial, and a jury convicted him of conspiracy to possess and possession of marijuana with the intent to distribute, as well as being an illegal alien in possession of ammunition. He raises a number of issues on appeal.[FN8]

> FN7. Renteria-Wolff, whose conviction is not at issue in this appeal and who is not a party to it, pled guilty to being an illegal alien in possession of ammunition, in violation of 18 U.S.C. § 922(g)(5) and 924(a)(2).
>
> FN8. Because we consider here only the reasonable suspicion issue and reach the same result as the panel majority, the panel opinion is reinstated as to all other issues.

In denying the motion to suppress, the district

court conceded that the government's case "was somewhat weak," but concluded that, upon considering "all the factors that the officers had in their possession at the time that each of them made the stops, ... there was a sufficient founded suspicion to make an investigatory stop." Those factors, as the district court categorized them, included: 1) the tip about a U-turn made in the middle of the highway just before the checkpoint by two cars with Mexican license plates; 2) the alleged driving in tandem and the Mexicali license plates which supported the inference drawn by the officers that these were the two cars identified by the tipster; 3) the area in question, which, based on the officers' experience with previous stops, is "a notorious spot where smugglers turn around to avoid inspection" just before the first sign indicating that the checkpoint was in fact open; 4) the fact that the occupants of both cars appeared to be of Hispanic descent; and 5) the fact that the passenger in the Blazer picked up a newspaper as the Border Patrol car approached. The district judge concluded that when these factors were considered in light of the officers' experience, they supported a finding of reasonable suspicion.

On appeal, Montero-Camargo and Sanchez-Guillen argued that the district court erred in denying the motion to suppress. The panel majority agreed, however, with the district court's conclusion. It did so by listing, without further explication, a number of factors,[FN9] including: apparent avoidance of a checkpoint, tandem driving, Mexicali license plates, the Hispanic appearance of the vehicles' occupants, the behavior of Renteria-Wolff, the agent's prior ***1129** experience during stops after similar turnarounds, and the pattern of criminal activity at the remote spot where the two cars stopped.[FN10] Although we reach the same result as both the district judge and the panel majority, we do so on the basis of a more selective set of factors.

FN9. In *United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir.1992), we noted that "we must be watchful for mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion, leading us to defer to the supervening wisdom of a case not now before us."

FN10. The original opinion simply listed "ethnicity" as a factor. The opinion was subsequently amended, and the term "ethnicity" replaced with "Hispanic appearance." Described either way, however, the factor is no longer one that is relevant or appropriate to the "reasonable suspicion" analysis. *See* discussion *infra* pp. 1131-35.

ANALYSIS

1. *The Reasonable Suspicion Calculus*

[1][2] The Fourth Amendment "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Accordingly, the Fourth Amendment requires that such seizures be, at a minimum, "reasonable." *Id.* In order to satisfy the Fourth Amendment's strictures, an investigatory stop by the police may be made only if the officer in question has "a reasonable suspicion supported by articulable facts that criminal activity may be afoot...." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (internal quotation omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

[3][4][5][6] Like probable cause determinations, the reasonable suspicion analysis is "not 'readily, or even usefully, reduced to a neat set of legal rules' " and, also like probable cause, takes into account the totality of the circumstances. *Sokolow*, 490 U.S. at 7-8, 109 S.Ct. 1581 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although the level of suspicion required for a brief investigatory stop is less demanding than that for probable cause, the Fourth Amendment nevertheless requires an object-

ive justification for such a stop. *See id.* at 7, 109 S.Ct. 1581. As a result, the officer in question "must be able to articulate more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, ----, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). Rather, reasonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion. *See United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States v. Salinas*, 940 F.2d 392, 394 (9th Cir.1991).

[7][8] The requirement of *particularized* suspicion encompasses two elements. *See Cortez*, 449 U.S. at 418, 101 S.Ct. 690. First, the assessment must be based upon the totality of the circumstances.[FN11] *Id.* Second, that assessment must arouse a reasonable suspicion that *the particular person being stopped* has committed or is about to commit a crime. *See id.; see Terry v. Ohio*, 392 U.S. at 21 n. 18, 88 S.Ct. 1868 ("[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). Accordingly, we have rejected profiles that are "likely to sweep many ordinary citizens into a generality of suspicious appearance...." *United States v. Rodriguez*, 976 F.2d 592, 595-96 (9th Cir.1992) (concluding that the factors cited in the case-namely, a Hispanic man carefully driving an old Ford with a worn suspension who looked in his rear view mirror while being followed by agents in a marked car-described "too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity"); *see also* ***1130***United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir.1994) (holding that reasonable suspicion cannot be based "on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped").

FN11. A stop may only be justified, however, by reference to factors that were present up to the time the stop was made. *See United States v. Robert L.*, 874 F.2d 701, 703 n. 2 (9th Cir.1989).

[9][10] In *Brignoni-Ponce*, the Court listed factors which officers might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. Those factors include: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers.[FN12] 422 U.S. at 884-85, 95 S.Ct. 2574. With time, however, "[s]ubsequent interpretations of these factors have created a highly inconsistent body of law," and we have given them varying weight in varying contexts. *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir.1989).

FN12. Our concurring colleagues ask "what excuse" exists "for resorting to a totality-of-the circumstances approach when a single factor ... alone justifies the search." Their quarrel, however, is not with us, but rather with the facts and with the Supreme Court. *See, e.g., Brignoni-Ponce*, 422 U.S. at 884-85, 95 S.Ct. 2574, and the set of factors listed in the text. The officers testified that they relied on a number of factors in making the stops. Accordingly, the Court's reasonable suspicion analysis *requires* a totality of the circumstances approach. *Sokolow*, 490 U.S. at 8, 109 S.Ct. 1581; *Cortez*, 449 U.S. at 418, 101 S.Ct. 690. Moreover, although the concurrence is correct that multi-factor tests can introduce a "troubling degree of uncertainty and unpredictability into the process ...," the problem would not be

solved by discarding the analytical approach the Court follows, even were we free to do so. As the Supreme Court has noted, reasonable suspicion determinations are "not 'readily, or even usefully, reduced to a neat set of legal rules' " or, for that matter, single determinative factors. *Sokolow*, 490 U.S. at 7, 109 S.Ct. 1581 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Finally, as a practical matter, we cannot ignore the valid considerations on which our law enforcement officers actually rely.

