14th Amendment Course

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Procedural Due Process

Goldberg v. Kelly

397 U.S. 254 (1970)

MR. JUSTICE BRENNAN delivered the opinion of the Court. The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law At the time the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure that conforms to either subdivision (a) or subdivision (b) of § 351 of the regulations as amended The City of New York elected to promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to

the proposed effective date of discontinuance or suspension, whichever occurs later."

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68-18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses However, the letter does inform the recipient that he may request a post-termination "fair hearing."[5] This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld. A recipient whose aid is not restored by a "fair hearing" decision may have judicial review.

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . Suffice it to say that to cut off a welfare recipient in the face of . .'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's over-powering need in this unique situation not to be wrongfully deprived of assistance . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of

New York appealed. We noted probable jurisdiction, to decide important issues that have been the subject of disagreement in principle between the three-judge court in the present case and that convened in Wheeler v. Montgomery, No. 14, post, p. 280, also decided today. We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a'privilege' and not a'right."' Shapiro v. Thompsonn. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner; or to denial of a tax exemption, Speiser v. Randall; or to discharge from public employment, Slochower v. Board of Higher Education The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corp.. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care Cf. Nash v. Florida Industrial Commission. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty This perception, against the background of our traditions, has significantly influenced the development of the contem-

porary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F. Supp..

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds

for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. Sniadach v. Family Finance Corp. (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean. The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and

who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., ICC v. Louisville & N. R. Co. (1913); Willner v. Committee on Character & Fitness (1963). What we said in Greene v. McElroy (1959), is particularly pertinent here:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . but also in all types of cases where administrative. . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205 (1969).

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel.

Co. v. PUC; United States v. Abilene & S. R. Co. (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. In re Murchison; Wong Yang Sung v. McGrath (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

From the footnotes to majority opinion:

It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

> [s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964). See also Goldsmith v. United States Board of Tax Appeals (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, C. A. 5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, C. A. 5th Cir.), cert. denied (right to attend a public college).

MR. JUSTICE BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States

receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers within written boundaries, which eventually became written constitutions They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free."

Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments —Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention In my judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, Marbury v. Madison, 1 Cranch 137 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out

the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing" even though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. Adamson v. California, and n. 5 (1947) (dissenting opinion). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable installment to an individual deprives that individual of his own property, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . .'brutal need' without a prior hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the governmental interest in summary adjudication." Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and

humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." See, e. g., Rochin v. California. Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits

before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates. Cf. Gideon v. Wainwright. Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the "collective conscience of mankind," but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the "collective conscience" remarkably similar to their own. Cf. Griswold v. Connecticut (1965) (BLACK, J., dissenting); Sniadach v. Family Finance Corp. (1969) (BLACK, J., dissenting).

To realize how uncertain a standard of "fundamental fairness" would be, one has only to reflect for a moment on the possible disagreement if the "fairness" of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the president of the national Chamber of Commerce, and the chairman of the John Birch Society.

Mathews v. Eldridge

424 U.S. 319 (1976)

MR. JUSTICE POWELL delivered the opinion of the Court. The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to the Social Security Act. 70 Stat. 815, 42 U. S. C. § 423 Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability 361 F. Supp. 520 (WD Va. 1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in Goldberg v. Kelly, which established a right to an "evidentiary hearing" prior to termination of welfare benefits The Secretary contended that Goldberg was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in

the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in Goldberg. It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See Fuentes v. Shevin (1972); Bell v. Burson. Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F. Supp. Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. We reverse.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e. g., Richardson v. Belcher (1971); Richardson v. Perales (1971); Flemming v. Nestor, that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. Arnett v. Kennedy POWELL, J., concurring in part) (1974); Board of Regents v. Roth (1972); Bell v. Burson; Goldberg v. Kelly. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell (1974). See, e. g., Phillips v. Commissioner (1931). See also Dent v. West Virginia (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Comm. v. McGrath (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo. See Grannis v. Ordean. Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent

to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, Goldberg v. Kelly, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. Sniadach v. Family Finance Corp., involving garnishment of wages, was entirely silent on the matter. In Fuentes v. Shevin, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, Bell v. Burson, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also North Georgia Finishing, Inc. v. Di-Chem, Inc.. More recently, in Arnett v. Kennedywe sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided.

These decisions underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy (POWELL, J., concurring in part); Goldberg v. Kelly; Cafeteria Workers v. McElroy. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly.

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U. S. C. § 421 (a) The standards applied and the procedures followed are prescribed by the Secretary, see § 421 (b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed. Reg. 4473 (1975).

In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

"to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . ." 42 U. S. C. § 423 (d) (1) (A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," § 423 (d) (3), that he has a physical or mental impairment of such severity that

"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." § 423 (d) (2) (A).

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.

The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail—in which case he is sent a detailed questionnaire—or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM § 6705 ; Disability Insurance State Manual (DISM) § 353 (TL No. 137, Mar. 5, 1975).

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM § 353 If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file He also may respond in writing and submit additional evidence. § 353

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U. S. C. § 421 (c); CM §§ 6701 (b), (c) If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons

for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR §§ 404 404 (1975) Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U. S. C. § 423 (a) (1970 ed., Supp. III).

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§ 404 404 (1975). The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. § 404 If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404 and finally may obtain judicial review. 42 U. S. C. § 405 (g); 20 CFR § 404 (1975).

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U. S. C. § 404. Cf. § 423 (b); 20 CFR §§ 404 404 404 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U. S. C. § 404.

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in Goldberg, see 397 U. S., the nonprobationary federal employee in Arnett, see 416 U. S., and the wage earner in Sniadach. See 395 U. S..

Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

"The crucial factor in this context—a factor not present in the case of . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397 U. S. (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need Indeed, it is wholly unrelated to the worker's income or support from many

other sources, such as earnings of other family members, workmen's compensation awards tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . ." Richardson v. Belcher (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9 (1974) (hereinafter Staff Report).

As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. Morrissey v. Brewer. The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U. S. C. § 423; 361 F. Supp.. Thus, in contrast to the discharged federal employee in Arnett, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in Fusari v. Steinberg, "the possible length of wrongful deprivation of . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. and the typically modest resources of the family unit of the physically disabled worker the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level See Arnett v. Kennedy, 416 U. S. (POWELL, J., concurring in part); (WHITE, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See Mitchell v. W. T. Grant Co.; Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of

"medically acceptable clinical and laboratory diagnostic techniques," 42 U. S. C. § 423 (d) (3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . ." § 423 (d) (1) (A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U. S..

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, concerning a subject whom they have personally examined In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." 407. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg.

The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U. S.. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation.

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state

agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58 % for appealed reconsideration decisions to an overall reversal rate of only 3 % Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an openfile basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased

assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly U. Pa. L. Rev., 1303.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co.. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." Joint Anti-Fascist Comm. v. McGrath (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See Arnett v. Kennedy (WHITE, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. Boddie v. Connecticut.

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting. For the reasons stated in my dissenting opinion in Richardson v. Wright, I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U. S. C. § 601 et seq. See Goldberg v. Kelly. I would add that the Court's consideration that a discontinuance of disability benefits may cause

the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

Londoner v. City and County of Denver

210 U.S. 373 (1908)

MR. JUSTICE MOODY delivered the opinion of the court. The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the Supreme Court of the State, which ordered judgment for the defendants. 33 Colorado, 104. The case is here on writ of error. The Supreme Court held that the tax was assessed in conformity with the constitution and laws of the State, and its decision on that question is conclusive.

The assignments of error relied upon are as follows:

"Fifth. The Supreme Court of Colorado more particularly erred in holding and deciding that the city authorities, in following the procedure in this Eighth Avenue Paving District, No. 1, of the city of Denver, Colorado, in the manner in which the record, evidence and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

These assignments will be passed upon in the order in which they seem to arise in the consideration of the whole case.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. It does not seem necessary to set forth fully the elaborate provisions of the charter regulating the exercise of this power, except where they call for special examination. The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order the paving of a street. The board must, however, first adopt specifications, mark out a district of assessment, cause a map to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. Before action notice by publication and an opportunity to be heard to any person interested must be given by the board.

The board may then order the improvement, but must recommend to the city council a form of ordinance authorizing it, and establishing an assessment district, which is not amendable by the council. The council may then, in its discretion, pass or refuse to pass the ordinance. If the ordinance is passed, the contract for the work is made by the mayor. The charter provides that "the finding of the city council, by ordinance, that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid shall be conclusive in every court or other tribunal." The charter then provides for the assessment of the cost in the following sections:

"SEC. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof, affording complete drainage for any part or parts of the district and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein showing the whole cost of the improvement, or such parts thereof, including six per cent additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this State made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

"SEC. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city of Denver, notify the owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

"SEC. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated:

1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice stating, inter alia, that the written complaints or objections of the owners, if filed within thirty days, would be "heard and determined by the city council before the passage of any ordinance assessing the cost." Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of Paulsen v. Portland, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it. Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper:

"Denver, Colorado, January 13, 1900.

"To the Honorable Board of Public Works and the Honorable Mayor and City Council of the City of Denver:

"The undersigned, by Joshua Grozier, their attorney, do hereby most earnestly and strenuously protest and object to the passage of the contemplated or any assessing ordinance against the property in Eighth Avenue Paving District No. 1, so called, for each of the following reasons, to wit:

"1st. That said assessment and all and each of the proceedings leading up to the same were and are illegal, voidable and void, and the attempted assessment

if made will be void and uncollectible.

"2nd. That said assessment and the cost of said pretended improvement should be collected, if at all, as a general tax against the city at large and not as a special assessment.

"3d. That property in said city not assessed is benefited by the said pretended improvement and certain property assessed is not benefited by said pretended improvement and other property assessed is not benefited by said pretended improvement to the extent of the assessment; that the individual pieces of property in said district are not benefited to the extent assessed against them and each of them respectively; that the assessment is abitrary and property assessed in an equal amount is not benefited equally; that the boundaries of said pretended district were arbitrarily created without regard to the benefits or any other method of assessment known to law; that said assessment is outrageously large.

"4th. That each of the laws and each section thereof under which the proceedings in said pretended district were attempted to be had do not confer the authority for such proceedings; that the 1893 city charter was not properly passed and is not a law of the State of Colorado by reason of not properly or at all passing the legislature; that each of the provisions of said charter under which said proceedings were attempted are unconstitutional and violative of fundamental principles of law, the Constitution of the United States and the state constitution, or some one or more of the provisions of one or more of the same.

"5th. Because the pretended notice of assessment is invalid and was not published in accordance with the law, and is in fact no notice at all; because there was and is no valid ordinance creating said district; because each notice required by the 1893 city charter to be given, where it was attempted to give such notice, was insufficient, and was not properly given or properly published.

"6th. Because of non-compliance by the contractor with his contract and failure to complete the work in accordance with the contract; because the contract for said work was let without right or authority; because said pretended district is incomplete and the work under said contract has not been completed in accordance with said contract; because items too numerous to mention, which were not a proper charge in the said assessment, are included therein.

"7th. Because the work was done under pretended grants of authority contained in pretended laws, which laws were violative of the constitution and fundamental laws of the State and Union.

"8th. Because the city had no jurisdiction in the premises. No petition subscribed by the owners of a majority of the frontage in the district to be assessed for said improvements was ever obtained or presented.

"9th. Because of delay by the board of public works in attempting to let the contract and because the said pretended improvement was never properly nor sufficiently petitioned for; because the contracts were not let nor the work done

in accordance with the petitions, if any, for the work, and because the city had no jurisdiction in the premises.

"10th. Because before ordering the pretended improvement full details and specifications for the same, permitting and encouraging competition and determining the number of installments and time within which the costs shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed, together with a map showing the approximate amounts to be assessed, were not adopted by the board of public works before the letting of the contract for the work and furnishing of material; because advertisement for 20 days in two daily newspapers of general circulation, giving notice to the owners of real estate in the district of the kind of improvements proposed, the number of installments and time in which payable, rate of interest and extent of the district, probable cost and time when a resolution ordering the improvement would be considered, was not made either properly or at all, and if ever attempted to be made was not made according to law or as required by the law or charter.

"11th. Because the attempted advertisement for bids on the contract attempted to be let were not properly published and were published and let, and the proceedings had, if at all, in such a way as to be prejudicial to the competition of bidders and to deter bidders; and the completion of the contracts after being attempted to be let was permitted to lag in such a manner as not to comply with the contract, charter or laws, and the power to let the contract attempted to be let was not within the power of the parties attempting to let the same; because the city council is or was by some of the proceedings deprived of legislative discretion, and the board of public works and other pretended bodies given such discretion, which discretion they delegated to others having no right or power to exercise the same; and executive functions were conferred on bodies having no right, power or authority to exercise the same and taken away from others to whom such power was attempted to be granted or given or who should properly exercise the same; that judicial power was attempted to be conferred on the board of public works, so called, and the city council, and other bodies or pretended bodies not judicial or quasi-judicial in character, having no right, power or authority to exercise the same, and the courts attempted to be deprived thereof.

"Wherefore, because of the foregoing and numerous other good and sufficient reasons, the undersigned object and protest against the passage of the said proposed assessing ordinance."

This certainly was a complaint against and objection to the proposed assessment. Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated but in a specially called session, and, without any hearing, adopted the following resolution:

"Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth Avenue Paving District No. 1, of

the city of Denver against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, no complaint or objection has been filed or made against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it.

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved."

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts was there a denial by the State of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. Hager v. Reclamation District; Kentucky Railroad Tax Cases; Winona & St. Peter Land Co. v. Minnesota; Lent v. Tillson; Glidden v. Harrington; Hibben v. Smith; Security Trust Co. v. Lexington; Central of Georgia v. Wright. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many

requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. Pittsburg &c.; Railway Co. v. Backus; Fallbrook Irrigation District v. Bradley, et seq. It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. Raymond v. Chicago Traction Co.. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE HOLMES dissent.

Bi-Metallic Investment Co. v. State Board of Equalization of Colorado

239 U.S. 441 (1915)

MR. JUSTICE HOLMES delivered the opinion of the court. This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force, and the defendant Pitcher as assessor of Denver from obeying, an order of the boards increasing the valuation of all taxable property in Denver forty per cent. The order was sustained and the suit directed to be dismissed by the Supreme Court of the State. 56 Colorado, 512. See 56 Colorado, 343. The plaintiff is the owner of real estate in Denver and brings the case here on the ground that it was given no opportunity to be heard and that therefore its property will be taken without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the state constitution and laws was an unwarranted surprise and on the other that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy and that as the Supreme Court of the State treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way — that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed

by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county the owner has had his opportunity to protest and appeal as usual in our system of taxation, Hagar v. Reclamation District, 710, so that it must be assumed that the property owners in the county all stand alike. The question then is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned — here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the State Railroad Tax Cases, at least as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state constitution had declared that Denver had been undervalued as compared with the rest of the State and had decreed that for the current year the valuation should be forty per cent. higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In Londoner v. Denver, 385, a local board had to determine'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed.

Hamdi v. Rumsfeld

542 U.S. 507 (2004)

JUSTICE O'CONNOR announced the judgment of the Court and

delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner Yaser Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely — without formal charges or proceedings — unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U. S. C. § 2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend. The elder

Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." App. 103, 104. The petition contends that Hamdi's detention was not legally authorized. It argues that, "[a]s an American citizen, . Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution." The habeas petition asks that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) "[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody." -109. Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received military training. -189. The 20-year-old was traveling on his own for the first time, his father says, and "[b]ecause of his lack of experience, he was trapped in Afghanistan once the military campaign began."

The District Court found that Hamdi's father was a proper next friend, appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi. -116. The United States Court of Appeals for the Fourth Circuit reversed that order, holding that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests. 283 (2002). It directed the District Court to consider "the most cautious procedures first," and to conduct a deferential inquiry into Hamdi's status, It opined that "if Hamdi is indeed an'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one."