> The concurrence also criticizes the idea that some factors are of more substantial weight than others. Our approach is not, however, as original nor as implausible-let alone as incomprehensible-as our esteemed colleagues would have us think. *See, e.g., Sokolow*, 490 U.S. at 10, 109 S.Ct. 1581 (noting that the degree of suspicion that attaches to differing types of noncriminal acts may vary). Rather, it seems eminently reasonable to us that a factor that often has innocent connotations-driving a minivan on a particular highway, for example-should carry less weight than a factor that frequently has criminal implications-such as wearing a ski mask on a summer day. The urge for simplicity is understandable, but unrealistic.

[11][12][13] As the list of factors set out in *Brignoni-Ponce* suggests, sometimes conduct that may be entirely innocuous when viewed in isolation may properly be considered in arriving at a determination that reasonable suspicion exists. In *United States v. Sokolow*, the Supreme Court held that: "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of 'noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry." 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (citations and footnotes omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 243-44, n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); *see also United States v. Franco-Munoz*, 952 F.2d 1055, 1057 (9th Cir.1991). In short, conduct that is not necessarily indicative of criminal activity may, in certain circumstances, be relevant to the reasonable suspicion calculus. *See Wardlow*, 528 U.S. at ----, 120 S.Ct. at 677. At the same time, however, innocuous conduct does *not* justify an investigatory stop unless there is other information or surrounding circumstances of which the police are aware, which, when considered along with the otherwise innocuous conduct, tend to indicate criminal activity has occurred or is about to take place. *See* ***1131** *People of the Territory of Guam v. Ichiyasu*, 838 F.2d 353, 355 (9th Cir.1988).

[14] In all circumstances, "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Brignoni-Ponce*, 422 U.S. at 885, 95 S.Ct. 2574. Nevertheless, "[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop." *Nicacio v. INS*, 797 F.2d 700, 705 (9th Cir.1986), *overruled in part on other grounds in Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir.1999); *see also United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir.1999). In other words, an officer's experience may furnish the background against which the relevant facts are to be assessed, *see Cortez*, 449 U.S. at 418, 101 S.Ct. 690, as long as the inferences he draws are objectively reasonable; but "experience" does not in itself serve as an independent factor in the reasonable suspicion analysis.

2. *The Factors Considered by the District Court*

As noted above, the district court based its determination that reasonable suspicion existed on a series of factors: 1) the U-turn made before the checkpoint by the two cars; 2) the driving in tandem and the Mexicali license plates; 3) the area at

which the U-turn occurred included a well-known drop-off point for smugglers; 4) the Hispanic appearance of the three defendants; and 5) Renteria-Wolff's picking up the newspaper after glancing back at the patrol cars.[FN13] Although we agree with the district court that reasonable suspicion did exist to justify an investigatory stop, we conclude that some of the factors on which the district court relied are not relevant or appropriate to the reasonable suspicion analysis. We begin by considering the factors in that category, before turning to address those which the district court properly considered.

> FN13. The panel majority's reasons differed only marginally from those of the district court, the principal difference being that the panel majority appears to have relied on tandem driving and Mexicali license plates as independent factors in the reasonable suspicion calculus, while the district court appears to have relied on them principally to establish the link between the cars described in the tip and the cars that were stopped by the Border Patrol.

[15] In concluding that reasonable suspicion existed, both the district court and the panel majority relied in part upon the Hispanic appearance of the three defendants. We hold that they erred in doing so. We first note that Agent Johnston testified at the suppression hearing that the majority of people who pass through the El Centro checkpoints are Hispanic, and thus, presumably have a Hispanic appearance.

[16] As we stressed earlier, reasonable suspicion requires *particularized* suspicion. *See Wardlow,* 528 U.S. at ----, 120 S.Ct. at 676; *see also Hernandez-Alvarado,* 891 F.2d at 1417; *Jimenez-Medina,* 173 F.3d at 754. Where, as here, the majority (or any substantial number) of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis.[FN14] *See Rodriguez-Sanchez,* 23 F.3d at 1492 (holding that reasonable suspicion cannot be based "on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to ***1132** be stopped"). As we put it in *Rodriguez,* "[w]e are not prepared to approve the wholesale seizure of miscellaneous persons ... in the absence of well-founded suspicion based on *particular, individualized, and objectively observable factors* which indicate that the person is engaged in criminal activity." 976 F.2d at 596 (holding that a stop cannot be upheld where the factors tendered as justification are "calculated to draw into the law enforcement net a generality of persons unmarked by any really articulable basis for reasonable suspicion ....") (emphasis added).

> FN14. According to recent newspaper articles, some persons tired of being stopped on account of their Hispanic appearance refer to the reason for the stops as "Driving while Mexican." *See* Jim Yardley, *Some Texans Tiring of a Busy Border Patrol,* N.Y. Times, Jan. 26, 2000 (noting that one state judge in Texas said that "it feels like occupied territory ..."); Ken Ellingwood, *U.S. Residents, Border Staff Clash,* Los Angeles Times, Jan. 21, 2000, at A3. Similar experiences on the part of African-Americans have given rise to the better known term, "Driving while Black." *See Washington v. Lambert,* 98 F.3d 1181, 1188 (9th Cir.1996).

[17][18] The likelihood that in an area in which the majority-or even a substantial part-of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.[FN15] As we have previously held, factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law. *See Gonzalez-Rivera,* 22 F.3d at 1446. Moreover,

as we explain below, Hispanic appearance is not, in general, an appropriate factor.

> FN15. "It is a well-known fact, of which we can take judicial notice, that Mexican males, driving old model General Motors sedans, blend into the morning commuter traffic to transport tons of Mexican marijuana from ports of entry in small towns along the Arizona-Sonora border. It is also well known that many thousands more Mexican males drive old model General Motors cars to work every morning. This phenomenon might justify the installation of a checkpoint where all cars could be inspected. ., but it does not justify the random stopping of 'suspicious' looking cars...." *Salinas*, 940 F.2d at 394-95.

In reaching our conclusion, we are mindful of *Brignoni-Ponce*, in which, a quarter-century ago, the Supreme Court affirmed this court's decision reversing the denial of Brignoni Ponce's motion to suppress and held that a stop could not be justified by ethnic appearance alone. In that case, the Court held that "[e]ven if [Border Patrol officers] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." *Brignoni-Ponce*, 422 U.S. at 886, 95 S.Ct. 2574. In a brief dictum consisting of only half a sentence, the Court went on to state, however, that ethnic appearance could be a factor in a reasonable suspicion calculus.[FN16]

> FN16. A year later, in *United States v. Martinez-Fuerte*, 428 U.S. 543, 563, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), the Supreme Court held it "constitutional to refer motorists selectively" to a secondary inspection area at a fixed, stationary checkpoint on the basis of criteria "that would not sustain a roving-patrol stop ... even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry." The Court's decision, however, is predicated on the fact that the initial stop of the motorist was lawful and that "no particularized suspicion need exist" to justify the subsequent referral to another part of the Border Patrol checkpoint.