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter Mobbs Declaration), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." App. 148. He expressed his "familiar[ity]" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of … Hamdi and his detention by U. S. military forces."

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. -149. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." According to the declaration, a series of "U. S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "[a] subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." -150.

After the Government submitted this declaration, the Fourth Circuit directed the District Court to proceed in accordance with its earlier ruling and, specifically, to " 'consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.' " The District Court found that the Mobbs Declaration fell "far short" of supporting Hamdi's detention. App. 292. It criticized the generic and hearsay nature of the affidavit, calling it "little more than the government's'say-so."' It ordered the Government to turn over numerous materials for in camera review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig. -186. The court indicated that all of these materials were necessary for "meaningful judicial review" of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations. -292.

The Government sought to appeal the production order, and the District Court certified the question of whether the Mobbs Declaration, " 'standing alone, is sufficient as a matter of law to allow a meaningful judicial review of [Hamdi's] classification as an enemy combatant.' " 316 F. 3d. The Fourth Circuit reversed, but did not squarely answer the certified question. It instead stressed that, because it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," no factual inquiry or evidentiary hearing allowing

Hamdi to be heard or to rebut the Government's assertions was necessary or proper. Concluding that the factual averments in the Mobbs Declaration, "if accurate," provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi pursuant to the President's war powers, it ordered the habeas petition dismissed. The Fourth Circuit emphasized that the "vital purposes" of the detention of uncharged enemy combatants — preventing those combatants from rejoining the enemy while relieving the military of the burden of litigating the circumstances of wartime captures halfway around the globe — were interests "directly derived from the war powers of Articles I and II." -466. In that court's view, because "Article

contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II," separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture," Accordingly, the District Court's more vigorous inquiry "went far beyond the acceptable scope of review."

On the more global question of whether legal authorization exists for the detention of citizen enemy combatants at all, the Fourth Circuit rejected Hamdi's arguments that 18 U. S. C. § 4001(a) and Article 5 of the Geneva Convention rendered any such detentions unlawful. The court expressed doubt as to Hamdi's argument that § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," required express congressional authorization of detentions of this sort. But it held that, in any event, such authorization was found in the post-September 11 AUMF. 316 F. 3d. Because "capturing and detaining enemy combatants is an inherent part of warfare," the court held, "the'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." ; see also -468 (noting that Congress, in 10 U. S. C. § 956(5), had specifically authorized the expenditure of funds for keeping prisoners of war and persons whose status was determined "to be similar to prisoners of war," and concluding that this appropriation measure also demonstrated that Congress had "authoriz[ed these individuals'] detention in the first instance"). The court likewise rejected Hamdi's Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities. 316 F. 3d.

Finally, the Fourth Circuit rejected Hamdi's contention that its legal analyses with regard to the authorization for the detention scheme and the process to which he was constitutionally entitled should be altered by the fact that he is an American citizen detained on American soil. Relying on Ex parte Quirin, 317 U. S. 1 (1942), the court emphasized that "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." 316 F. 3d. "The privilege of citizenship," the court held, "entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war

powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there."

The Fourth Circuit denied rehearing en banc, and we granted certiorari. 540 U. S. 1099 (2004). We now vacate the judgment below and remand.

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan in an armed conflict against the United States"' there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article I of the Constitution.

We do not reach the question whether Article I provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U. S. C. § 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U. S. C. § 811 et seq., which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II. H. R. Rep. No. 92-116 (1971); ("The concentration camp implications of the legislation render it abhorrent"). The Government again presses two alternative positions. First, it argues that § 4001(a), in light of its legislative history and its location in Title 18, applies only to "the control of civilian prisons and related detentions," not to military detentions. Brief for Respondents 21. Second, it maintains that § 4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress"—the AUMF. -22. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the

AUMF satisfied § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." Ex parte Quirin, 30. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war"' (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when'no quarter' was the rule on the battlefield. . It is now recognized that'Captivity is neither a punishment nor an act of vengeance,' but'merely a temporary detention which is devoid of all penal character.' . .'A prisoner of war is no convict; his imprisonment is a simple war measure"' (citations omitted)); cf. In re Territo, CA9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released" (footnotes omitted)).

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In Quirin, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U. S.. We held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of … the law of war." -38. While Haupt was tried for violations of the law of war, nothing in Quirin suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. See -31. See also Lieber Code ¶ 153, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 273, ¶ 153 (1880) (contemplating,

in code binding the Union Army during the Civil War, that "captured rebels" would be treated "as prisoners of war"). Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the indefinite detention to which he is now subject. The Government responds that "the detention of enemy combatants during World War II was just as'indefinite' while that war was being fought." We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." The prospect Hamdi raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV)Oct. 18, 1907, 36 Stat. 2301 ("conclusion of peace" (Art. 20)); Geneva ConventionJuly 27, 1929, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Paust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510-511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 U. S. T., 3392, 3406, 3418)).

Hamdi contends that the AUMF does not authorize indefinite or perpetual

detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, e. g., Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); Dept. of Defense, News Transcript, Gen. J. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004,

http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html (as visited June 8, 2004, and available in Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan, 4 Wall. 2, 125 (1866), does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. 131. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Moreover, as JUSTICE SCALIA acknowledges, the Court in Ex parte Quirin, 317 U. S. 1 (1942), dismissed the language of Milligan that the petitioners had suggested prevented them from being subject to military process. Post (dissenting opinion). Clear in this rejection was a disavowal of the New York State cases cited in Milligan, 4 Wall., on which JUSTICE SCALIA relies. See Both Smith v. Shaw and M'Connell v. Hampton were civil suits for false imprisonment. Even accepting that these cases once could have been viewed as standing for the sweeping proposition for which JUSTICE SCALIA cites them—that the military does not have authority to try an American citizen accused

of spying against his country during wartime—Quirin makes undeniably clear that this is not the law today.

Haupt, like the citizens in Smith and M'Connell, was accused of being a spy. The Court in Quirin found him "subject to trial and punishment by [a] military tribuna[l]" for those acts, and held that his citizenship did not change this result. 317 U. S., 37-38.

Quirin was a unanimous opinion. It both postdates and clarifies Milligan, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

To the extent that JUSTICE SCALIA accepts the precedential value of Quirin, he argues that it cannot guide our inquiry here because "[i]n Quirin it was uncontested that the petitioners were members of enemy forces," while Hamdi challenges his classification as an enemy combatant. Post. But it is unclear why, in the paradigm outlined by JUSTICE SCALIA, such a concession should have any relevance. JUSTICE SCALIA envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. Post. He does not explain how his historical analysis supports the addition of a third option—detention under some other process after concession of enemy-combatant status—or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process. To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

Further, JUSTICE SCALIA largely ignores the context of this case: a United States citizen captured in a foreign combat zone. JUSTICE SCALIA refers to only one case involving this factual scenario — a case in which a United States citizen-prisoner of war (a member of the Italian army) from World War II was seized on the battlefield in Sicily and then held in the United States. The court in that case held that the military detention of that United States citizen was lawful. See In re Territo, 156 F. 2d.

JUSTICE SCALIA'S treatment of that case—in a footnote—suffers from the same defect as does his treatment of Quirin: Because JUSTICE SCALIA finds the fact of battlefield capture irrelevant, his distinction based on the fact that the petitioner "conceded" enemy-combatant status is beside the point. See. JUSTICE SCALIA can point to no case or other authority for the proposition that those captured on a foreign battlefield (whether detained there or in U. S. territory) cannot be detained outside the criminal process.

Moreover, JUSTICE SCALIA presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. See post. This

creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. Brief for Petitioners 16. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Brief for Respondents 46. Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U. S. Const., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). Only in the rarest of circumstances has Congress seen fit to suspend the writ. See, e. g., Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See INS v. St. Cyr. All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U. S. C. § 2241. Brief for Respondents 12. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court

completed the required factual development. It suggests two separate reasons for its position that no further process is due.

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." 337 F. 3d (opinion of Luttig, J.); see also -372 (opinion of Motz, J.). Further, the "facts" that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict. Brief for Respondents 3. The habeas petition states only that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." App. 104. An assertion that one resided in a country in which combat operations are taking place is not a concession that one was "captured in a zone of active combat" operations in a foreign theater of war, 316 F. 3d (emphasis added), and certainly is not a concession that one was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States." Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. ("Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination" (citing Superintendent, Mass. Correctional Institution at Walpole v. Hill (1985) (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion"))). Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis

was a legitimate one. Brief for Respondents 36; see also 316 F. 3d (declining to address whether the "some evidence" standard should govern the adjudication of such claims, but noting that "[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm" the legality of Hamdi's detention).

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. See, e. g., Zadvydas v. Davis; Addington v. Texas (1979). He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," Brief for Petitioners 21, and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review."

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U. S. Const., Amdt. 5, is the test that we articulated in Mathews v. Eldridge. See, e. g., Heller v. Doe (1993); Zinermon v. Burch (1990); United States v. Salerno; Schall v. Martin (1984); Addington v. Texas. Mathews dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U. S.. The Mathews calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." We take each of these steps in turn.

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest … affected by the official action," , is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. Foucha v. Louisiana ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); see also Parham v. J. R.

(noting the "substantial liberty interest in not being confined unnecessarily"). "In our society liberty is the norm," and detention without trial "is the carefully limited exception." Salerno. "We have always been careful not to'minimize the importance and fundamental nature' of the individual's right to liberty," Foucha (quoting Salerno), and we will not do so today.

Nor is the weight on this side of the Mathews scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," Jones v. United States (emphasis added; internal quotation marks omitted), and at this stage in the Mathews calculus, we consider the interest of the erroneously detained individual. Carey v. Piphus.

("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also [cite] (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"). Indeed, as amicus briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. See Brief for AmeriCares et al. as Amici Curiae 13-22 (noting ways in which "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions"). Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See Ex parte Milligan, 4 Wall. ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen"). Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," O'Connor v. Donaldson, our starting point for the Mathews v. Eldridge analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those

realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. Department of Navy v. Egan (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); Youngstown Sheet & Tube Co. v. Sawyer (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. Brief for Respondents 46-49. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See Kennedy v. Mendoza-Martinez (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); see also United States v. Robel ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties … which makes the defense of the Nation worthwhile").

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. Mathews.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a

neutral decisionmaker. See Cleveland Bd. of Ed. v. Loudermill ("An essential principle of due process is that a deprivation of life, liberty, or property'be preceded by notice and opportunity for hearing appropriate to the nature of the case"' (quoting Mullane v. Central Hanover Bank & Trust Co.); Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal. ("due process requires a'neutral and detached judge in the first instance"' (quoting Ward v. Monroeville (1972))). "For more than a century the central meaning of procedural due process has been clear:'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard'must be granted at a meaningful time and in a meaningful manner."' Fuentes v. Shevin (quoting Baldwin v. Hale, 1 Wall. 223, 233 (1864); Armstrong v. Manzo (other citations omitted)). These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of Mathews, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U. S..

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Brief for Respondents 3-4. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all,

in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. Korematsu v. United States (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); Sterling v. Constantin ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Youngstown Sheet & Tube. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Mistretta v. United States (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); Home Building & Loan Assn. v. Blaisdell (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. See St. Cyr ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been

strongest"). Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. Brief for Respondents 35. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. See, e. g., St. Cyr; Hill. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.

Today we are faced only with such a case. Aside from unspecified "screening" processes, Brief for Respondents 3-4, and military interrogations in which the Government suggests Hamdi could have contested his classification, Tr. of Oral Arg. 40, 42, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. Compare Brief for Respondents 42-43 (discussing the "secure interrogation environment," and noting that military interrogations require a controlled "interrogation dynamic" and "a relationship of trust and dependency" and are "a critical source" of "timely and effective intelligence") with Concrete Pipe ("[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge … which might lead him not to hold the balance nice, clear and true" (internal quotation marks omitted)). That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." Tumey v. Ohio. Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva

Convention. See Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, § 1-6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Brief for Petitioners 19. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty. Although I share the plurality's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitu-

tional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . there would soon be an end of all other rights and immunities. . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. .

"To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him." 1 W. Blackstone, Commentaries on the Laws of England 131-133 (1765) (hereinafter Blackstone).

These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84, p. 444 (G. Carey & J. McClellan eds. 2001). The two ideas central to Blackstone's understanding — due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned —found expression in the Constitution's Due Process and Suspension Clauses. See Amdt. 5; Art. I, § 9, cl. 2.

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. See, e. g., 2 & 3 Philip & Mary, ch. 10 (1555); 3 J. Story, Commen-

taries on the Constitution of the United States § 1783, p. 661 (1833) (hereinafter Story) (equating "due process of law" with "due presentment or indictment, and being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." See also T. Cooley, General Principles of Constitutional Law 224 (1880) ("When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted" (internal quotation marks omitted)).

To be sure, certain types of permissible noncriminal detention — that is, those not dependent upon the contention that the citizen had committed a criminal act — did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions — civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. See Opinion on the Writ of Habeas Corpus, Wilm. 77, 88Eng. Rep. 29, 36-37 (H. L. 1758) (Wilmot, J.). It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.

Cf. Kansas v. Hendricks ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

These due process rights have historically been vindicated by the writ of habeas corpus. In England before the founding, the writ developed into a tool for challenging executive confinement. It was not always effective. For example, in Darnel's Case, 3 How. St. Tr. 1 (K. B. 1627), King Charles I detained without charge several individuals for failing to assist England's war against France and Spain. The prisoners sought writs of habeas corpus, arguing that without specific charges, "imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually." The Attorney General replied that the Crown's interest in protecting the realm justified imprisonment in "a matter of state . not ripe nor timely" for the ordinary process of accusation and trial. The court denied relief, producing widespread outrage, and Parliament responded with the Petition of Right, accepted by the King in 1628, which expressly prohibited imprisonment without formal charges, see 3 Car. 1, ch. 1, §§ 5, 10.

The struggle between subject and Crown continued, and culminated in the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, described by Blackstone as a "second magna carta, and stable bulwark of our liberties." 1 Blackstone 133. The Act governed all persons "committed or detained . for any crime." § 3. In cases other than felony or treason plainly expressed in the warrant of commitment, the Act required release upon appropriate sureties (unless the commitment was for a nonbailable offense). Where the commitment was for felony or high trea-

son, the Act did not require immediate release, but instead required the Crown to commence criminal proceedings within a specified time. § 7. If the prisoner was not "indicted some Time in the next Term," the judge was "required . to set at Liberty the Prisoner upon Bail" unless the King was unable to produce his witnesses. Able or no, if the prisoner was not brought to trial by the next succeeding term, the Act provided that "he shall be discharged from his Imprisonment." English courts sat four terms per year, see 3 Blackstone 275-277, so the practical effect of this provision was that imprisonment without indictment or trial for felony or high treason under § 7 would not exceed approximately three to six months.

The writ of habeas corpus was preserved in the Constitution — the only common-law writ to be explicitly mentioned. See Art. I, § 9, cl. 2. Hamilton lauded "the establishment of the writ of habeas corpus" in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments . in all ages, [one of] the favourite and most formidable instruments of tyranny." The Federalist No. 84. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases, see Art. III, § 2, cl. 3) was his basis for arguing that additional, explicit procedural protections were unnecessary. See The Federalist No. 83.

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing by aiding the enemy in wartime. A

JUSTICE O'CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy aliens. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

As early as 1350, England's Statute of Treasons made it a crime to "levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere." 25 Edw. 3, Stat. 5, c. 2. In his 1762 Discourse on High Treason, Sir Michael Foster explained:

"With regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places.

. .