[19][20] In arriving at the dictum suggesting that ethnic appearance could be relevant, the Court relied heavily on now-outdated demographic information.[FN17] In a footnote, the Court noted that:

> FN17. We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir.1996) (noting that "we treat Supreme Court dicta with *due deference* ") (emphasis added). As we have frequently acknowledged, Supreme Court dicta "have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold"; accordingly, we do "not blandly shrug them off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir.1992) (Noonan, J., concurring and dissenting). Nevertheless, we have on occasion followed the Supreme Court's admonition that, although dictum "may be followed if sufficiently persuasive," it "ought not to control the judgment in a subsequent suit ..." *Humphrey's Executor v. United States*, 295 U.S. 602, 627, 55 S.Ct. 869, 79 L.Ed. 1611 (1935); *see, e.g., Rabang v. INS*, 35 F.3d 1449, 1453-54 (9th Cir.1994). Here, for reasons we explain above, we conclude that the brief dictum to which we allude should not dictate the result here.

***1133** The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens from

> Mexico. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens.

Brignoni-Ponce, 422 U.S. at 886 n. 12, 95 S.Ct. 2574. *Brignoni-Ponce* was handed down in 1975, some twenty-five years ago. Current demographic data demonstrate that the statistical premises on which its dictum relies are no longer applicable. The Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously-at least five-fold in the four states referred to in the Supreme Court's decision. According to the U.S. Census Bureau, as of January 1, 2000, that population group stands at nearly 34 million. Furthermore, Hispanics are heavily concentrated in certain states in which minorities are becoming if not the majority, then at least the single largest group, either in the state as a whole or in a significant number of counties.FN18 According to the same data, California has the largest Hispanic population of any state-estimated at 10,112,986 in 1998, while Texas has approximately 6 million. As of this year, minorities-Hispanics, Asians, blacks and Native Americans-comprise half of California's residents; by 2021, Hispanics are expected to be the Golden State's largest group, making up about 40% of the state's population. Today, in Los Angeles County, which is by far the state's biggest population center, Hispanics already constitute the largest single group.FN19

> FN18. Seven states have Hispanic populations of more than 1 million: California, Texas, New York, Florida, Illinois, Arizona and New Jersey. Combined, California and Texas are home to more than half of the nation's Hispanic population. The states with the highest proportion of Hispanics are New Mexico (40%), California (31%), and Texas (30%). According to the same data, Arizona has the third largest Hispanic population-estimated at 1,033,822. Its white population is estimated at 4,145,043. By 2045, if current demographic trends continue, Hispanics will make up the majority of Arizona citizens. *See* Pat Flannery, *The Valley Melting Pot: Racial, ethnic shifts transform region*, The Arizona Republic, A1, Jan. 2, 2000, at A12.
>
> In the four border counties of the lower Rio Grande valley, Hispanics make up 88% of nearly one million legal residents. *See* Yardley, *Some Texans Tiring of a Busy Border Patrol*, N.Y. Times, Jan. 26, 2000. As of the last fiscal year, the number of illegal immigrants apprehended in that same area, however, was only 25,053 (less than 0.3% of the entire Hispanic population of the area). *See id.; see also* n.20 infra.
>
> FN19. Current census estimates puts the Hispanic population in Los Angeles County at 4.3 million. In contrast, there are 3.2 million (non-Hispanic) white people, 927,000 black people, and 1.2 million Asian people. The U.S. Census Bureau treats race and ethnicity differently-as a result, under this system everyone is classified as both a member of one of the four race groups (white, black, American Indian and Alaska Native, or Asian & Pacific Islander) and also as either Hispanic or non-Hispanic.

[21][22][23][24] One area where Hispanics are heavily in the majority is El Centro, the site of the vehicle stop. As Agent Johnson acknowledged, the majority of the people who pass through the El Centro checkpoint are Hispanic. His testimony is in turn corroborated by more general demographic data from that area. The population of Imperial County, in which El Centro is located, is 73% Hispanic. In Imperial County, as of 1998, Hispanics

accounted for 105,355 of the total population of 144,051. More broadly, according to census data, five Southern California counties are home to more than a fifth of the nation's Hispanic population.[FN20] *See* Dick ***1134** Kirschten, *The Emerging Minority*, Nat'l J., Aug. 14, 1999. During the current decade, Hispanics will become the single largest population group in Southern California, *see A Lesson in How to Count*, The Economist, Nov. 13, 1999, and by 2040, will make up 59% of Southern California's population. Accordingly, Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.[FN21] Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.[FN22]

FN20. In fact, four counties in Southern California (Los Angeles County, Orange County, San Diego, and San Bernardino) are ranked respectively first, fifth, seventh, and tenth among the ten counties in the United States with the largest Hispanic populations.

FN21. In *Brignoni-Ponce*, the Supreme Court also noted that "[t]he Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." 422 U.S. at 885, 95 S.Ct. 2574. Those factors, however, have been largely ignored by lower courts, in favor of a broader reading of Mexican or Hispanic appearance. In reaching our holding, we do not reject the use of factors such as dress or haircut when they are relevant. Nor do we preclude the use of racial or ethnic appearance as *one* factor relevant to reasonable suspicion or probable cause when a particular suspect has been identified as having a specific racial or ethnic appearance, be it Caucasian, African-American, Hispanic or other. We note, however, that a stop based *solely* on the fact that the racial or ethnic appearance of an individual matches the racial or ethnic description of a specific suspect would *not* be justified. *See United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir.1982).

FN22. As we explain in n. 21, *supra*, Hispanic appearance, or any other racial or ethnic appearance, including Caucasian, may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance. Even in such circumstances, however, persons of a particular racial or ethnic group may not be stopped and questioned because of such appearance, unless there are other individualized or particularized factors which, together with the racial or ethnic appearance identified, rise to the level of reasonable suspicion or probable cause. To the extent that our prior cases have approved the use of Hispanic appearance as a factor where there was no particularized, individual suspicion, they are overruled. Such cases include, but are not limited to: *United States v. Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir.1994); *United States v. Franco-Munoz*, 952 F.2d 1055 (9th Cir.1991).