"The joining with Rebels in an Act of Rebellion, or with Enemies in Acts of Hostility, will make a Man a Traitor: in the one Case within the Clause of Levying War, in the other within that of Adhering to the King's enemies.

. .

"States in Actual Hostility with Us, though no War be solemnly Declared, are Enemies within the meaning of the Act. And therefore in an Indictment on the Clause of Adhering to the King's Enemies, it is sufficient to Aver that the Prince or State Adhered to is an Enemy, without shewing any War Proclaimed. . And if the Subject of a Foreign Prince in Amity with Us, invadeth the Kingdom without Commission from his Sovereign, He is an Enemy. And a Subject of England adhering to Him is a Traitor within this Clause of the Act." A Report of Some Proceedings on the Commission . for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, Introduction, § 1, p. 183; Ch. 2, § 8, p. 216; § 12, p. 219.

Subjects accused of levying war against the King were routinely prosecuted for treason. E.g., Harding's Case, 2 Ventris 315, 86 Eng. Rep. 461 (K. B. 1690); Trial of Parkyns, 13 How. St. Tr. 63 (K. B. 1696); Trial of Vaughan, 13 How. St. Tr. 485 (K. B. 1696); Trial of Downie, 24 How. St. Tr. 1 (1794). The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally. The Constitution provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort"; and establishes a heightened proof requirement (two witnesses) in order to "convic[t]" of that offense. Art. III, § 3, cl. 1.

In more recent times, too, citizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War II in a spying conspiracy on behalf of Germany were tried in federal court. See United States v. Fricke, 259 F. 673 (SDNY 1919); United States v. Robinson, 259 F. 685 (SDNY 1919). A German member of the same conspiracy was subjected to military process. See United States ex rel. Wessels v. McDonald, 265 F. 754 (EDNY 1920). During World War III, the famous German saboteurs of Ex parte Quirin, 317 U. S. 1 (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur, discussed below) were punished under the criminal process. See Haupt v. United States; L. Fisher, Nazi Saboteurs on Trial 80-84 (2003); see also Cramer v. United States, 325 U. S. 1 (1945).

The modern treason statute is 18 U. S. C. § 2381; it basically tracks the language of the constitutional provision. Other provisions of Title 18 criminalize various acts of warmaking and adherence to the enemy. See, e.g., § 32 (destruction of aircraft or aircraft facilities), § 2332a (use of weapons of mass destruction), § 2332b (acts of terrorism transcending national boundaries), § 2339A (providing material support to terrorists), § 2339B (providing material support to certain terrorist organizations), § 2382 (misprision of treason), § 2383 (rebellion or insurrection), § 2384 (seditious conspiracy), § 2390 (enlistment to serve in armed hostility against the United States). See also 31 CFR § 595 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to

terrorists); 50 U. S. C. § 1705(b) (criminalizing violations of 31 CFR § 595). The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States was subjected to criminal process and convicted upon a guilty plea. See United States v. Lindh, 212 F. Supp. 2d 541 (ED Va. 2002) (denying motions for dismissal); Seelye, N. Y. Times, Oct. 5, 2002, p. A1, col. 5.

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods. Blackstone explained:

"And yet sometimes, when the state is in real danger, even this [i. e., executive detention] may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it[s] liberty for a while, in order to preserve it for ever." 1 Blackstone 132.

Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension. In England, Parliament on numerous occasions passed temporary suspensions in times of threatened invasion or rebellion. E. g., 1 W. & M., c. 7 (1688) (threatened return of James II); 7 & 8 Will. 3, c. 11 (1696) (same); 17 Geo. 2, c. 6 (1744) (threatened French invasion); 19 Geo. 2, c. 1 (1746) (threatened rebellion in Scotland); 17 Geo. 3, c. 9 (1777) (the American Revolution). Not long after Massachusetts had adopted a clause in its constitution explicitly providing for habeas corpus, see Mass. Const. pt. 2, ch. 6 (1780), reprinted in 3 Federal and State Constitutions, Colonial Charters and Other Organic Laws 1888, 1910 (F. Thorpe ed. 1909), it suspended the writ in order to deal with Shay's Rebellion, see Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 10, 1786 Mass. Acts p. 510.

Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I. See Ex parte Bollman, 4 Cranch 75, 101 (1807); Ex parte Merryman, 17 F. Cas. 144, 151-152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story § 1336.

The Suspension Clause was by design a safety valve, the Constitution's only

"express provision for exercise of extraordinary authority because of a crisis," Youngstown Sheet & Tube Co. v. Sawyer (Jackson, J., concurring). Very early in the Nation's history, President Jefferson unsuccessfully sought a suspension of habeas corpus to deal with Aaron Burr's conspiracy to overthrow the Government. See 16 Annals of Congress 402-425 (1807). During the Civil War, Congress passed its first Act authorizing Executive suspension of the writ of habeas corpus, see Act of Mar. 3, 1863, 12 Stat. 755, to the relief of those many who thought President Lincoln's unauthorized proclamations of suspension (e. g., Proclamation No. 1, 13 Stat. 730 (1862)) unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization, e. g., Proclamation No. 7, 13 Stat. 734 (1863). During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties. See Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14; A Proclamation [of Oct. 17, 1871], 7 Compilation of the Messages and Papers of the Presidents 136-138 (J. Richardson ed. 1899) (hereinafter Messages and Papers); -139.

Two later Acts of Congress provided broad suspension authority to governors of U. S. possessions. The Philippine Civil Government Act of 1902 provided that the Governor of the Philippines could suspend the writ in case of rebellion, insurrection, or invasion. Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692. In 1905 the writ was suspended for nine months by proclamation of the Governor. See Fisher v. Baker (1906). The Hawaiian Organic Act of 1900 likewise provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof). Ch. 339, § 67, 31 Stat. 153.

Of course the extensive historical evidence of criminal convictions and habeas suspensions does not necessarily refute the Government's position in this case. When the writ is suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. See Brief for Respondents 34. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only traditional means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not require a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. First, the text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ. In the United States, this Act was read as "enforc[ing] the common law," Ex parte Watkins, 3 Pet. 193, 202 (1830), and shaped the early understanding of the scope of the writ. As noted above, see, § 7 of the Act specifically addressed those committed for high treason, and provided a remedy if they were not indicted and tried by the second succeeding court term. That remedy was not a bobtailed judicial inquiry into

whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, "he shall be discharged from his Imprisonment." 31 Car. 2, c. 2, § 7. The Act does not contain any exception for wartime. That omission is conspicuous, since § 7 explicitly addresses the offense of "High Treason," which often involved offenses of a military nature. See cases cited.

Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ. In 1788, Thomas Jefferson wrote to James Madison questioning the need for a Suspension Clause in cases of rebellion in the proposed Constitution. His letter illustrates the constraints under which the Founders understood themselves to operate:

"Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages." 13 Papers of Thomas Jefferson 442 (July 31, 1788) (J. Boyd ed. 1956).

A similar view was reflected in the 1807 House debates over suspension during the armed uprising that came to be known as Burr's conspiracy:

"With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution. From the communication of the Executive, it appeared there was sufficient evidence to authorize their commitment. Several months would elapse before their final trial, which would give time to collect evidence, and if this shall be sufficient, they will not fail to receive the punishment merited by their crimes, and inflicted by the laws of their country." 16 Annals of Congress (remarks of Rep. Burwell).

The absence of military authority to imprison citizens indefinitely in wartime — whether or not a probability of treason had been established by means less than jury trial — was confirmed by three cases decided during and immediately after the War of 1812. In the first, In re Stacy, 10 Johns.

(N. Y. 1813), a citizen was taken into military custody on suspicion that he was "carrying provisions and giving information to the enemy." (emphasis deleted). Stacy petitioned for a writ of habeas corpus, and, after the defendant custodian attempted to avoid complying, Chief Justice Kent ordered attachment against him. Kent noted that the military was "without any color of authority in any military tribunal to try a citizen for that crime" and that it was "holding him in the closest confinement, and contemning the civil authority of the state." -.

Two other cases, later cited with approval by this Court in Ex parte Milligan, 4

Wall. 2, 128-129 (1866), upheld verdicts for false imprisonment against military officers. In Smith v. Shaw, 12 Johns. (N. Y. 1815), the court affirmed an award of damages for detention of a citizen on suspicion that he was, among other things, "an enemy's spy in time of war." The court held that "[n]one of the offences charged against Shaw were cognizable by a court-martial, except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy." "If the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." Finally, in M'Connell v. Hampton, 12 Johns. (N. Y. 1815), a jury awarded $9,000 for false imprisonment after a military officer confined a citizen on charges of treason; the judges on appeal did not question the verdict but found the damages excessive, in part because "it does not appear that [the defendant] . knew [the plaintiff] was a citizen." (Spencer, J.). See generally Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1567 (2004).

President Lincoln, when he purported to suspend habeas corpus without congressional authorization during the Civil War, apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial. In his famous message to Congress on July 4, 1861, he argued only that he could suspend the writ, not that even without suspension, his imprisonment of citizens without criminal trial was permitted. See Special Session Message, 6 Messages and Papers 20-31.

Further evidence comes from this Court's decision in Ex parte Milligan. There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. -7. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the'laws and usages of war,"' :

"It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed,"

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of Milligan logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

"If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended."

Thus, criminal process was viewed as the primary means — and the only means absent congressional action suspending the writ — not only to punish traitors, but to incapacitate them.

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." The Federalist No. 45, p. 238 (J. Madison). No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. Congress's authority "[t]o raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. Const., Art. I, § 8, cl. 12. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be "much inferior" to that of the British King:

"It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature." The Federalist No. 69, p. 357.

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon Ex parte Quirin, 317 U. S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Herbert Haupt, was a U. S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief per curiam issued the day after oral argument concluded, see -19, unnumbered note; a week later the Government carried out the commission's death sentence upon

six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. See The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, Quirin purported to interpret the language of Milligan quoted above (the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed") in the following manner:

"Elsewhere in its opinion . the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . ." 317 U. S..

In my view this seeks to revise Milligan rather than describe it. Milligan had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its discussion of the first point. See 4 Wall.. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war, while mentioned earlier in the opinion, see were made relevant and brought to bear in the Court's later discussion, see of whether Milligan came within the statutory provision that effectively made an exception to Congress's authorized suspension of the writ for (as the Court described it) "all parties, not prisoners of war, resident in their respective jurisdictions, . who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired," Milligan thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called "belligerents" or "prisoners of war."

But even if Quirin gave a correct description of Milligan, or made an irrevocable revision of it, Quirin would still not justify denial of the writ here. In Quirin it was uncontested that the petitioners were members of enemy forces. They were "admitted enemy invaders," 317 U. S. (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces, The specific holding of the Court was only that, "upon the conceded facts,"

the petitioners were "plainly within [the] boundaries" of military jurisdiction, (emphasis

added) But where those jurisdictional

facts are not conceded—where the petitioner insists that he is not a belligerent —Quirin left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, 115 Stat. 224, which provides:

"That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a).

This is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns, see Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council; with the clarity necessary to comport with cases such as Ex parte Endo, and Duncan v. Kahanamoku; or with the clarity necessary to overcome the statutory prescription that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U. S. C. § 4001(a) But even if it did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate. It "weigh[s] the private interest . against the Government's asserted interest," (internal quotation marks omitted), and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. See It claims authority to engage in this sort of "judicious balancing" from Mathews v. Eldridge, a case involving … the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to "engag[e] in a factfinding process that is both prudent and incremental," "In the absence of [the Executive's prior provision of procedures that satisfy due process], … a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. See Preiser v. Rodriguez ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and … the traditional function of the writ is to secure release from illegal custody"); 1 Blackstone 132-133. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should

have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Cf. Johnson v. Eisentrager (1950); Reid v. Covert (1957) (Harlan, J., concurring in result); Rasul v. Bush, (SCALIA, J., dissenting). Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. See, e.g., County of Riverside v. McLaughlin (brief detention pending judicial determination after warrantless arrest); United States v. Salerno (pretrial detention under the Bail Reform Act). The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. See 3 Story § 1336 If civil rights

are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,

"is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing

to run the risk of being less free." The Federalist No. 8, p. 33 (A. Hamilton).

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, inter arma silent leges. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

Notes:

1. As I shall discuss presently, see infra, the Court purported to limit this language in Ex parte Quirin. Whatever Quirin's effect on Milligan's precedential value, however, it cannot undermine its value as an indicator of original meaning. Cf. Reid v. Covert (plurality opinion) (Milligan remains "one of the great landmarks in this Court's history").

2. Without bothering to respond to this analysis, the plurality states that Milligan "turned in large part" upon the defendant's lack of prisoner-of-war status, and that the Milligan Court explicitly and repeatedly said so. Neither is true. To the extent, however, that prisoner-of-war status was relevant in Milligan, it was only because prisoners of war received different statutory treatment under the conditional suspension then in effect.

3. The only two Court of Appeals cases from World War II cited by the Government in which citizens were detained without trial likewise involved petitioners who were conceded to have been members of enemy forces. See In re Territo, -145 (CA9 1946); Colepaugh v. Looney, CA10 1956). The plurality complains that Territo is the only case I have identified in which "a United States citizen [was] captured in a foreign combat zone," Indeed it is; such cases must surely be rare. But given the constitutional tradition I have described, the burden is not upon me to find cases in which the writ was granted to citizens in this country who had been captured on foreign battlefields; it is upon those who would carve out an exception for such citizens (as the plurality's complaint suggests it would) to find a single case (other than one where enemy status was admitted) in which habeas was denied.

4. The plurality's assertion that Quirin somehow "clarifies" Milligan, is simply false. As I discuss and this page, the Quirin Court propounded a mistaken understanding of Milligan; but nonetheless its holding was limited to "the case presented by the present record," and to "the conceded facts," and thus avoided conflict with the earlier case. See 317 U. S. (em-

phasis added). The plurality, ignoring this expressed limitation, thinks it "beside the point" whether belligerency is conceded or found "by some other process" (not necessarily a jury trial) "that verifies this fact with sufficient certainty." But the whole point of the procedural guarantees in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen's liberty depends. The plurality's claim that Quirin's one-paragraph discussion of Milligan provides a "[c]lear … disavowal" of two false imprisonment cases from the War of 1812, thus defies logic; unlike the plaintiffs in those cases, Haupt was concededly a member of an enemy force.

The Government also cites Moyer v. Peabody, a suit for damages against the Governor of Colorado, for violation of due process in detaining the alleged ringleader of a rebellion quelled by the state militia after the Governor's declaration of a state of insurrection and (he contended) suspension of the writ "as incident thereto." Ex parte Moyer, 35 Colo. 154, 157, 91 P. 738, 740 (1905). But the holding of Moyer v. Peabody (even assuming it is transferable from state-militia detention after state suspension to federal standing-army detention without suspension) is simply that "[s]o long as such arrests [were] made in good faith and in the honest belief that they [were] needed in order to head the insurrection off," 212 U. S., an action in damages could not lie. This "good-faith" analysis is a forebear of our modern doctrine of qualified immunity. Cf. Scheuer v. Rhodes (1974) (understanding Moyer in this way). Moreover, the detention at issue in Moyer lasted about 2½ months, see 212 U. S., roughly the length of time permissible under the 1679 Habeas Corpus Act, see.

In addition to Moyer v. Peabody, JUSTICE THOMAS relies upon Luther v. Borden, 7 How. 1 (1849), a case in which the state legislature had imposed martial law—a step even more drastic than suspension of the writ. See post (dissenting opinion). But martial law has not been imposed here, and in any case is limited to "the theatre of active military operations, where war really prevails," and where therefore the courts are closed. Ex parte Milligan, 4 Wall. 2, 127 (1866); see also -130 (distinguishing

Luther).

1. The plurality rejects any need for "specific language of detention" on the ground that detention of alleged combatants is a "fundamental incident of waging war." Its authorities do not support that holding in the context of the present case. Some are irrelevant because they do not address the detention of American citizens. E.g., Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002). The plurality's assertion that detentions of citizen and alien combatants are equally authorized has no basis in law or common sense. Citizens and noncitizens, even if equally dangerous, are not similarly situated. See, e.g., Milligan; Johnson v. Eisentrager; Rev. Stat. 4067, 50 U.S.C. § 21 (Alien Enemy Act). That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution

places on the American Government's treatment of its own citizens. Of the authorities cited by the plurality that do deal with detention of citizens, Quirinand Territohave already been discussed and rejected. See, and n. 3. The remaining authorities pertain to U.S. detention of citizens during the Civil War, and are irrelevant for two reasons: (1) the Lieber Code was issued following a congressional authorization of suspension of the writ, see Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 246; Act of Mar. 3, 1863, 12 Stat. 755, §§ 1, 2; and (2) citizens of the Confederacy, while citizens of the United States, were also regarded as citizens of a hostile power.

2. JUSTICE THOMAS worries that the constitutional conditions for suspension of the writ will not exist "during many . emergencies during which … detention authority might be necessary," post. It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of Mathews v. Eldridge. I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

"It is'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee (quoting Aptheker v. Secretary of State). The national security, after all, is the primary responsibility and purpose of the Federal Government. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer (Clark, J., concurring in judgment); The Federalist No. 23, pp. 146-147 (J. Cooke ed. 1961) (A. Hamilton) ("The principle purposes to be answered by Union are these — The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks"). But because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create

a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation

"ought to exist without limitation . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

See also Nos. 34 and 41.

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." No. 70 (A. Hamilton). The principle "ingredien[t]" for "energy in the executive" is "unity." This is because "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number."

These structural advantages are most important in the national-security and foreign-affairs contexts. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." No. 74 (A. Hamilton). Also for these reasons, John Marshall explained that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800); see -614. To this end, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief of the" Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3.

This Court has long recognized these features and has accordingly held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion.

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority…. Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance … is a question to be decided by him." Prize Cases, 2 Black 635, 668, 670 (1863).

The Court has acknowledged that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 9 How. 603, 615 (1850). With respect to foreign affairs as well, the Court has recognized the President's independent authority and need to be free from interference.

See, e. g., United States v. Curtiss-Wright Export Corp. (explaining that the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results"); Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp..

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. I cannot improve on Justice Jackson's words, speaking for the Court:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

Several points, made forcefully by Justice Jackson, are worth emphasizing. First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because "[t]hey are delicate, complex, and involve large elements of prophecy." Third, the Court in Chicago & Southern Air Lines and elsewhere has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts.

For these institutional reasons and because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," it should come as no surprise that "[s]uch failure of Congress … does not,'especially … in the areas of foreign policy and national security,' imply'congressional disapproval' of action taken by the Executive." Dames & Moore v. Regan (quoting Agee). Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that

Congress intended to deprive him of particular powers not specifically enumerated. See Dames & Moore. As far as the courts are concerned, "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to'invite"measures on independent presidential responsibility.'" (quoting Youngstown (Jackson, J., concurring)).

Finally, and again for the same reasons, where "the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."' Dames & Moore (quoting Youngstown (Jackson, J., concurring)). That is why the Court has explained, in a case analogous to this one, that "the detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted." Ex parte Quirin. See also Ex parte Milligan, 4 Wall. 2, 133 (1866) (Chase, C. J., concurring in judgment) (stating that a sentence imposed by a military commission "must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress"). This deference extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate. See Quirin ("We are not here concerned with any question of the guilt or innocence of petitioners"). See also Hirabayashi v. United States; Prize Cases, 2 Black; Martin v. Mott, 12 Wheat. 19, 29-30 (1827).

To be sure, the Court has at times held, in specific circumstances, that the military acted beyond its warmaking authority. But these cases are distinguishable in important ways. In Ex parte Endo, the Court held unlawful the detention of an admittedly law-abiding and loyal American of Japanese ancestry. It did so because the Government's asserted reason for the detention had nothing to do with the congressional and executive authorities upon which the Government relied. Those authorities permitted detention for the purpose of preventing espionage and sabotage and thus could not be pressed into service for detaining a loyal citizen. See -302. Further, the Court "stress[ed] the silence … of the [relevant] Act and the Executive Orders." (emphasis added); see also -304. The Court sensibly held that the Government could not detain a loyal citizen pursuant to executive and congressional authorities that could not conceivably be implicated given the Government's factual allegations. And in Youngstown, Justice Jackson emphasized that "Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with th[e] seizure." 343 U.S. (concurring opinion). See also Milligan (Chase, C. J., concurring in judgment) (noting that the Government failed to comply with statute directly on point).

I acknowledge that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi's detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Chicago & Southern Air Lines. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, see, e.g., Ex parte Endowe lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches In the

words of then-Judge Scalia:

"In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The [C]ourt's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing." Ramirez de Arellano v. Weinberger, -1551 (CADC 1984) (en banc) (dissenting opinion) (footnote omitted).

See also n. 1 (noting that "[e]ven the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief"). The decision whether someone is an enemy combatant is, no doubt, "delicate, complex, and involv[es] large elements of prophecy," Chicago & Southern Air Lines, which, incidentally might in part explain why "the Government has never provided any court with the full criteria that it uses in classifying individuals as such," See also infra (discussing other military decisions).

"'The war power of the national government is"the power to wage war successfully."'" Lichter v. United States, n. 9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238 (1917)). It follows that this power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict," In re Yamashita; see also Stewart v. Kahn, 11 Wall. 493, 507 (1871), and quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies, see, e.g., Quirin, 30-31; -39; Duncan v. Kahanamoku (1946); W. Winthrop, Military Law and Precedents 788 (2d ed. rev. 1920); W. Whiting, War Powers Under the Constitution of the United States 167 (43d ed. 1871); -46 (noting that Civil War "rebels" may be treated as foreign belligerents); see also Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the

President to do so. See The Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. Indeed, the Court has previously concluded that language materially identical to the AUMF authorizes the Executive to "make the ordinary use of the soldiers …; that he may kill persons who resist and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace." Moyer v. Peabody.

The plurality, however, qualifies its recognition of the President's authority to detain enemy combatants in the war on terrorism in ways that are at odds with our precedent. Thus, the plurality relies primarily on Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U. S. T. 3406, T. I. A. S. No. 3364, for the proposition that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." It then appears to limit the President's authority to detain by requiring that "the record establis[h] that United States troops are still involved in active combat in Afghanistan" because, in that case, detention would be "part of the exercise of'necessary and appropriate force."' But I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply. See n. 6, infra. Further, we are bound by the political branches' determination that the United States is at war. See, e.g., Ludecke v. Watkins (1948); Prize Cases, 2 Black; Mott, 12 Wheat.. And, in any case, the power to detain does not end with the cessation of formal hostilities. See, e.g., Madsen v. Kinsella; Johnson v. Eisentrager; cf. Moyer.

Accordingly, the President's action here is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." Dames & Moore (internal quotation marks omitted) The question becomes

whether the Federal Government (rather than the President acting alone) has power to detain Hamdi as an enemy combatant. More precisely, we must determine whether the Government may detain Hamdi given the procedures that were used.

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. See But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

This makes complete sense once the process that is due Hamdi is made clear. As an initial matter, it is possible that the Due Process Clause requires only "that our Government must proceed according to the'law of the land'—that is,

according to written constitutional and statutory provisions." In re Winship (Black, J., dissenting). I need not go this far today because the Court has already explained the nature of due process in this context.

In a case strikingly similar to this one, the Court addressed a Governor's authority to detain for an extended period a person the executive believed to be responsible, in part, for a local insurrection. Justice Holmes wrote for a unanimous Court:

"When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm." Moyer (citation omitted; emphasis added).

The Court answered Moyer's claim that he had been denied due process by emphasizing that

"it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country…. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." -85 (citations omitted).

In this context, due process requires nothing more than a good-faith executive determination To be clear: The Court

has held that an executive, acting pursuant to statutory and constitutional authority, may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the executive deems this necessary for the public safety even if he is mistaken.

Moyer is not an exceptional case. In Luther v. Borden, 7 How. 1 (1849), the Court discussed the President's constitutional and statutory authority, in response to a request from a state legislature or executive, " 'to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress [an] insurrection.' " (quoting Act of Feb. 28, 1795). The Court explained that courts could not review the President's decision to recognize one of the competing legislatures or executives. See 7 How.. If a court could second-guess this determination, "it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States." "If the judicial power extends so far," the Court concluded, "the guarantee contained in the Constitution of the United States [referring to Art. IV, § 4] is a guarantee of anarchy, and not of order." The Court clearly contemplated that the President had authority to detain as he deemed necessary, and such detentions evidently comported with the Due

Process Clause as long as the President correctly decided to call forth the militia, a question the Court said it could not review.

The Court also addressed the natural concern that placing "this power in the President is dangerous to liberty, and may be abused." The Court noted that "[a]ll power may be abused if placed in unworthy hands," and explained that "it would be difficult . to point out any other hands in which this power would be more safe, and at the same time equally effectual." Putting that aside, the Court emphasized that this power "is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." Finally, the Court explained that if the President abused this power "it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it."

Almost 140 years later, in United States v. Salerno, the Court explained that the Due Process Clause "lays down [no] categorical imperative." The Court continued:

"We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."

The Court cited Ludecke v. Watkins, for this latter proposition even though Ludecke actually involved detention of enemy aliens. See also Selective Draft Law Cases; Jacobson v.

Massachusetts (1905) (upholding legislated mass vaccinations and approving of forced quarantines of Americans even if they show no signs of illness); cf. Kansas v. Hendricks; Juragua Iron Co. v. United States.

The Government's asserted authority to detain an individual that the President has determined to be an enemy combatant, at least while hostilities continue, comports with the Due Process Clause. As these cases also show, the Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function. See Part I.

I therefore cannot agree with JUSTICE SCALIA'S conclusion that the Government must choose between using standard criminal processes and suspending the writ. See (dissenting opinion). JUSTICE SCALIA relies heavily upon Ex parte Milligan, 4 Wall. 2 (1866), see -572, and three cases decided by New York state courts in the wake of the War of 1812, see I admit that Milligan supports his position. But because the Executive Branch there, unlike here, did not follow a specific statutory mechanism provided by Congress, the Court did not need to reach the broader question of Congress' power, and its discussion on this point

was arguably dicta, see 4 Wall., as four Justices believed, see 134-136 (Chase, C. J., joined by Wayne, Swayne, and Miller, JJ., concurring in judgment).

More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan. In fact, this feature serves to distinguish the state cases as well. See In re Stacy, 10 Johns. (N. Y. 1813) ("A military commander is here assuming criminal jurisdiction over a private citizen" (emphasis added)); Smith v. Shaw, 12 Johns. (N. Y. 1815) (Shaw "might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy" (emphasis added)); M'Connell v. Hampton, 12 Johns. (N. Y. 1815) (same for treason).

Although I do acknowledge that the reasoning of these cases might apply beyond criminal punishment, the punishment-nonpunishment distinction harmonizes all of the precedent. And, subsequent cases have at least implicitly distinguished Milligan in just this way. See, e. g., Moyer ("Such arrests are not necessarily for punishment, but are by way of precaution"). Finally, Quirin overruled Milligan to the extent that those cases are inconsistent. See Quirin (limiting Milligan to its facts). Because the Government does not detain Hamdi in order to punish him, as the plurality acknowledges, see Milligan and the New York cases do not control.

JUSTICE SCALIA also finds support in a letter Thomas Jefferson wrote to James Madison. See I agree that this provides some evidence for his position. But I think this plainly insufficient to rebut the authorities upon which I have relied. In any event, I do not believe that JUSTICE SCALIA'S evidence leads to the necessary "clear conviction that [the detention is] in conflict with the Constitution or laws of Congress constitutionally enacted," Quirin, to justify nullifying the President's wartime action.

Finally, JUSTICE SCALIA'S position raises an additional concern. JUSTICE SCALIA apparently does not disagree that the Federal Government has all power necessary to protect the Nation. If criminal processes do not suffice, however, JUSTICE SCALIA would require Congress to suspend the writ. See But the fact that the writ may not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2, poses two related problems. First, this condition might not obtain here or during many other emergencies during which this detention authority might be necessary. Congress would then have to choose between acting unconstitutionally4 and

depriving the President of the tools he needs to protect the Nation. Second, I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. JUSTICE SCALIA'S position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the

President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

Although I do not agree with the plurality that the balancing approach of Mathews v. Eldridge, is the appropriate analytical tool with which to analyze this case,5 I cannot help but explain that the

plurality misapplies its chosen framework, one that if applied correctly would probably lead to the result I have reached. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See But: "It is'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Agee (quoting Aptheker). In Moyer, the Court recognized the paramount importance of the Governor's interest in the tranquility of a Colorado town. At issue here is the far more significant interest of the security of the Nation. The Government seeks to further that interest by detaining an enemy soldier not only to prevent him from rejoining the ongoing fight. Rather, as the Government explains, detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism. See Brief for Respondents 15; App. 347-351.

Additional process, the Government explains, will destroy the intelligence gathering function. Brief for Respondents 43-45. It also does seem quite likely that, under the process envisioned by the plurality, various military officials will have to take time to litigate this matter. And though the plurality does not say so, a meaningful ability to challenge the Government's factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.

The plurality manages to avoid these problems by discounting or entirely ignoring them. After spending a few sentences putatively describing the Government's interests, the plurality simply assures the Government that the alleged burdens "are properly taken into account in our due process analysis." The plurality also announces that "the risk of an erroneous deprivation of a detainee's liberty interest is unacceptably high under the Government's proposed rule." (internal quotation marks omitted). But there is no particular reason to believe that the federal courts have the relevant information and expertise to make this judgment. And for the reasons discussed in Part Ithere is every reason to think that courts cannot and should not make these decisions.

The plurality next opines that "[w]e think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." Apparently by limiting hearings "to the alleged combatant's acts,"

such hearings "meddl[e] little, if at all, in the strategy or conduct of war." Of course, the meaning of the combatant's acts may become clear only after quite invasive and extensive inquiry. And again, the federal courts are simply not situated to make these judgments.

Ultimately, the plurality's dismissive treatment of the Government's asserted interests arises from its apparent belief that enemy-combatant determinations are not part of "the actual prosecution of a war," , or one of the "central functions of warmaking," This seems wrong: Taking and holding enemy combatants is a quintessential aspect of the prosecution of war. See, e. g., ; Quirin. Moreover, this highlights serious difficulties in applying the plurality's balancing approach here. First, in the war context, we know neither the strength of the Government's interests nor the costs of imposing additional process.

Second, it is at least difficult to explain why the result should be different for other military operations that the plurality would ostensibly recognize as "central functions of warmaking." As the plurality recounts:

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (internal quotation marks omitted).

See also ("notice" of the Government's factual assertions and "a fair opportunity to rebut [those] assertions before a neutral decisionmaker" are essential elements of due process). Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets. To take one more example, in November 2002, a Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States, and four others. See Priest, CIA Killed U. S. Citizen In Yemen Missile Strike, Washington Post, Nov. 8, 2002, p. A1. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well. Cf. Tennessee v. Garner, 471 U. S. 1 (1985). I offer these examples not because I think the plurality would demand additional process in these situations but because it clearly would not. The result here should be the same.

I realize that many military operations are, in some sense, necessary. But many, if not most, are merely expedient, and I see no principled distinction between the military operation the plurality condemns today (the holding of an enemy combatant based on the process given Hamdi) from a variety of other military operations. In truth, I doubt that there is any sensible, bright-line distinction. It could be argued that bombings and missile strikes are an inherent part of war, and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed. But this does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy

combatants exactly as the Government has detained Hamdi.