Moreover, the demographic changes we describe have been accompanied by significant changes in the law restricting the use of race as a criterion in government decision-making. The use of race and ethnicity for such purposes has been severely limited. *See Adarand Constructors v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854

(1989). Relying on the principle that " '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,' " *Croson*, 488 U.S. at 521, 109 S.Ct. 706 (Scalia, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting)), the Supreme Court has repeatedly held that reliance "on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980)). In invalidating the use of racial classifications used to remedy past discrimination in *Croson*, the Court applied strict scrutiny, stating that its rigorousness would ensure that:

> the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

***1135** *Croson*, 488 U.S. at 493, 109 S.Ct. 706. The danger of stigmatic harm of the type that the Court feared overbroad affirmative action programs would pose is far more pronounced in the context of police stops in which race or ethnic appearance is a factor. So, too, are the consequences of "notions of racial inferiority" and the "politics of racial hostility" that the Court pointed to. Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection-that they are in effect assumed to be potential criminals first and individuals second. [FN23] It would be an anomalous result to hold that race may be considered when it harms people, but not when it helps them.[FN24]

FN23. In his Interim Report on race-based stops by the New Jersey State Police, the state's then Attorney General concluded that disparate treatment indeed existed and "engender[ed] feelings of fear, resentment, hostility, and mistrust by minority citizens." P. Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4, 7 (April 20, 1999). Even some police officers acknowledge the damage done by such practices: a survey of 650 Los Angeles Police Department officers found that 25% felt that " 'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.' " Report of the Independent Comm'n on the Los Angeles Police Department 69 (1991).

FN24. A significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in police officer's decisions to arrest, stop or frisk potential suspects. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, nn. 1-3 (1999) (collecting sources detailing the role race plays in law enforcement decisions to stop and search); *see also* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L.Rev. 551, 554-71 (1997) (summarizing studies of selective law enforcement practices and public perceptions of them); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999) (id.); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J.Crim.L. & Criminology 544, 559-71

(1997) (discussing 4 cases of racial bias in traffic stops); Angela J. Davis, *Race, Cops, and Traffic Stops,* 51 U. Miami L. Rev. 425, 431-32 nn. 41-51 (1997) (summarizing empirical evidence on the role of race in decisions to stop and detain civilians).

For examples of such stops in the Southern California area, *see generally Price v. Kramer,* 200 F.3d 1237 (9th Cir.2000) ; *Washington v. Lambert,* 98 F.3d 1181, 1188 (9th Cir.1996).

[25] We decide no broad constitutional questions here. Rather, we are confronted with the narrow question of how to square the Fourth Amendment's requirement of individualized reasonable suspicion with the fact that the majority of the people who pass through the checkpoint in question are Hispanic. In order to answer that question, we conclude that, at this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also not an appropriate factor.[FN25]

FN25. *Cf.* supra, n. 22, explaining that race or ethnicity may properly be a factor when a person who has been observed committing or fleeing from a crime is identified as having a particular racial or ethnic appearance, and the other factors suggesting that the individual to be stopped may have committed the crime (in combination with his race or ethnicity) suffice to justify "reasonable suspicion" or "probable cause."

[26][27] We now turn to another factor on which the United States relies, namely Renteria-Wolff's behavior. Both the district court judge as well as the panel majority concluded that Renteria-Wolff's behavior-more specifically, her picking up a newspaper after glancing at the patrol car in the rear-view mirror-was a relevant factor in the reasonable suspicion analysis. ***1136** We disagree. In general, although eye contact, or the lack thereof, may be considered as a factor establishing reasonable suspicion, we have noted that whether the contact is suspicious or not "is highly subjective and must be evaluated in light of the circumstances of each case." *United States v. Robert L.,* 874 F.2d 701, 703 (9th Cir.1989); *see also United States v. Magana,* 797 F.2d 777, 781 (9th Cir.1986); *United States v. Pulido-Santoyo,* 580 F.2d 352, 354 (9th Cir.1978). The skepticism with which this factor is treated is in large part due to the fact that reliance upon "suspicious" looks can so easily devolve into a case of damned if you do, equally damned if you don't. *See Gonzalez-Rivera v. INS,* 22 F.3d 1441, 1446-47 (9th Cir.1994); *Nicacio,* 797 F.2d at 704; *see also United States v. Mallides,* 473 F.2d 859, 861 n. 4 (9th Cir.1973) (collecting cases). Accordingly, we have noted that that factor is "of questionable value ... generally."[FN26] *United States v. Munoz,* 604 F.2d 1160, 1160 (9th Cir.1979) (per Kennedy, J.).

FN26. Indeed, in some cases, we have suggested that it cannot be considered at all. *See Gonzalez-Rivera v. INS,* 22 F.3d 1441, 1446 (9th Cir.1994) ("[u]nder Ninth Circuit law, a driver's failure to look at the Border Patrol cannot weigh in the balance of whether there existed reasonable suspicion for a stop").

In this case, Agent Johnson testified that, as he approached the Blazer from behind, he observed that Renteria-Wolff appeared to glance quickly in the rear view mirror before picking up a newspaper and reading it. It is unclear from the record whether Johnson could in fact have seen such a glance as he drove up behind the Blazer. In any event, it is a common, if not universal, practice for drivers and passengers alike to take note of a law enforcement vehicle coming up behind them. In fact, the most

law-abiding of citizens frequently adjust their driving accordingly.

Further, we give no weight to the fact that Sylvia Renteria-Wolff picked up a newspaper after glancing at the patrol car. Agent Johnson did not suggest that by this action she sought to conceal her face so that he would not recognize her. Had Renteria-Wolff continued to keep her eyes on the patrol car behind them after her initial glance, Agent Johnson might well have found it equally suspicious-because she paid too much, rather than too little attention to him. It is, in fact, difficult to imagine what Renteria-Wolff could have done at that point that might *not* have appeared suspicious to a Border Patrol agent.[FN27] It is for this very reason that we reached the conclusion we did in then-Judge Kennedy's opinion in *Munoz.*

> FN27. Moreover, such behavior is susceptible to different interpretations depending on one's culture. In some cultures, to look directly at a person in a position of authority is deeply disrespectful; in others, *not* to look directly at that person gives rise to the impression that one is somehow dishonest.