This, in fact, bolsters my argument in Part

to the extent that the laws of war show that the power to detain is part of a sovereign's war powers.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, a fortiori, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. See But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42-43. See also App. 347-351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts, see, e. g., Johnson v. Eisentrager, and protecting classified information, see, e. g., Department of Navy v. Egan (President's "authority to classify and control access to information bearing on national security and to determine" who gets access "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant"); Agee (upholding revocation of former CIA employee's passport in large part by reference to the Government's need "to protect the secrecy of [its] foreign intelligence operations").

For these reasons, I would affirm the judgment of the Court of Appeals. ———

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Notes:

1. Although I have emphasized national-security concerns, the President's foreign-affairs responsibilities are also squarely implicated by this case. The Government avers that Northern Alliance forces captured Hamdi, and the District Court demanded that the Government turn over information relating to statements made by members of the Northern Alliance. See CA4 2003).

2. It could be argued that the habeas statutes are evidence of congressional intent that enemy combatants are entitled to challenge the factual basis for the Government's determination. See, e.g., 28 U.S.C. §§ 2243, 2246. But factual development is needed only to the extent necessary to resolve the legal challenge to the detention. See, e.g., Walker v. Johnston.

3. Indeed, it is not even clear that the Court required good faith. See Moyer ("It is not alleged that [the Governor's] judgment was not honest, if that

be material, or that [Moyer] was detained after fears of the insurrection were at an end").

4. I agree with JUSTICE SCALIA that this Court could not review Congress' decision to suspend the writ. See
5. Evidently, neither do the parties, who do not cite Mathews even once.
6. Hamdi's detention comports with the laws of war, including the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U. S. T. 3406, T. I. A. S. No. 3364. See Brief for Respondents 22-24. 7. These observations cast still more doubt on the appropriateness and usefulness of Mathews v. Eldridge, in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to national security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?

Substantive Due Process

Incorporation

Slaughter-House Cases

83 U.S. 36 (1872)

(Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.)

Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court. These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

The cases named on a preceding page,11 with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it as length on a motion made by plaintiffs in error for an order in the nature of an injunction

or supersedeas, pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273.

On account of the importance of the questions involved in these cases they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court under these circumstances ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page,12 who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled 'An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.'

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect

within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment; That it abridges the privileges and immunities of citizens of the United States; That it denies to the plaintiffs the equal protection of the laws; and, That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution

of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument.

Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese

coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words 'privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares 'that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.'

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield v. Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of Ward v. The State of Maryland,23 while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which the fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of Paul v. Virginia,24 the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens.'

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the

case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of Crandall v. Nevada It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;' and it is, as such citizens, that their rights are supported in this court in Crandall v. Nevada.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several

States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bon a fide residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Adamson v. California

332 U.S. 46 (1947)

Mr. Justice Reed delivered the opinion of the Court.

The appellant, Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree After considering the same objections to the conviction that are pressed here, the sentence of death was affirmed by the Supreme Court of the state. 27 Cal. 2d 478, 165 P. 2d 3. Review of that judgment by this Court was sought and allowed under Judicial Code § 237; 28 U. S. C. § 344 The provisions of California law which were challenged in the state proceedings as invalid under the Fourteenth Amendment to the Federal Constitution are those of the state constitution and penal code in the margin. They permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of § 1 of the Fourteenth Amendment.

The appellant was charged in the information with former convictions for burglary, larceny and robbery and pursuant to § 1025, California Penal Code, answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial Under California's interpretation of § 1025 of the Penal Code and § 2051 of the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced "the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." People v. Adamson, 27 Cal. 2d 478, 494, 165 P. 2d 3, 11; People v. Braun, 14 Cal. 2d 1, 6, 92 P. 2d 402, 405. This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

In the first place, appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

Secondly, appellant relies upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law, set out in note 3and as applied (a) because comment on failure to testify is permitted, (b)

because appellant was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination, and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to appellant in permitting comment on his failure to testify.

We shall assume, but without any intention thereby of ruling upon the issue,6 that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243; Feldman v. United States. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence7 secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The Slaughter-House Cases8 decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. Maxwell v. Bugbee; Hamilton v. Regents. The power to free defendants in state trials.from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in Twining v. New Jersey. "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." 9 The Twining case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. Twining v. New Jersey; Palko v. Connecticut. After declaring that state and national citizenship coexist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of

the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the Twining and Palko cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut. It was rejected with citation of the cases excluding several of the rights, protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty," p. 325, became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. Twining v. New Jersey; Palko v. Connecticutp. 323. For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial. Therefore, we must examine the effect of the California law applied in this trial to see whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an accused. The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion It forbids any other type of coercion that falls within the scope of due process California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. Cf. VIH Wigmore on Evidence (3d ed.) § 2252. That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the due process clause, but to the constitutionality of the provision of the California law that permits com-

ment upon his failure to testify. It is, of course, logically possible that while an accused might be required, under appropriate penalties, to submit himself as a witness without a violation of due process, comment by judge or jury on inferences to be drawn from his failure to testify, in jurisdictions where an accused's privilege against self-incrimination is protected, might deny due process. For example, a statute might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence.

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions This arises from state constitutional or statutory provisions similar in character to the federal provisions. Fifth Amendment and 28 U. S. C. § 632. California, however, is one of a few states that permit limited comment upon a defendant's failure to testify That permission is narrow. The California law is set out in note 3 and authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. Compare Tot v. United States. It allows inferences to be drawn from proven facts. Beeaúse of this clause, the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. Compare Caminetti v. United States; Raffel v. United States. There is here no lack of power in the trial court to adjudge and no denial of a hearing. California has prescribed a method for advising the jury in the search for truth-. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain.

Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment. The guilty person was not seen at the place and time of the crime. There was evidence, however, that entrance to the place or room where the crime was committed might have been obtained through a small door. It was freshly broken. Evidence showed that six fingerprints on the door were petitioner's. Certain diamond rings were missing from the deceased's possession. There was evidence that appellant, sometime after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring. As has been stated, the information charged other crimes to appellant and he admitted them. His argument here is that he could not take the stand to deny the evidence against him because he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence

so produced might well bring about his conviction. Such cross-examination is allowable in California. People v. Adamson, 27 Cal. 2d 478, 494, 165 P. 2d 3, 11. Therefore, appellant contends the California statute permitting comment denies him due process.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.

There is no basis in the California law for appellant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. Failure of the accused to testify is not an admission of the truth of the adverse evidence. Instructions told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt. People v. Adamson, 27 Cal. 2d 478, 489P. 2d 3, 9-12. It only directs attention to the strength of the evidence for the prosecution or to the weakness of that for the-defense. The Supreme Court of California called attention to the fact that the prosecutor's argument approached the borderline in a statement that might have been construed as asserting "that the jury should infer guilt solely from defendant's silence." That court felt that it was improbable the jury was misled into such an understanding of their power. We shall not interfere with such a conclusion. People v. Adamson, 27 Cal. 2d 478, 494P. 2d 3, 12.

We find no other error that gives ground for our intervention in California's administration of criminal justice.

Affirmed.

Mr. Justice Frankfurter, concurring.

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness

stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. 20 Stat. 30; see Bruno v. United States. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. (This opinion is concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment. I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but one of the decisions beginning with the Slaughter-House Cases, 16 Wall. 36, see the deviation in Colgate v. Harvey, overruled by Madden v. Kentucky.)

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court — a period of seventy years — the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but — it is especially relevant to note — -they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandéis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are "narrow or provincial" would deem essential to "a fair and enlightened system of justice." Palko v. Connecticut. To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange

for a Constitution to convey such specific commands in such a roundabout and inexplicit way. After all, an amendment to the Constitution should be read in a " 'sense most obvious to the common understanding at the time of its adoption.' . For it was for public adoption that it was proposed." See Mr. Justice Holmes in Eisner v. Macomber. Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing* of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Mr. Justice Black, dissenting.

The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments—Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were,

in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

But these limitations were not expressly imposed upon state court action. In 1833, Barron v. Baltimorewas decided by this Court. It specifically held inapplicable to the states that provision of the Fifth Amendment which declares: "nor shall private property be taken for public use, without just compensation." In deciding the particular point raised, the Court there said that it could not hold that the first eight amendments applied to the states. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866.

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

For this reason, I am attaching to this dissent an appendix which contains a résumé, by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights. Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here. However that may be, our prior decisions, including Twining, do not prevent our carrying out that purpose, at least to the extent of making applicable to the states, not a mere part, as the Court has, .but the full protection of the Fifth Amendment's provision against compelling evidence from an accused to convict him of crime. And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. And my belief seems to be in accord with the views expressed by this Court, at least for the first two decades after the Fourteenth Amendment was adopted.

McDonald v. City of Chicago

561 U.S. 742 (2010)

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, II-D, III-A, and III-B, in which THE CHIEF JUSTICE, Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, and an opinion with respect to Parts II-C, IV, and V, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

Two years ago, in District of Columbia v. Heller, 554 U.S. _____, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges or Immunities Clause adopted in the Slaughter-House Casesshould now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right.

Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only if that right is an indispensable attribute of any " 'civilized' " legal system. Brief for Municipal Respondents 9. If it is possible to imagine a civilized country that does not recognize the right, the municipal respondents tell us, then that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, the municipal respondents maintain that due process does not preclude such measures. -23. In light of the parties' far-reaching arguments, we begin by recounting this Court's analysis over the years of the relationship between the provisions of the Bill of Rights and the States.

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In Barron ex rel. Tiernan v. Mayor of Baltimore, 7 Pet. 243, the Court, in an opinion by Chief Justice Marshall, explained that this question was "of great importance" but "not of much difficulty." In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only

to the Federal Government. See also Lessee of Livingston v. Moore, 7 Pet. 469, 551-552, ("[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states").

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."

Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to "the privileges or immunities of citizens of the United States." The Slaughter-House Casesinvolved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that "the State governments were created to establish and secure"—were not protected by the Clause.

In drawing a sharp distinction between the rights of federal and state citizenship, the Court relied on two principal arguments. First, the Court emphasized that the Fourteenth Amendment's Privileges or Immunities Clause spoke of "the privileges or immunities of citizens of the United States," and the Court contrasted this phrasing with the wording in the first sentence of the Fourteenth Amendment and in the Privileges and Immunities Clause of Article IV, both of which refer to state citizenship (Emphasis added.) Second, the Court stated that a contrary reading would "radically chang[e] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," and the Court refused to conclude that such a change had been made "in the absence of language which expresses such a purpose too clearly to admit of doubt." Finding the phrase "privileges or immunities of citizens of the United States" lacking by this high standard, the Court reasoned that the phrase must mean something more limited.

Under the Court's narrow reading, the Privileges or Immunities Clause protects such things as the right

"to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions … [and to] become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State." -80 (internal quotation marks omitted).

Finding no constitutional protection against state intrusion of the kind envi-

sioned by the Louisiana statute, the Court upheld the statute. Four Justices dissented. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, criticized the majority for reducing the Fourteenth Amendment's Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." ; see also Justice Field opined that the Privileges or Immunities Clause protects rights that are "in their nature … fundamental," including the right of every man to pursue his profession without the imposition of unequal or discriminatory restrictions. -97. Justice Bradley's dissent observed that "we are not bound to resort to implication … to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself." Justice Bradley would have construed the Privileges or Immunities Clause to include those rights enumerated in the Constitution as well as some unenumerated rights. Justice Swayne described the majority's narrow reading of the Privileges or Immunities Clause as "turn[ing] … what was meant for bread into a stone." (dissenting opinion).

Today, many legal scholars dispute the correctness of the narrow Slaughter-House interpretation. See, e.g., Saenz v. Roe, n. 1, 527, (THOMAS, J., dissenting) (scholars of the Fourteenth Amendment agree "that the Clause does not mean what the Court said it meant in 1873"); Amar, Substance and Method in the Year 2000, 28 Pepperdine L.Rev. 601, 631, n. 178 (2001) ("Virtually no serious modern scholar—left, right, and center— thinks that this [interpretation] is a plausible reading of the Amendment"); Brief for Constitutional Law Professors as Amici Curiae 33 (claiming an "overwhelming consensus among leading constitutional scholars" that the opinion is "egregiously wrong"); C. Black, A New Birth of Freedom 74-75 (1997).

Three years after the decision in the Slaughter-House Cases, the Court decided Cruikshank, the first of the three 19th-century cases on which the Seventh Circuit relied. 92 U.S. 542, In that case, the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms.

The Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms. Cruikshank, 559. The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence." "The second amendment," the Court continued, "declares that it shall not be infringed; but this … means no more than that it shall not be

infringed by Congress." "Our later decisions in Presser v. Illinois[,] (1886), and Miller v. Texas[,] (1894), reaffirmed that the Second Amendment applies only to the Federal Government." Heller, n. 23, 128 S.Ct. n. 23.

As previously noted, the Seventh Circuit concluded that Cruikshank, Presser, and Miller doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the "privileges or immunities of citizens of the United States." In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others, see Brief for Petitioners 10, 14, 15-21, but petitioners are unable to identify the Clause's full scope. Nor is there any consensus on that question among the scholars who agree that the Slaughter-House Cases' interpretation is flawed. See Saenz, n. 1, (THOMAS, J., dissenting).

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.

At the same time, however, this Court's decisions in Cruikshank, Presser, and Miller do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States. See Heller, n. 23, 128 S.Ct. n. 23. None of those cases "engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases." As explained more fully below, Cruikshank, Presser, and Miller all preceded the era in which the Court began the process of "selective incorporation" under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.

Indeed, Cruikshank has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In Cruikshank, the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the States. See 92 U.S.. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] … safeguarded by the due process clause of the Fourteenth Amendment." De Jonge v. Oregon, We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. See Hurtado v. California (due process does not require grand jury indictment); Chicago, B. & Q.R. Co. v. Chicago (due process prohibits States from taking of private property for public use without just compensation). Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See Twining v. New Jersey, Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law." See also, e.g., Adamson v. California; Betts v. Brady; Palko v. Connecticut; Grosjean v. American Press Co.; Powell v. AlabamaWhile it was "possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action," the Court stated, this was "not because those rights are enumerated in the first eight Amendments." Twining.

The Court used different formulations in describing the boundaries of due process. For example, in Twining, the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." 211 U.S., (internal quotation marks omitted). In Snyder v. Massachusetts, the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in Palko, the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S., Third, in some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." Duncan v. Louisiana, n. 14, Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." Chicago, B. & Q.R. Co., Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law."

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. See, e.g., Gitlow v. New York, (freedom of speech and press); Near v. Minnesota ex rel. Olson (same); Powell(assistance of counsel in capital cases); De Jonge(freedom of assembly); Cantwell v. Connecticut (free exercise of religion). But others did not. See, e.g., Hurtado(grand jury indictment requirement); Twining(privilege against self-incrimination).

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. To give one example, in Betts the Court held that, although the Sixth Amendment required the appointment of

counsel in all federal criminal cases in which the defendant was unable to retain an attorney, the Due Process Clause required appointment of counsel in state criminal proceedings only where "want of counsel in [the] particular case … result[ed] in a conviction lacking in … fundamental fairness." 316 U.S., Similarly, in Wolf v. Coloradothe Court held that the "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" but that the exclusionary rule, which applied in federal cases, did not apply to the States.

An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., Adamson, (Black, J., dissenting); Duncan, (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in Barron Adamson, (dissenting opinion) Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., Gideon v. Wainwright, ; Malloy v. Hogan, ; Pointer v. Texas, ; Washington v. Texas, ; Duncan, ; Benton v. Maryland.

The decisions during this time abandoned three of the previously noted characteristics of the earlier period The Court made it clear that the governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection." Duncan, n. 14, Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. and n. 14, ; see also (referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (emphasis added; internal quotation marks omitted)).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights Only a handful of the Bill of Rights protections remain unincorporated.

Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." Malloy, (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

; see also Mapp v. Ohio, ; Ker v. California, ; Aguilar v. Texas, ; Pointer, ; Duncan, 157S.Ct. 1444; Benton, ; Wallace v. Jaffree,

Employing this approach, the Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States. S

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, Duncan, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," Washington v. Glucksberg, (internal quotation marks omitted).

Our decision in Heller points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day,15 and in Heller, we held that individual self-defense is "the central component" of the Second Amendment right. 128 S.Ct.; see also ***, 128 S.Ct. (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, , we found that this right applies to handguns because they are "the most preferred firearm in the nation to'keep' and use for protection of one's home and family,"*** , 128 S.Ct. (some internal quotation marks omitted); see also ***, 128 S.Ct. (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense);*** , 128 S.Ct. ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense."

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." Glucksberg, (internal quotation marks omitted). Heller explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, - ____, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen."

Blackstone's assessment was shared by the American colonists. As we noted in Heller, King George III's attempt to disarm the colonists in the 1760's and 1770's "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."16 ____, 128 S.Ct.; see also L. Levy, Origins of the Bill of Rights 137-143 (1999) (hereinafter Levy).

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." Heller____, 128 S.Ct. (citing Letters from the Federal Farmer

(Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed)); see also Federal Farmer: An Additional Number of Letters to the Republican, Letter XVIII (Jan. 25, 1788), in 17 Documentary History of the Ratification of the Constitution 360, 362-363 (J. Kaminski & G. Saladino eds); S. Halbrook, The Founders' Second Amendment 171-278 (2008). Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution's assignment of only limited powers to the Federal Government. Heller____, 128 S.Ct.; cf. The Federalist No. 46, p. 296 (C. Rossiter ed. 1961) (J. Madison). Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. See Levy 143-149; J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 155-164 (1994). But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution. See 1 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 327-331 (2d ed. 1854); 3 -661; 4 ; see also Levy 26-34; A. Kelly & W. Harbison, The American Constitution: Its Origins and Development 110, 118 (7th ed). This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.

This understanding persisted in the years immediately following the ratification of the Bill of Rights. In addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820. Heller____, Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as "the true palladium of liberty" and explained that prohibitions on the right would place liberty "on the brink of destruction." 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803); see also W. Rawle, A View of the Constitution of the United States of America, 125-126 (2d ed. 1829) (reprint 2009); 3 J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them").

By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense. See M. Doubler, Civilian in Peace, Soldier in War 87-90 (2003); Amar, Bill of Rights 258-259. Abolitionist authors wrote in support of the right. See L. Spooner, The Unconstitutionality of Slavery 66 (1860) (reprint 1965); J. Tiffany, A Treatise on the Unconstitutionality of American Slavery 117-118

(1849) (reprint 1969). And when attempts were made to disarm "Free-Soilers" in "Bloody Kansas," Senator Charles Sumner, who later played a leading role in the adoption of the Fourteenth Amendment, proclaimed that "[n]ever was [the rifle] more needed in just self-defense than now in Kansas." The Crime Against Kansas: The Apologies for the Crime: The True Remedy, Speech of Hon. Charles Sumner in the Senate of the United States 64-65 (1856). Indeed, the 1856 Republican Party Platform protested that in Kansas the constitutional rights of the people had been "fraudulently and violently taken from them" and the "right of the people to keep and bear arms" had been "infringed." National Party Platforms 1840-1972, p. 27 (5th ed).

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. See Heller, 128 S.Ct.; E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877, p. 8 (1988) (hereinafter Foner). The laws of some States formally prohibited African Americans from possessing firearms. For example, a Mississippi law provided that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed); see also Regulations for Freedmen in Louisiana, in -280; H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (describing a Kentucky law); E. McPherson, The Political History of the United States of America During the Period of Reconstruction 40 (1871) (describing a Florida law); (describing an Alabama law).

Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves. In the first session of the 39th Congress, Senator Wilson told his colleagues: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country." 39th Cong. Globe 40 (1865). The Report of the Joint Committee on Reconstruction — which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment19— contained numerous examples of such abuses. See, e.g., Joint Committee on Reconstruction, H.R.Rep. No. 30, 39th Cong., 1st Sess., pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49-50 (1866); see also S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 23, 36 (1865). In one town, the "marshal [took] all arms from returned colored soldiers, and [was] very prompt in shooting the blacks whenever an opportunity occur[red]." H.R. Exec. Doc. No. 70 (internal quotation marks omitted). As Senator Wilson put it during the debate on a failed proposal to disband Southern militias: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down

the country searching houses, disarming people, committing outrages of every kind and description." 39th Cong. Globe 915 (1866).

Union Army commanders took steps to secure the right of all citizens to keep and bear arms,21 but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.

The most explicit evidence of Congress' aim appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that "the right … to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens… without respect to race or color, or previous condition of slavery." 14 Stat. 176-177 (emphasis added) Section 14 thus explicitly guaranteed that "all the citizens," black and white, would have "the constitutional right to bear arms."

The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms Section 1 of the Civil Rights Act guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." This language was virtually identical to language in § 14 of the Freedmen's Bureau Act, 14 Stat. 176-177 ("the right … to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal"). And as noted, the latter provision went on to explain that one of the "laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal" was "the constitutional right to bear arms." Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep and bear arms. 39th Cong. Globe 1292. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms" and not simply to prohibit discrimination. See also Amar, Bill of Rights 264-265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. See General Building Contractors Assn., Inc. v. Pennsylvania, ; see also Amar, Bill of Rights 187; Calabresi, Two Cheers for Professor Balkin's Originalism, 103 Nw.

U.L.Rev. 663, 669-670 (2009).

In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safeguards of liberty under our form of Government." 39th Cong. Globe 1182. One of these, he said, was the right to keep and bear arms:

"Every man . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete."

Even those who thought the Fourteenth Amendment unnecessary believed that blacks, as citizens, "have equal right to protection, and to keep and bear arms for self-defense." (Sen. James Nye); see also Foner 258-259.

Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." "The fourteenth amendment, now so happily adopted, settles the whole question." Cong. Globe, 40th Cong., 2d Sess., 1967. And in debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South. See Halbrook, Freedmen 120-131. Finally, legal commentators from the period emphasized the fundamental nature of the right. See, e.g., T. Farrar, Manual of the Constitution of the United States of America § 118, p. 145 (1867) (reprint 1993); J. Pomeroy, An Introduction to the Constitutional Law of the United States § 239, pp. 152-153 (3d ed. 1875).

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. See Calabresi & Agudo, Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition? 87 Texas L.Rev. 7, 50 (2008) Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amend-

ment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

Despite all this evidence, municipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw "discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle" and that even an outright ban on the possession of firearms was regarded as acceptable, "so long as it was not done in a discriminatory manner." Brief for Municipal Respondents 7. They argue that Members of Congress overwhelmingly viewed § 1 of the Fourteenth Amendment "as an antidiscrimination rule," and they cite statements to the effect that the section would outlaw discriminatory measures. This argument is implausible.

First, while § 1 of the Fourteenth Amendment contains "an antidiscrimination rule," namely, the Equal Protection Clause, municipal respondents can hardly mean that § 1 does no more than prohibit discrimination. If that were so, then the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the Fourth Amendment, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures—and so on. We assume that this is not municipal respondents' view, so what they must mean is that the Second Amendment should be singled out for special—and specially unfavorable—treatment. We reject that suggestion.

Second, municipal respondents' argument ignores the clear terms of the Freedmen's Bureau Act of 1866, which acknowledged the existence of the right to bear arms. If that law had used language such as "the equal benefit of laws concerning the bearing of arms," it would be possible to interpret it as simply a prohibition of racial discrimination. But § 14 speaks of and protects "the constitutional right to bear arms," an unmistakable reference to the right protected by the Second Amendment. And it protects the "full and equal benefit" of this right in the States. 14 Stat. 176-177. It would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist.

Third, if the 39th Congress had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers. In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense. Any such law—like the Chicago and Oak Park ordinances challenged here—presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers. And as the Report of the Joint Committee on Reconstruction revealed, see, those groups were widely involved in harassing blacks in the South.

Fourth, municipal respondents' purely antidiscrimination theory of the Four-

teenth Amendment disregards the plight of whites in the South who opposed the Black Codes. If the 39th Congress and the ratifying public had simply prohibited racial discrimination with respect to the bearing of arms, opponents of the Black Codes would have been left without the means of self-defense—as had abolitionists in Kansas in the 1850's.

Fifth, the 39th Congress' response to proposals to disband and disarm the Southern militias is instructive. Despite recognizing and deploring the abuses of these militias, the 39th Congress balked at a proposal to disarm them. See 39th Cong. Globe 914; Halbrook, Freedmen. Disarmament, it was argued, would violate the members' right to bear arms, and it was ultimately decided to disband the militias but not to disarm their members. See Act of Mar. 2, 1867, § 6, 14 Stat. 485, 487; Halbrook, Freedmen 68-69; Cramer 858-861. It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.

Municipal respondents' remaining arguments are at war with our central holding in Heller: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in Heller as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.

Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era. Municipal respondents submit that the Due Process Clause protects only those rights " 'recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.' " Brief for Municipal Respondents 9 (quoting Chicago, B. & Q.R. Co.,). According to municipal respondents, if it is possible to imagine any civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States. Brief for Municipal Respondents 9. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment. -23.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. See Duncan, and n. 14, And the present-day implications of municipal respondents' argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country If our understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of any civilized country, it would follow that the United States is the only civilized Nation in the world.

Municipal respondents attempt to salvage their position by suggesting that their

argument applies only to substantive as opposed to procedural rights. Brief for Municipal Respondents 10, n. 3. But even in this trimmed form, municipal respondents' argument flies in the face of more than a half-century of precedent. For example, in Everson v. Board of Ed. of Ewing, the Court held that the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment. Yet several of the countries that municipal respondents recognize as civilized have established state churches If we were to adopt municipal respondents' theory, all of this Court's Establishment Clause precedents involving actions taken by state and local governments would go by the boards.

We turn, finally, to the two dissenting opinions. Justice STEVENS' eloquent opinion covers ground already addressed, and therefore little need be added in response. Justice STEVENS would " 'ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.' " Post (quoting Malloy, (Harlan, J., dissenting)). The question presented in this case, in his view, "is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom." Post. He would hold that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." Post.

As we have explained, the Court, for the past half-century, has moved away from the two-track approach. If we were now to accept Justice STEVENS' theory across the board, decades of decisions would be undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely for the individual right that Heller recognized, over vigorous dissents.

The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle. It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." Malloy, (internal quotation marks omitted).

Justice BREYER's conclusion that the Fourteenth Amendment does not incorporate the right to keep and bear arms appears to rest primarily on four factors: First, "there is no popular consensus" that the right is fundamental, post; second, the right does not protect minorities or persons neglected by those holding political power, post; third, incorporation of the Second Amendment right would "amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government" and preventing local variations, post; and fourth, determining the scope of the Second Amendment right in cases involving state and local laws will force judges to answer difficult empirical questions regarding matters that are outside their area of expertise, post. Even if we believed that these factors were relevant to the incorporation inquiry, none of these factors undermines the

case for incorporation of the right to keep and bear arms for self-defense.

First, we have never held that a provision of the Bill of Rights applies to the States only if there is a "popular consensus" that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An amicus brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. See Brief for Senator Kay Bailey Hutchison et al. as Amici Curiae 4. Another brief submitted by 38 States takes the same position. Brief for State of Texas et al. as Amici Curiae 6.

Second, petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. The plight of Chicagoans living in high-crime areas was recently highlighted when two Illinois legislators representing Chicago districts called on the Governor to deploy the Illinois National Guard to patrol the City's streets The legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during that same period in Afghanistan and Iraq and that 80% of the Chicago victims were black Amici supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

Third, Justice BREYER is correct that incorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." Heller, This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

Finally, Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in Heller recommended an interest-balancing test, the Court specifically rejected that suggestion. See. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." Heller____.

In Heller, we held that the Second Amendment protects the right to possess a

handgun in the home for the purpose of self-defense. Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See Duncan, and n. 14, We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

Justice SCALIA, concurring.

I join the Court's opinion. Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited." Albright v. Oliver, (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

I write separately only to respond to some aspects of Justice STEVENS' dissent. Not that aspect which disagrees with the majority's application of our precedents to this case, which is fully covered by the Court's opinion. But much of what Justice STEVENS writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount. He proposes a different theory, which he claims is more "cautiou[s]" and respectful of proper limits on the judicial role. Post. It is that claim I wish to address.

After stressing the substantive dimension of what he has renamed the "liberty clause," post,1 Justice STEVENS proceeds to urge readoption of the theory of incorporation articulated in Palko v. Connecticut, see post. But in fact he does not favor application of that theory at all. For whether Palko requires only that "a fair and enlightened system of justice would be impossible without" the right sought to be incorporated, or requires in addition that the right be rooted in the "traditions and conscience of our people," (internal quotation marks omitted), many of the rights Justice STEVENS thinks are incorporated could not past muster under either test: abortion, post (citing Planned Parenthood of Southeastern Pa. v. Casey,); homosexual sodomy, post (citing Lawrence v. Texas,); the right to have excluded from criminal trials evidence obtained in violation of the Fourth Amendment, post (citing Mapp v. Ohio, 655-657,); and the right to teach one's children foreign languages, post (citing Meyer v. Nebraska,), among others.

That Justice STEVENS is not applying any version of Palko is clear from comparing, on the one hand, the rights he believes are covered, with, on the other hand, his conclusion that the right to keep and bear arms is not covered. Rights that pass his test include not just those "relating to marriage, procreation, contraception, family relationships, and child rearing and education," but also rights against "[g]overnment action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life

choices without adequate justification, [or] perpetrates gross injustice." Post (internal quotation marks omitted). Not all such rights are in, however, since only "some fundamental aspects of personhood, dignity, and the like" are protected, post, at _____ (emphasis added). Exactly what is covered is not clear. But whatever else is in, he knows that the right to keep and bear arms is out, despite its being as "deeply rooted in this Nation's history and tradition," Washington v. Glucksberg, (internal quotation marks omitted), as a right can be, see District of Columbia v. Heller, 554 U.S. , - , - , - _____, 2801, I can find no other explanation for such certitude except that Justice STEVENS, despite his forswearing of "personal and private notions," post (internal quotation marks omitted), deeply believes it should be out.

The subjective nature of Justice STEVENS' standard is also apparent from his claim that it is the courts' prerogative— indeed their duty—to update the Due Process Clause so that it encompasses new freedoms the Framers were too narrow-minded to imagine, post, and n. 21. Courts, he proclaims, must "do justice to [the Clause's] urgent call and its open texture" by exercising the "interpretive discretion the latter embodies." Post, (Why the people are not up to the task of deciding what new rights to protect, even though it is they who are authorized to make changes, see U.S. Const., Art. V, is never explained) And it would be "judicial abdication" for a judge to "tur[n] his back" on his task of determining what the Fourteenth Amendment covers by "outsourc[ing]" the job to "historical sentiment," post—that is, by being guided by what the American people throughout our history have thought. It is only we judges, exercising our "own reasoned judgment," post, who can be entrusted with deciding the Due Process Clause's scope—which rights serve the Amendment's "central values," post—which basically means picking the rights we want to protect and discarding those we do not.

Justice STEVENS resists this description, insisting that his approach provides plenty of "guideposts" and "constraints" to keep courts from "injecting excessive subjectivity" into the process Post. Plenty indeed—and that alone is a problem. The ability of omnidirectional guideposts to constrain is inversely proportional to their number. But even individually, each lodestar or limitation he lists either is incapable of restraining judicial whimsy or cannot be squared with the precedents he seeks to preserve.