We recognize that in its recent decision in *Wardlow,* the Supreme Court noted that evasive behavior may be a "pertinent factor in determining reasonable suspicion." *Wardlow,* 528 U.S. at ----, 120 S.Ct. at 674. However, nothing in *Wardlow*-or the three Supreme Court cases it cites to illustrate that proposition-runs contrary to our conclusion that Renteria-Wolff's conduct provides no basis for reasonable suspicion. The three earlier cases all involved obvious, unambiguous attempts to evade contact with law enforcement officials-conduct very different from what was observed by the Border Patrol agent as he followed the car in which Renteria-Wolff was riding. In the first case, namely *Brignoni-Ponce,* the Supreme Court categorized evasive behavior as "*obvious* attempts to evade officers" or to hide. *See Brignoni-Ponce,* 422 U.S. at 885, 95 S.Ct. 2574 (emphasis added). In the second case, *Sokolow,* the Court held that evidence that the suspect took an evasive or erratic path through an airport in an apparent attempt to avoid police might also be relevant to the reasonable suspicion determination. *See Sokolow,* 490 U.S. at 8, 109 S.Ct. 1581. In the third, *Florida v. Rodriguez,* 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (per curiam), the Supreme Court held that articulable suspicion existed where three ***1137** men spoke furtively among themselves after seeing officers approaching them, where one was twice overheard during that conversation urging the others to "get out of here," and where one of the three, Rodriguez, in fact turned around and attempted to flee. *See id.* at 6, 105 S.Ct. 308. As noted above, all three cases described actual-and obvious-attempts to evade or to hide from law enforcement officers. Moreover, *Wardlow* itself, of course, involved headlong flight, which the Court termed "the consummate act of evasion...." *Wardlow,* 528 U.S. at ----, 120 S.Ct. at 674. We do not mean to suggest that these cases establish the outer parameters for what is evasive behavior. Rather, we conclude only that glancing in a rear view mirror and then picking up a newspaper to read is not. Such actions are simply not the sort of evasive conduct that the Supreme Court has held is properly part of the reasonable suspicion calculus, nor did the officers suggest that it was the type of behavior they had observed in the past when wrongdoing was afoot. Accordingly, we conclude that, like Hispanic appearance, Renteria-Wolff's behavior was not a relevant or appropriate factor to consider in determining reasonable suspicion.

[28] The question then is what factors *are* both relevant and appropriate to the reasonable suspicion analysis in this case. Those factors are, in a certain sense, interwoven, and they draw their significance, in part, from one another. The first of these factors to consider is the U-turn or turnaround.[FN28] In *United States v. Ogilvie,* 527 F.2d 330, 332 (9th Cir.1975), this Court held that "turning off the highway and turning around [are] not in themselves suspicious...." Accordingly, "the proximity of the turn to the checkpoint, regardless of the legality of the checkpoint, [is] *not* a *sufficient* foundation on

which to rest reasonable suspicion." *Id.* (emphasis added).

> FN28. The concurrence attempts to make much of our use of the term "U-turn," and the difference our concurring colleagues perceive between it and a "turnaround", a more general term that includes, *inter alia*, U-turns. In the past, we have sometimes used the broader term to refer to reversals-in-direction that occur when a defendant uses an exit ramp and overpass to change course, as in *Ogilvie*, or turns off onto a road or driveway, and then heads back whence he came. For the most part in this opinion, we use the term U-turn because we believe it more accurately describes what transpired.

In the panel decision, the majority and the dissenting judge disagreed as to whether *Ogilvie* prohibited reliance on the U-turn in this case. We side with the majority and conclude that it does not. *Ogilvie* simply holds that a turnaround alone is not enough in and of itself to create reasonable suspicion,[FN29] *see Ogilvie*, 527 F.2d at 332. Indeed, in subsequent decisions, this Court has made it clear that a turnaround combined with other factors may be considered as part of a reasonable suspicion analysis. *See* ***1138***United States v. Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir.1997) ("[a]pparent efforts to avoid checkpoints combined with other factors have generally been found to constitute 'reasonable suspicion' "); *United States v. Medina-Gasca*, 739 F.2d 1451 (9th Cir.1984). Even more so, a U-turn.

> FN29. *Ogilvie* is in no way inconsistent with *Wardlow*. There are three primary differences between the two cases: first, *Ogilvie* involved a simple turnaround, executed legally, using an exit ramp, while *Wardlow* involved headlong flight on foot by a suspect carrying a bag. Second, in *Ogilvie*, no causal connection was made between the turnaround and the existence of the border stop. In contrast, in *Wardlow*, the flight was clearly a direct response to the defendant's sighting of police officers. Third, in *Ogilvie*, no other factors existed that would have made the otherwise innocent turnaround suspicious, while in *Wardlow*, several other factors contributed to the degree of suspicion that attached to Wardlow's actions. As we noted earlier, innocuous conduct does *not* justify an investigatory stop absent other circumstances that tend to indicate that criminal activity has occurred or is about to take place. *See Ichiyasu*, 838 F.2d at 355. In fact, *Ogilvie* was explicitly predicated on the *absence* of other factors-no evidence existed to show that Ogilvie "drove fast, as if running away, disobeyed any traffic laws, or otherwise drove in an unusual or erratic manner." *Ogilvie*, 527 F.2d at 332. The concern our concurring colleagues express over our failure to overrule *Ogilvie* appears to us to be wholly unwarranted, and to give that case far more importance than it deserves.

In concluding that the U-turn in this case constitutes a significant factor, we note a number of circumstances that combine to make it so, some of which also constitute independent factors in the reasonable suspicion analysis. First, a U-turn on a highway is very different from reversing direction by using a designated highway exit. The use of a highway exit is both frequent and legal; in contrast, a U-turn on a highway is unusual and often illegal. While it is not clear whether the U-turn here was legal, the other surrounding circumstances render the reversal-in-direction one that may properly be given significant weight in our reasonable suspicion analysis.[FN30] One of those circumstances is the fact that the two cars made their U-turn and immediately *stopped* at the side of the highway in an isolated, desert area frequently used to drop off or pick up undocumented aliens or contraband. Another is that the U-turn occurred just after a sign indic-

ating that an upcoming checkpoint had been re-opened. Finally, it is highly unlikely that the reason for the U-turn was that the cars had accidentally passed their exit point. There is only one turn-off anywhere in the area before the checkpoint, and that turn-off leads to a private road rather than one that members of the general public might use.