He begins with a brief nod to history, post, but as he has just made clear, he thinks historical inquiry unavailing, post. Moreover, trusting the meaning of the Due Process Clause to what has historically been protected is circular, see post, since that would mean no new rights could get in.

Justice STEVENS moves on to the "most basic" constraint on subjectivity his theory offers: that he would "esche[w] attempts to provide any all-purpose, top-down, totalizing theory of'liberty."' Post. The notion that the absence of a coherent theory of the Due Process Clause will somehow curtail judicial caprice is at war with reason. Indeterminacy means opportunity for courts to impose whatever rule they like; it is the problem, not the solution. The idea that

interpretive pluralism would reduce courts' ability to impose their will on the ignorant masses is not merely naive, but absurd. If there are no right answers, there are no wrong answers either.

Justice STEVENS also argues that requiring courts to show "respect for the democratic process" should serve as a constraint. Post. That is true, but Justice STEVENS would have them show respect in an extraordinary manner. In his view, if a right "is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate." In other words, a right, such as the right to keep and bear arms, that has long been recognized but on which the States are considering restrictions, apparently deserves less protection, while a privilege the political branches (instruments of the democratic process) have withheld entirely and continue to withhold, deserves more. That topsy-turvy approach conveniently accomplishes the objective of ensuring that the rights this Court held protected in Casey, Lawrence, and other such cases fit the theory—but at the cost of insulting rather than respecting the democratic process.

The next constraint Justice STEVENS suggests is harder to evaluate. He describes as "an important tool for guiding judicial discretion" "sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society." Post. I cannot say whether that sensitivity will really guide judges because I have no idea what it is. Is it some sixth sense instilled in judges when they ascend to the bench? Or does it mean judges are more constrained when they agonize about the cosmic conflict between liberty and its potentially harmful consequences? Attempting to give the concept more precision, Justice STEVENS explains that "sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution." Both traits are undeniably admirable, though what relation they bear to sensitivity is a mystery. But it makes no difference, for the first case Justice STEVENS cites in support, see , Casey, dispels any illusion that he has a meaningful form of judicial modesty in mind.

Justice STEVENS offers no examples to illustrate the next constraint: stare decisis, post. But his view of it is surely not very confining, since he holds out as a "canonical" exemplar of the proper approach, see post, 3118, Lawrence, which overruled a case decided a mere 17 years earlier, Bowers v. Hardwick. 539 U.S., (it "was not correct when it was decided, and it is not correct today"). Moreover, Justice STEVENS would apply that constraint unevenly: He apparently approves those Warren Court cases that adopted jot-for-jot incorporation of procedural protections for criminal defendants, post, but would abandon those Warren Court rulings that undercut his approach to substantive rights, on the basis that we have "cut back" on cases from that era before, post.

Justice STEVENS also relies on the requirement of a "careful description of the asserted fundamental liberty interest" to limit judicial discretion. Post (internal quotation marks omitted). I certainly agree with that requirement, see Reno v. Flores, though some cases Justice STEVENS approves have not ap-

plied it seriously, see, e.g., Lawrence, ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions"). But if the "careful description" requirement is used in the manner we have hitherto employed, then the enterprise of determining the Due Process Clause's "conceptual core," post, is a waste of time. In the cases he cites we sought a careful, specific description of the right at issue in order to determine whether that right, thus narrowly defined, was fundamental. See, e.g., Glucksberg, ; Reno, ; Collins v. Harker Heights, ; Cruzan v. Director, Mo. Dept. of Health, ; see also Vacco v. Quill, The threshold step of defining the asserted right with precision is entirely unnecessary, however, if (as Justice STEVENS maintains) the "conceptual core" of the "liberty clause," post, includes a number of capacious, hazily defined categories. There is no need to define the right with much precision in order to conclude that it pertains to the plaintiff's "ability independently to define [his] identity," his "right to make certain unusually important decisions that will affect his own, or his family's, destiny," or some aspect of his "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity [or] respect." (internal quotation marks omitted). Justice STEVENS must therefore have in mind some other use for the careful-description requirement—perhaps just as a means of ensuring that courts "procee[d] slowly and incrementally," post. But that could be achieved just as well by having them draft their opinions in longhand.

If Justice STEVENS' account of the constraints of his approach did not demonstrate that they do not exist, his application of that approach to the case before us leaves no doubt. He offers several reasons for concluding that the Second Amendment right to keep and bear arms is not fundamental enough to be applied against the States None is persuasive, but more pertinent to my purpose, each is either intrinsically indeterminate, would preclude incorporation of rights we have already held incorporated, or both. His approach therefore does nothing to stop a judge from arriving at any conclusion he sets out to reach.

Justice STEVENS begins with the odd assertion that "firearms have a fundamentally ambivalent relationship to liberty," since sometimes they are used to cause (or sometimes accidentally produce) injury to others. Post. The source of the rule that only nonambivalent liberties deserve Due Process protection is never explained —proof that judges applying Justice STEVENS' approach can add new elements to the test as they see fit. The criterion, moreover, is inherently manipulable. Surely Justice STEVENS does not mean that the Clause covers only rights that have zero harmful effect on anyone. Otherwise even the First Amendment is out. Maybe what he means is that the right to keep and bear arms imposes too great a risk to others' physical well-being. But as the plurality explains, other rights we have already held incorporated pose similarly substantial risks to public safety. In all events, Justice STEVENS supplies neither a standard for how severe the impairment on others' liberty must be for a right to be disqualified, nor (of course) any method of measuring the severity.

Justice STEVENS next suggests that the Second Amendment right is not fun-

damental because it is "different in kind" from other rights we have recognized. Post. In one respect, of course, the right to keep and bear arms is different from some other rights we have held the Clause protects and he would recognize: It is deeply grounded in our nation's history and tradition. But Justice STEVENS has a different distinction in mind: Even though he does "not doubt for a moment that many Americans . see [firearms] as critical to their way of life as well as to their security," he pronounces that owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality." Post. Who says? Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.

No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what other countries do. Post. When it comes to guns, Justice STEVENS explains, our Nation is already an outlier among "advanced democracies"; not even our "oldest allies" protect as robust a right as we do, and we should not widen the gap. Never mind that he explains neither which countries qualify as "advanced democracies" nor why others are irrelevant. For there is an even clearer indication that this criterion lets judges pick which rights States must respect and those they can ignore: As the plurality shows, and nn. 28-29, this follow-the-foreign-crowd requirement would foreclose rights that we have held (and Justice STEVENS accepts) are incorporated, but that other "advanced" nations do not recognize—from the exclusionary rule to the Establishment Clause. A judge applying Justice STEVENS' approach must either throw all of those rights overboard or, as cases Justice STEVENS approves have done in considering unenumerated rights, simply ignore foreign law when it undermines the desired conclusion, see, e.g., Casey(making no mention of foreign law).

Justice STEVENS also argues that since the right to keep and bear arms was codified for the purpose of "prevent[ing] elimination of the militia," it should be viewed as " 'a federalism provision' " logically incapable of incorporation. Post (quoting Elk Grove Unified School Dist. v. Newdow, (THOMAS, J., concurring in judgment); some internal quotation marks omitted). This criterion, too, evidently applies only when judges want it to. The opinion Justice STEVENS quotes for the "federalism provision" principle, Justice THOMAS's concurrence in Newdow, argued that incorporation of the Establishment Clause "makes little sense" because that Clause was originally understood as a limit on congressional interference with state establishments of religion. -51, Justice STEVENS, of course, has no problem with applying the Establishment Clause to the States. See, e.g., n. 4, (opinion for the Court by STEVENS, J.) (acknowledging that the Establishment Clause "appl[ies] to the States by incorporation into the Fourteenth Amendment"). While he insists that Clause is not a "federalism provision," post, n. 40, he does not explain why it is not, but the right to keep and bear arms is (even though only the latter refers to a "right of the people"). The "federalism" argument prevents the incorporation of only certain rights.

Justice STEVENS next argues that even if the right to keep and bear arms is "deeply rooted in some important senses," the roots of States' efforts to regulate guns run just as deep. Post (internal quotation marks omitted). But this too is true of other rights we have held incorporated. No fundamental right—not even the First Amendment—is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character. At least that is what they show (Justice STEVENS would agree) for other rights. Once again, principles are applied selectively.

Justice STEVENS' final reason for rejecting incorporation of the Second Amendment reveals, more clearly than any of the others, the game that is afoot. Assuming that there is a "plausible constitutional basis" for holding that the right to keep and bear arms is incorporated, he asserts that we ought not to do so for prudential reasons. Post. Even if we had the authority to withhold rights that are within the Constitution's command (and we assuredly do not), two of the reasons Justice STEVENS gives for abstention show just how much power he would hand to judges. The States'"right to experiment" with solutions to the problem of gun violence, he says, is at its apex here because "the best solution is far from clear." Post (internal quotation marks omitted). That is true of most serious social problems—whether, for example, "the best solution" for rampant crime is to admit confessions unless they are affirmatively shown to have been coerced, but see Miranda v. Arizona, or to permit jurors to impose the death penalty without a requirement that they be free to consider "any relevant mitigating factor," see Eddings v. Oklahoma, which in turn leads to the conclusion that defense counsel has provided inadequate defense if he has not conducted a "reasonable investigation" into potentially mitigating factors, see, e.g., Wiggins v. Smith, inquiry into which question tends to destroy any prospect of prompt justice, see, e.g., Wong v. Belmontes, 558 U.S. ____, (per curiam) (reversing grant of habeas relief for sentencing on a crime committed in 1981). The obviousness of the optimal answer is in the eye of the beholder. The implication of Justice STEVENS' call for abstention is that if We The Court conclude that They The People's answers to a problem are silly, we are free to "interven[e]," post, but if we too are uncertain of the right answer, or merely think the States may be on to something, we can loosen the leash.

A second reason Justice STEVENS says we should abstain is that the States have shown they are "capable" of protecting the right at issue, and if anything have protected it too much. Post. That reflects an assumption that judges can distinguish between a proper democratic decision to leave things alone (which we should honor), and a case of democratic market failure (which we should step in to correct). I would not—and no judge should— presume to have that sort of omniscience, which seems to me far more "arrogant," post, than confining courts' focus to our own national heritage.

Justice STEVENS' response to this concurrence, post, makes the usual rejoinder of "living Constitution" advocates to the criticism that it empowers judges to eliminate or expand what the people have prescribed: The traditional, his-

torically focused method, he says, reposes discretion in judges as well Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.

I will stipulate to that But the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what Justice STEVENS proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—any historical methodology, under any plausible standard of proof, would lead to the same conclusion Moreover, the methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, post, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments Justice STEVENS would have courts pronounce. And whether or not special expertise is needed to answer historical questions, judges most certainly have no "comparative . advantage," post (internal quotation marks omitted), in resolving moral disputes. What is more, his approach would not eliminate, but multiply, the hard questions courts must confront, since he would not replace history with moral philosophy, but would have courts consider both.

And the Court's approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision. Justice STEVENS' approach, on the other hand, deprives the people of that power, since whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be. After all, he notes, the people have been wrong before, post, and courts may conclude they are wrong in the future. Justice STEVENS abhors a system in which "majorities or powerful interest groups always get their way," post, but replaces it with a system in which unelected and life-tenured judges always get their way. That such usurpation is effected unabashedly, see post—with "the judge's cards . laid on the table," —makes it even worse. In a vibrant democracy, usurpation should have to be accomplished in the dark. It is Justice STEVENS' approach, not the Court's, that puts democracy in peril.

I do not entirely understand Justice STEVENS' renaming of the Due Process Clause. What we call it, of course, does not change what the Clause says, but

shorthand should not obscure what it says. Accepting for argument's sake the shift in emphasis—from avoiding certain deprivations without that "process" which is "due," to avoiding the deprivations themselves—the Clause applies not just to deprivations of "liberty," but also to deprivations of "life" and even "property."

Justice STEVENS insists that he would not make courts the sole interpreters of the "liberty clause"; he graciously invites "[a]ll Americans" to ponder what the Clause means to them today. Post, n. 22. The problem is that in his approach the people's ponderings do not matter, since whatever the people decide, courts have the last word.

Justice BREYER is not worried by that prospect. His interpretive approach applied to incorporation of the Second Amendment includes consideration of such factors as "the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims"; whether recognizing a particular right will "further the Constitution's effort to ensure that the government treats each individual with equal respect" or will "help maintain the democratic form of government"; whether it is "inconsistent . with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises"; whether it fits with "the Framers' basic reason for believing the Court ought to have the power of judicial review"; courts' comparative advantage in answering empirical questions that may be involved in applying the right; and whether there is a "strong offsetting justification" for removing a decision from the democratic process. Post, 3125-3129 (dissenting opinion).

After defending the careful-description criterion, Justice STEVENS quickly retreats and cautions courts not to apply it too stringently. Post. Describing a right too specifically risks robbing it of its "universal valence and a moral force it might otherwise have," , and "loads the dice against its recognition," post, n. 25 (internal quotation marks omitted). That must be avoided, since it endangers rights Justice STEVENS does like. See (discussing Lawrence v. Texas). To make sure those rights get in, we must leave leeway in our description, so that a right that has not itself been recognized as fundamental can ride the coattails of one that has been.

Justice STEVENS claims that I mischaracterize his argument by referring to the Second Amendment right to keep and bear arms, instead of "the interest in keeping a firearm of one's choosing in the home," the right he says petitioners assert. Post, n. 36. But it is precisely the "Second Amendment right to keep and bear arms" that petitioners argue is incorporated by the Due Process Clause. See, e.g., Pet. for Cert. i. Under Justice STEVENS' own approach, that should end the matter. See post ("[W]e must pay close attention to the precise liberty interest the litigants have asked us to vindicate"). In any event, the demise of watered-down incorporation, see means that we no longer subdivide Bill of Rights guarantees into their theoretical components, only some of which apply to the States. The First Amendment freedom of speech is incorporated—not

the freedom to speak on Fridays, or to speak about philosophy.

Justice STEVENS goes a step farther still, suggesting that the right to keep and bear arms is not protected by the "liberty clause" because it is not really a liberty at all, but a "property right." Post. Never mind that the right to bear arms sounds mighty like a liberty; and never mind that the "liberty clause" is really a Due Process Clause which explicitly protects "property," see United States v. Carlton, (SCALIA, J., concurring in judgment). Justice STEVENS' theory cannot explain why the Takings Clause, which unquestionably protects property, has been incorporated, see Chicago, B. & Q.R. Co. v. Chicago, in a decision he appears to accept, post, n. 14.

As Justice STEVENS notes, see post, I accept as a matter of stare decisis the requirement that to be fundamental for purposes of the Due Process Clause, a right must be "implicit in the concept of ordered liberty," Lawrence, n. 3, (SCALIA, J., dissenting) (internal quotation marks omitted). But that inquiry provides infinitely less scope for judicial invention when conducted under the Court's approach, since the field of candidates is immensely narrowed by the prior requirement that a right be rooted in this country's traditions. Justice STEVENS, on the other hand, is free to scan the universe for rights that he thinks "implicit in the concept, etc." The point Justice STEVENS makes here is merely one example of his demand that an historical approach to the Constitution prove itself, not merely much better than his in restraining judicial invention, but utterly perfect in doing so. See Part III, infra.

Justice STEVENS also asserts that his approach is "more faithful to this Nation's constitutional history" and to "the values and commitments of the American people, as they stand today," post. But what he asserts to be the proof of this is that his approach aligns (no surprise) with those cases he approves (and dubs "canonical,"). Cases he disfavors are discarded as "hardly bind[ing]" "excesses," post, or less "enduring," post, n. 16. Not proven. Moreover, whatever relevance Justice STEVENS ascribes to current "values and commitments of the American people" (and that is unclear, see post, n. 47), it is hard to see how it shows fidelity to them that he disapproves a different subset of old cases than the Court does.