> FN30. U-turns are illegal when "the driver ... does not have an unobstructed view for 200 feet in both directions along the highway and of any traffic thereon." *See* Cal. Vehicle Code §§ 665.5, 22105. The Border Patrol officers did not assert (nor did the government argue at trial or on appeal) that they had probable cause to believe that a traffic violation had occurred. Although it appears that a driver coming from the checkpoint area could neither see nor be seen by someone at the turnaround area until after he had crossed the bridge, the record is not clear enough on this point to allow us to rely upon the possible illegality.

[29] We also rely on the characteristics of the area in which the cars stopped after the reversal-in-direction as an independent factor. We note initially that an individual's presence in a high crime area is *not* enough to support reasonable, particularized suspicion that the individual in question has committed or is about to commit a crime. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (holding that an investigatory stop was not justified when police officers detained two men walking away from each other in an alley in an area with a high rate of drug trafficking because "the appellant's activity was no different from the activity of other pedestrians in that neighborhood"). Still, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at ----, 120 S.Ct. at 676 (quoting *Adams v. Williams*, 407 U.S. 143, 144, 147-48, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)).

[30][31][32] The citing of an area as "high-crime" requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity. District courts must carefully examine the testimony of police officers in cases such as this, and make a fair and forthright evaluation of the evidence they offer, regardless of the consequences. We must be particularly careful to ensure that a "high crime" area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity. FN31 In this ***1139** case, the "high crime" area is in an isolated and unpopulated spot in the middle of the desert. Thus, the likelihood of an innocent explanation for the defendants' presence and actions is far less than if the stop took place in a residential or business area. FN32

> FN31. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677 (1994) (noting that minority groups "make up almost all of the population in most of the neighborhoods the police regard as high crime areas").

> FN32. We agree with the statement in the concurrence that the use of the term "high-crime area" as a factor in reasonable suspicion analysis may well be "an invitation to trouble." *But see Wardlow*, 528 U.S. at ----, 120 S.Ct. at 676. It is for precisely that reason that our resolution of that aspect of the case before us is conditioned on the unique circumstances of the locale. As noted above, two cars stopped at a barren area at the side of the highway which apparently served no purpose other than as a site for criminal activity. The area was situated in an isolated, uninhab-

> ited locale. With respect to populated areas, or areas in which people typically carry on legitimate activities (including areas where people frequently camp or hike), we share our concurring colleagues' concern, and agree that more than mere war stories are required to establish the existence of a high-crime area. As we have stated in the text, courts should examine with care the specific data underlying any such assertion. Moreover, both courts and law enforcement must be careful not to tar people with the sins of their neighbors.

[33] Finally, we consider the tandem driving as well as the Mexicali license plates. The panel majority treated the two as independent factors giving rise to reasonable suspicion. In contrast, the district court took a different approach, relying on the "tandem driving" and Mexicali license plates solely for the purposes of linking the cars described by the tipster to the ones observed by the Border Patrol officers. We conclude that, under the circumstances present here, both occurrences may be given some direct weight in the reasonable suspicion analysis. They do not, however, constitute substantial factors, either singly or collectively.

[34] With respect to tandem driving, we have held that two or more cars traveling together, although not sufficient in itself to establish reasonable suspicion, *may* nonetheless "be indicative of illegal smuggling activity." *See United States v. Robert L.*, 874 F.2d 701, 704 (9th Cir.1989); *see also United States v. Medina-Gasca*, 739 F.2d 1451, 1453 (9th Cir.1984); *United States v. Saenz*, 578 F.2d 643, 646-47 (5th Cir.1978); *United States v. Larios-Montes*, 500 F.2d 941, 943-44 (9th Cir.1974). However, the circumstances of the tandem driving will in the end determine whether that factor is relevant. While two cars driving together is intrinsically innocuous, here the fact that the two cars not only turned around in tandem in the middle of a highway, but then pulled off the shoulder together and stopped where criminal activity often took place, makes the tandem driving relevant. The fact that the cars had Mexicali license plates may also provide some additional weight, given all the other circumstances. While having Mexican plates is ordinarily of no significance, where the criminal act suspected involves border-crossing, the presence of foreign license plates may be afforded some weight in determining whether a stop is reasonable.

CONCLUSION

[35] In this case, the two cars driven in tandem by Montero-Camargo and Sanchez-Guillen made U-turns on a highway, at a place where the view of the border officials was obstructed, and stopped briefly at a locale historically used for illegal activities, before proceeding back in the direction from which they had come. The U-turn occurred at a location where it was unlikely that the cars would have reversed directions because they had missed an exit. Moreover, the vehicles in question bore Mexicali license plates and the U-turn occurred just after a sign indicating that a Border Patrol checkpoint that had been closed for some time was now open. We conclude that these factors, although not overwhelming, are sufficient to constitute reasonable suspicion for the stop. In reaching that result, however, we firmly reject any reliance upon the Hispanic appearance or ethnicity of the defendants. We also do not consider Renteria-Wolff's ***1140** behavior in glancing at the Border Patrol car in the rear view mirror and then picking up and reading a newspaper.

In affirming the district court's ruling, we note that the agents' initial decision to investigate the tip and to pursue the two vehicles was made without any knowledge on their part of the defendants' ethnicity or Hispanic appearance. Agents Johnson and Fisher observed that appearance only when the officers subsequently caught up with the defendants' cars. Moreover, the agents had enough information to justify the stop *before* they became aware of the defendants' likely ethnicity. Under these circumstances, there is no need to remand the matter to the district court for reconsideration of its decision. In-

stead, we AFFIRM the district court's denial of the motion to suppress.

KOZINSKI, Circuit Judge, with whom Judges T.G. NELSON, KLEINFELD and SILVERMAN join, concurring:

What happened in this case is perfectly clear. It is revealed in a direct answer to a simple question from the district court:

> THE COURT: Right. But why did you stop [the defendants] at that time?
>
> THE WITNESS [AGENT JOHNSON]: Well, we stopped them-there's only-the only reason that we-especially on that side that we have the people stop and turn around at that particular point, is because they're in violation of some immigration or some criminal code that make[s] them not want to be inspected by our checkpoint. So they try to turn around at that point and head back up. FN1

> FN1. Reporter's Transcript, *United States v. Montero-Camargo,* No. 96-2233-IEG-CRIM [hereinafter RT] at 39 (Dec. 23, 1996).

That's the whole story: The border patrol agents stopped the two cars in which defendants were travelling because they had turned around just short of the Highway 86 checkpoint, which raised the entirely plausible inference that they were up to no good. Everything else the agents said had contributed to the stop-the license plates, the newspaper, the acceleration, the tandem driving, the Hispanic appearance, the furtive glance-is window dressing, designed to get around our opinion in *United States v. Ogilvie,* 527 F.2d 330 (9th Cir.1975), where we held that avoiding a checkpoint by reversing direction is not sufficient to establish reasonable suspicion. *See id.* at 332.

Ogilvie is just plain wrong and we should overrule it. Turning in one's tracks just before reaching a law enforcement checkpoint is precisely the kind of behavior that properly gives rise to reasonable suspicion. It is possible that a motorist will do so for entirely legitimate reasons, but "commonsense judgments and inferences about human behavior" suggest that the maneuver was designed to avoid the checkpoint. *Illinois v. Wardlow,* 528 U.S. 119, ----, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). *Ogilvie* seems to require that the motorist have done something more to arouse suspicion, like disobeying the traffic laws or driving erratically, 527 F.2d at 332, but the opinion doesn't explain why any of those things would make it more likely that the motorist was trying to evade the checkpoint. After all, a motorist wishing to avoid police scrutiny will slink away as unobtrusively as possible, not peel rubber and disappear in a cloud of dust.

The majority retains *Ogilvie* and tries to distinguish it, but its efforts are sadly unconvincing. The first ground on which the majority tries to distinguish *Ogilvie* is the so-called U-turn factor: Ogilvie reversed directions by means of an exit ramp and overpass, whereas the defendants here used that reckless and exotic maneuver-the U-turn. *See* Maj. Op. at 1138. In fact, the majority is so taken with the idea that defendants made a U-turn, it uses the term no fewer than 15 times.

But nowhere in the record does any witness say that defendants made a U-turn. Agent Johnson testified that "all [the passing motorist] said was there was a ***1141** couple of vehicles turning around south of the [check]point." RT at 17 (Dec. 23, 1996). FN2 A U-turn, in the technical sense the majority uses that term, *see* Maj. Op. at 1138 & n.30, starts and ends on the highway, with the vehicle winding up in a lane moving in the opposite direction. By contrast, a turnaround can be accomplished by pulling off the road, changing direction in the off-road area, and then driving back onto the highway heading in the opposite direction. FN3 This would be consistent with the testimony of the agents that when they first came upon the two vehicles, they were off the highway, just making their way back onto it. *See* RT at 14 (Dec. 23,

1996); *id.* at 7 (Jan. 6, 1997).[FN4]

FN2. *See also* RT at 10 (Dec. 23, 1996) ("[H]e just had two vehicles turn around south of the point."), *id.* at 4 (Jan. 6, 1997) ("[T]wo vehicles had turned around just south of the checkpoint.").

FN3. Such a maneuver is not a U-turn under California law. *See* Cal. Vehicle Code § 665.5 (defining a U-turn as "the turning of a vehicle *upon* a highway") (emphasis added); *People v. McGuire*, 145 Cal.Rptr. 514, 515 (Cal.Super.1978) (holding that a turnaround effected by pulling off the highway into a driveway did not fall under statute prohibiting U-turns). What defendants did was neither unusual nor illegal, and the agents said as much. *See* RT at 15 (Dec. 23, 1996) (Q: Do you know, based on your experience, whether this is a spot that ... is often used to turn around? "A: Yes, it is."), 20 (Jan. 6, 1997) ("Q: Did he violate any traffic laws that you know of? A: That I know of, no.").

FN4. At oral argument, the government displayed trial exhibits which disclosed that there was a sizable off-road area where vehicles could turn around.

Why does it matter? Because once we get rid of the "unusual and often illegal" U-turn, Maj. Op. at 4017, the difference between this case and *Ogilvie* evaporates. Ogilvie found herself on a freeway, facing a police barricade:

> Four marked government vehicles were parked on the median strip separating northbound and southbound lanes of I-19; cone shaped red markers were placed to cause northbound traffic to merge to a single lane; two stop signs with flashing red lights were placed beside the single lane. All cars going north were being stopped.

527 F.2d at 331. She used the only path open to her to avoid the checkpoint-she took an exit, traversed the overpass and merged into the southbound lane.

What the defendants did here is directly analogous, given the nature of the road *they* were on. They were travelling on a highway, not a freeway, so there were no exits or overpasses. When they spotted the sign indicating that the checkpoint was open, they took advantage of "the only place where it's really feasible to turn around safely" before the checkpoint. RT at 16 (Dec. 23, 1996). This is just what Ogilvie did. For her it meant using the exit; for them it meant pulling off the road, turning around, then getting back onto the highway. The majority's attempt to salvage *Ogilvie* by painting the turnaround here as somehow dangerous or illegal falls of its own weight.

Even less convincing is the majority's attempt to invoke "characteristics of the area" as a distinguishing factor. Maj. Op. at 1138. To read the majority opinion, one might get the impression that the area just south of the checkpoint is a combat zone rivaling Prohibition-era Chicago. The majority does not pause to query why a barren stretch of highway in the middle of the desert would become such an active center of criminal activity, nor why criminals would be so stupid as "to drop off or pick up undocumented aliens or contraband," *id.*, within a mile of a border checkpoint, when they have countless miles of road where they could safely make such exchanges.

The answer to this mystery is that the description of the area as "high crime" isn't supported by the record either. What the two arresting agents said is this: On several prior occasions, they had stopped vehicles that had done precisely what these defendants had done-reversed direction at or near the spot where they ***1142** first became aware that the checkpoint was operational-and, in almost every case, the vehicles were carrying contraband or aliens. The agents did not testify that they had ever apprehended anyone actually using this spot as a drop off point.[FN5] They watched the spot routinely

because, "That's where we expect the turnaround to be, if they do turn around, because that's the only place where it's really feasible to turn around safely, at that point." RT at 16 (Dec. 23, 1996).

> FN5. It was one of the lawyers who persisted in characterizing the area as a drop off point. Agent Fisher assented to the description once, but when pressed by the court to say at what point there was a "notorious pick up and delivery," he was willing to say only, "That is an area that we have turn arounds at." RT at 14-17 (Jan. 6, 1997).

What this evidence does show-the *only* thing it shows-is that *Ogilvie* is bunkum: People who turn around right before a checkpoint generally do have something to hide. Far from distinguishing *Ogilvie*, the majority's emphasis on the "high crime area" illustrates just how silly *Ogilvie* is. The *only* thing about this "area" that leads to a high incidence of arrests is the presence of the checkpoint, which prompts criminals to reveal themselves by turning around-just as happened in *Ogilvie*. Had the *Ogilvie* checkpoint stayed in place long enough to catch a few more people, that mild-mannered stretch of I-19 might have turned into a "high crime area" as well.

The majority's contorted efforts to preserve an ancient and ill-conceived precedent would be amusing, were this not such serious business. What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it. It also creates an incentive for officers to exaggerate or invent factors, just to make sure that the judges who review the case will approve their balancing act.

I understand that it's not always possible to eliminate uncertainty, and that weighing and balancing is the stuff of many legal doctrines. But what excuse is there for resorting to a totality-of-the-circumstances approach when a single factor-the turnaround right before the checkpoint-alone justifies the search? And what excuse is there for language like this, which calls for an advanced degree in philology to comprehend:

> We conclude that, under the circumstances present here, both occurrences [tandem driving and Mexicali license plates] may be given some direct weight in the reasonable suspicion analysis. They do not, however, constitute substantial factors, either singly or collectively.

Maj. Op. at 1139. What on earth does this mean? First, consider all the hedges and qualifiers ("under the circumstances present here ... some direct weight ..."). What purpose do they serve? What guidance do they give? There are so many slippery surfaces, the human mind can find no purchase in wrapping itself around it.

But then ponder the meaning of the entire passage: These factors may be given *some* weight, but they are not *substantial* factors. So we not only have a multifactor test, not only do we ask district courts and police in the field to weigh and balance all the factors, we now have different classes of factors-regular and jumbo. How many regular factors add up to make a substantial factor? And how many substantial factors amount to reasonable suspicion? I have no clue, which makes me think that cops on their beats all over this circuit will have some trouble figuring it out as well.[FN6]

> FN6. The advice we give police today is reminiscent of that once given by a Russian nobleman to his horse. Having been told by his wife, "Please dear, hurry home-but don't gallop," he turns to his horse and says: "Don't gallop. Do you hear that Petya? Don't gallop, but hurry home. That's *your* job, you'll have to puzzle it

out. It's too much for me." The Twelve Chairs (Twentieth Century Fox 1970).

***1143** But there is a darker side to the majority's verbal Macarena. The opinion recognizes the danger in allowing the police to characterize an area as "high-crime" to establish a basis for reasonable suspicion, but then proceeds to do just that, based on nothing more than the personal experiences of two arresting agents. As I discuss above, the agents didn't even claim this was a high crime area, but let's say they had. What in this record would support their conclusion? Both agents testified only that they had detected criminal violations after stopping people in the area. How often? One agent said he'd been involved in 15-20 stops over eight and a half years, and "[could]n't recall any ... where we didn't have a violation of some sort." RT at 14-15 (Dec. 23, 1996). The other agent testified to "about a dozen" stops in the same period, all but one of which led to an arrest. *Id.* at 3, 30 (Jan. 6, 1997).

Without hesitation, the majority treats this as a crime wave, but is it really? Does an arrest every four months or so make for a high crime area? *Compare United States v. Thornton,* 197 F.3d 241, 248 (7th Cir.1999) ("In less than one year there had been some 2,500 drug arrests in the five-block-by-five-block area where the incident occurred."); *United States v. Morales,* 191 F.3d 602, 604 (5th Cir.1999) ("In the past year alone, the Agent had detained approximately 600 illegal aliens on this stretch of the highway."). Can we rely on the vague and undocumented recollections of the officers here? Do the two officers' figures of "15-20" and "about a dozen" reflect separate pools of incidents, or do they include some where, as here, both officers were involved? Are such estimates sufficiently precise to tell us anything useful about the area? I wouldn't have thought so, although I could be persuaded otherwise. But my colleagues don't even pause to ask the questions. To them, it's a high crime area, because the officers say it's a high crime area.

Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. *See, e.g., Price v. Kramer,* 200 F.3d 1237, 1247 (9th Cir.2000) (police officers sought to justify stop on the ground that Crenshaw Boulevard in Torrance was a "high crime area known for 'gang activity' "). Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop's repertoire of war stories to determine what is a "high crime area"-and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion-strikes me as an invitation to trouble. If the testimony of two officers that they made, at most, 32 arrests during the course of a decade is sufficient to turn the road here into a high crime area, then what area under police surveillance *wouldn't* qualify as one? There are street corners in our inner cities that see as much crime within a month-even a week. I would be most reluctant to give police the power to turn any area into a high crime area based on their unadorned personal experiences. I certainly would not reach out to decide the issue.

The majority purports to draw support for its methodology from the Supreme Court's *Wardlow* opinion, where the Court held that "relevant characteristics of a location" may be considered in the reasonable suspicion calculus. Maj. Op. at 1139 (quoting *Wardlow,* 528 U.S. at ----, 120 S.Ct. at 676). This misses the point entirely. The question is not *whether* the characteristics of the area may be taken into account, but *how* these characteristics are established. In our first opinion to interpret this language from *Wardlow,* the majority adopts a methodology for establishing the characteristics of the area that is about as rigorous as the recipe for Leftovers Casserole.

***1144** Not to worry, the opinion says, because we take the police at their word only when it's an "isolated" area where people don't "typically carry

on legitimate activities." Maj. Op. at 1139 n.32. But we're talking here about a highway-one that sees enough traffic to make a checkpoint worth the government's trouble. How can an area traversed by hundreds, perhaps thousands, of people every day be considered "isolated," and why is it that people who travel on rural highways do not "carry on legitimate activities"? If we're willing to ignore all the cars and people, I suppose the Santa Monica Freeway is an isolated area too. Then again, perhaps the majority considers the shoulder of the highway as "isolated" where the highway itself is not. A more contrived distinction is difficult to imagine.

Perhaps the majority imagines that by retaining *Ogilvie*, it avoids eroding Fourth Amendment liberties. Instead it accelerates the process. The patently suspicious behavior in *Ogilvie* is the kind of thing we *want* police to act on: It's a specific event, easy to observe and verify. It consists of a deliberate act by a given individual, and does not require any speculation, impressions, hunches or broad characterizations about an area or a class of people. It gives rise to a reasonable inference that the individual taking the evasive action has cause to fear scrutiny. It's not a perfect inference; they never are. But it's vastly more objective and less open to manipulation than the amalgamation of ambiguous factors from which the majority constructs founded suspicion today. Such foundations are not of concrete, but quicksand.

C.A.9 (Cal.),2000.
U.S. v. Montero-Camargo
208 F.3d 1122, 00 Cal. Daily Op. Serv. 2774, 2000 Daily Journal D.A.R. 3733

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