That is not to say that every historical question on which there is room for debate is indeterminate, or that every question on which historians disagree is equally balanced. Cf. post. For example, the historical analysis of the principal dissent in Heller is as valid as the Court's only in a two-dimensional world that conflates length and depth.

By the way, Justice STEVENS greatly magnifies the difficulty of an historical approach by suggesting that it was my burden in Lawrence to show the "ancient roots of proscriptions against sodomy," post (internal quotation marks omitted). Au contraire, it was his burden (in the opinion he joined) to show the ancient roots of the right of sodomy.

Justice THOMAS, concurring in part and concurring in the judgment. I agree

with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment "fully applicable to the States." I write separately because I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history.

Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," (citing Duncan v. Louisiana,), and " 'deeply rooted in this Nation's history and tradition,' " (quoting Washington v. Glucksberg,). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

The provision at issue here, § 1 of the Fourteenth Amendment, significantly altered our system of government. The first sentence of that section provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This unambiguously overruled this Court's contrary holding in Dred Scott v. Sandford, 19 How. 393, that the Constitution did not recognize black Americans as citizens of the United States or their own State. -406.

The meaning of § 1's next sentence has divided this Court for many years. That sentence begins with the command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." On its face, this appears to grant the persons just made United States citizens a certain collection of rights—i.e., privileges or immunities—attributable to that status.

This Court's precedents accept that point, but define the relevant collection of rights quite narrowly. In the Slaughter-House Cases, 16 Wall. 36, decided just five years after the Fourteenth Amendment's adoption, the Court interpreted this text, now known as the Privileges or Immunities Clause, for the first time. In a closely divided decision, the Court drew a sharp distinction between the privileges and immunities of state citizenship and those of federal citizenship, and held that the Privileges or Immunities Clause protected only the latter category of rights from state abridgment. The Court defined that category to include only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." This arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship. See (listing "[t]he right to peaceably assemble" and "the privilege of the writ of habeas corpus" as rights potentially protected by the Privileges or Immunities Clause). But the Court soon rejected that proposition, interpreting the Privileges or Immunities Clause even more narrowly in its later cases.

Chief among those cases is United States v. CruikshankL.Ed. 588 (1876). There, the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. ; see L. Keith, The Colfax Massacre 109 (2008). According to the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because "[t]he right . existed long before the adoption of the Constitution." 92 U.S. (emphasis added). Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth.

That circular reasoning effectively has been the Court's last word on the Privileges or Immunities Clause In the intervening years, the Court has held that the Clause prevents state abridgment of only a handful of rights, such as the right to travel, see Saenz v. Roe, that are not readily described as essential to liberty.

As a consequence of this Court's marginalization of the Clause, litigants seeking federal protection of fundamental rights turned to the remainder of § 1 in search of an alternative fount of such rights. They found one in a most curious place—that section's command that every State guarantee "due process" to any person before depriving him of "life, liberty, or property." At first, litigants argued that this Due Process Clause "incorporated" certain procedural rights codified in the Bill of Rights against the States. The Court generally rejected those claims, however, on the theory that the rights in question were not sufficiently "fundamental" to warrant such treatment. See, e.g., Hurtado v. California (grand jury indictment requirement); Maxwell v. Dow (12-person jury requirement); Twining v. New Jersey (privilege against self-incrimination).

That changed with time. The Court came to conclude that certain Bill of Rights guarantees were sufficiently fundamental to fall within § 1's guarantee of "due process." These included not only procedural protections listed in the first eight Amendments, see, e.g., Benton v. Maryland (protection against double jeopardy), but substantive rights as well, see, e.g., Gitlow v. New York, (right to free speech); Near v. Minnesota ex rel. Olson, (same). In the process of incorporating these rights against the States, the Court often applied them differently against the States than against the Federal Government on the theory that only those "fundamental" aspects of the right required Due Process Clause protection. See, e.g., Betts v. Brady, (holding that the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to retain an attorney, but that the Due Process Clause required appointment of counsel in state criminal cases only where "want of counsel . result[ed] in a conviction lacking in . fundamental fairness"). In more

recent years, this Court has "abandoned the notion" that the guarantees in the Bill of Rights apply differently when incorporated against the States than they do when applied to the Federal Government. (opinion of the Court) (internal quotation marks omitted). But our cases continue to adhere to the view that a right is incorporated through the Due Process Clause only if it is sufficiently "fundamental," -3050 (plurality opinion)—a term the Court has long struggled to define.

While this Court has at times concluded that a right gains "fundamental" status only if it is essential to the American "scheme of ordered liberty" or " 'deeply rooted in this Nation's history and tradition,' " (plurality opinion) (quoting Glucksberg,), the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria, see Lawrence v. Texas, (concluding that the Due Process Clause protects "liberty of the person both in its spatial and in its more transcendent dimensions"). Using the latter approach, the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights. See, e.g., Lochner v. New York; Roe v. Wade; Lawrence.

All of this is a legal fiction. The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish "fundamental" rights that warrant protection from nonfundamental rights that do not. Today's decision illustrates the point. Replaying a debate that has endured from the inception of the Court's substantive due process jurisprudence, the dissents laud the "flexibility" in this Court's substantive due process doctrine, post (STEVENS, J., dissenting); see post (BREYER, J., dissenting), while the plurality makes yet another effort to impose principled restraints on its exercise, see But neither side argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.

To be sure, the plurality's effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives. See post (BREYER, J., dissenting) (arguing that rights should be incorporated against the States through the Due Process Clause if they are "well-suited to the carrying out of . constitutional promises"); post (STEVENS, J., dissenting) (warning that there is no "all-purpose, top-down, totalizing theory of'liberty"' protected by the Due Process Clause). But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.

I cannot accept a theory of constitutional interpretation that rests on such ten-

uous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of stare decisis to the stability of our Nation's legal system. But stare decisis is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. Planned Parenthood of Southeastern Pa. v. Casey, (Rehnquist, C. J., concurring in judgment in part and dissenting in part). It is not "an inexorable command." Lawrence, Moreover, as judges, we interpret the Constitution one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. With the inquiry appropriately narrowed, I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.

"It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1 Cranch 137, 174, (Marshall, C. J.). Because the Court's Privileges or Immunities Clause precedents have presumed just that, I set them aside for the moment and begin with the text.

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are " 'written to be understood by the voters.' " Heller, 128 S.Ct. (quoting United States v. Sprague,). Thus, the objective of this inquiry is to discern what "ordinary citizens" at the time of ratification would have understood the Privileges or Immunities Clause to mean.

The text examined so far demonstrates three points about the meaning of the Privileges or Immunities Clause in § 1. First, "privileges" and "immunities" were synonyms for "rights." Second, both the States and the Federal Government had long recognized the inalienable rights of their citizens. Third, Article IV, § 2 of the Constitution protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship.

Section 1 overruled Dred Scott's holding that blacks were not citizens of either the United States or their own State and, thus, did not enjoy "the privileges and immunities of citizens" embodied in the Constitution. 19 How.. The Court in Dred Scott did not distinguish between privileges and immunities of citizens

of the United States and citizens in the several States, instead referring to the rights of citizens generally. It did, however, give examples of what the rights of citizens were—the constitutionally enumerated rights of "the full liberty of speech" and the right "to keep and carry arms."

This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. As the Court demonstrates, there can be no doubt that § 1 was understood to enforce the Second Amendment against the States. See In my view, this is because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.

Justice STEVENS, dissenting.

I further agree with the plurality that there are weighty arguments supporting petitioners' second submission, insofar as it concerns the possession of firearms for lawful self-defense in the home. But these arguments are less compelling than the plurality suggests; they are much less compelling when applied outside the home; and their validity does not depend on the Court's holding in Heller. For that holding sheds no light on the meaning of the Due Process Clause of the Fourteenth Amendment. Our decisions construing that Clause to render various procedural guarantees in the Bill of Rights enforceable against the States likewise tell us little about the meaning of the word "liberty" in the Clause or about the scope of its protection of nonprocedural rights.

This is a substantive due process case. Section 1 of the Fourteenth Amendment decrees that no State shall "deprive any person of life, liberty, or property, without due process of law." The Court has filled thousands of pages expounding that spare text. As I read the vast corpus of substantive due process opinions, they confirm several important principles that ought to guide our resolution of this case. The principal opinion's lengthy summary of our "incorporation" doctrine, see -3036 (majority opinion), 3030-3031 (plurality opinion), and its implicit (and untenable) effort to wall off that doctrine from the rest of our substantive due process jurisprudence, invite a fresh survey of this old terrain.

The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to "process." But substance and procedure are often deeply entwined. Upon closer inspection, the text can be read to "impos[e] nothing less than an obligation to give substantive content to the words'liberty' and'due process of law,"' Washington v. Glucksberg, (Souter, J., concurring in judgment), lest superficially fair procedures be permitted to "destroy the enjoyment" of life, liberty, and property, Poe v. Ullman, (Harlan, J., dissenting), and the Clause's prepositional modifier be permitted to swallow its primary command. Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations.

I have yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise. To the contrary, the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase "due process of law" had acquired substantive content as a term of art within the legal community This understanding is consonant with the venerable "notion that governmental authority has implied limits which preserve private autonomy," a notion which predates the founding and which finds reinforcement in the Constitution's Ninth Amendment, see Griswold v. Connecticut, (Goldberg, J., concurring) The Due Process Clause cannot claim to be the source of our basic freedoms—no legal document ever could, see Meachum v. Fano, (STEVENS, J., dissenting)— but it stands as one of their foundational guarantors in our law.

If text and history are inconclusive on this point, our precedent leaves no doubt: It has been "settled" for well over a century that the Due Process Clause "applies to matters of substantive law as well as to matters of procedure." Whitney v. California, (Brandeis, J., concurring). Time and again, we have recognized that in the Fourteenth Amendment as well as the Fifth, the "Due Process Clause guarantees more than fair process, and the'liberty' it protects includes more than the absence of physical restraint." Glucksberg, "The Clause also includes a substantive component that'provides heightened protection against government interference with certain fundamental rights and liberty interests."' Troxel v. Granville, (opinion of O'Connor, J., joined by Rehnquist, C.J., and GINSBURG and BREYER, JJ.) (quoting Glucksberg,). Some of our most enduring precedents, accepted today by virtually everyone, were substantive due process decisions. See, e.g., Loving v. Virginia, (recognizing due-process as well as equal-protection-based right to marry person of another race); Bolling v. Sharpe, (outlawing racial segregation in District of Columbia public schools); Pierce v. Society of Sisters, (vindicating right of parents to direct upbringing and education of their children); Meyer v. Nebraska, (striking down prohibition on teaching of foreign languages).

The second principle woven through our cases is that substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field. It is the liberty clause that enacts the Constitution's "promise" that a measure of dignity and self-rule will be afforded to all persons. Planned Parenthood of Southeastern Pa. v. Casey, It is the liberty clause that reflects and renews "the origins of the American heritage of freedom [and] the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." Fitzgerald v. Porter Memorial Hospital, C.A 1975) (Stevens, J.). Our substantive due process cases have episodically invoked values such as privacy and equality as well, values that in certain contexts may intersect with or complement a subject's liberty interests in profound ways. But as I have observed on numerous occasions, "most of the significant [20th-century] cases raising Bill of Rights issues have, in the final analysis, actually interpreted the word'liberty' in the Fourteenth Amendment."

It follows that the term "incorporation," like the term "unenumerated rights," is something of a misnomer. Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is "comprised within the term liberty." Whitney, (Brandeis, J., concurring). As the second Justice Harlan has shown, ever since the Court began considering the applicability of the Bill of Rights to the States, "the Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments." Malloy v. Hogan, (dissenting opinion); see also Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L.Rev. 746, 747-750 (1965). In the pathmarking case of Gitlow v. New York, for example, both the majority and dissent evaluated petitioner's free speech claim not under the First Amendment but as an aspect of "the fundamental personal rights and'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

In his own classic opinion in Griswold, (concurring in judgment), Justice Harlan memorably distilled these precedents' lesson: "While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands … on its own bottom."10 Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment. This Court's " 'selective incorporation' " doctrine, is not simply "related" to substantive due process, ; it is a subset thereof.

The third precept to emerge from our case law flows from the second: The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights. As drafted, the Bill of Rights directly constrained only the Federal Government. See Barron ex rel. Tiernan v. Mayor of Baltimore, 7 Pet. 243, Although the enactment of the Fourteenth Amendment profoundly altered our legal order, it "did not unstitch the basic federalist pattern woven into our constitutional fabric." Williams v. Florida, (Harlan, J., concurring in result). Nor, for that matter, did it expressly alter the Bill of Rights. The Constitution still envisions a system of divided sovereignty, still "establishes a federal republic where local differences are to be cherished as elements of liberty" in the vast run of cases, National Rifle Assn. of Am. Inc. v. Chicago, C.A 2009) (Easterbrook, C. J.), still allocates a general "police power… to the States and the States alone," United States v. Comstock, 560 U.S. **,** , (KENNEDY, J., concurring in judgment). Elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas.

It is true, as the Court emphasizes, that we have made numerous provisions of

the Bill of Rights fully applicable to the States. It is settled, for instance, that the Governor of Alabama has no more power than the President of the United States to authorize unreasonable searches and seizures. Ker v. CaliforniaBut we have never accepted a "total incorporation" theory of the Fourteenth Amendment, whereby the Amendment is deemed to subsume the provisions of the Bill of Rights en masse. See And we have declined to apply several provisions to the States in any measure. See, e.g., Minneapolis & St. Louis R. Co. v. Bombolis (Seventh Amendment); Hurtado v. California (Grand Jury Clause). We have, moreover, resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, demanding 12-member panels and unanimous verdicts in federal trials, yet not in state trials. See Apodaca v. Oregon (plurality opinion); WilliamsIn recent years, the Court has repeatedly declined to grant certiorari to review that disparity While those denials have no precedential significance, they confirm the proposition that the "incorporation" of a provision of the Bill of Rights into the Fourteenth Amendment does not, in itself, mean the provision must have precisely the same meaning in both contexts.

It is true, as well, that during the 1960's the Court decided a number of cases involving procedural rights in which it treated the Due Process Clause as if it transplanted language from the Bill of Rights into the Fourteenth Amendment. See, e.g., Benton v. Maryland, (Double Jeopardy Clause); Pointer v. Texas, (Confrontation Clause). "Jot-for-jot" incorporation was the norm in this expansionary era. Yet at least one subsequent opinion suggests that these precedents require perfect state/federal congruence only on matters " 'at the core' " of the relevant constitutional guarantee. Crist v. Bretz, ; see also S.Ct. 2156 (Powell, J., dissenting). In my judgment, this line of cases is best understood as having concluded that, to ensure a criminal trial satisfies essential standards of fairness, some procedures should be the same in state and federal courts: The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue. That principle has little relevance to the question whether a non procedural rule set forth in the Bill of Rights qualifies as an aspect of the liberty protected by the Fourteenth Amendment.

Notwithstanding some overheated dicta in Malloy, it is therefore an overstatement to say that the Court has "abandoned," (majority opinion), 3047 (plurality opinion), a "two-track approach to incorporation," (plurality opinion). The Court moved away from that approach in the area of criminal procedure. But the Second Amendment differs in fundamental respects from its neighboring provisions in the Bill of Rights, as I shall explain in Part V, infra; and if some 1960's opinions purported to establish a general method of incorporation, that hardly binds us in this case. The Court has not hesitated to cut back on perceived Warren Court excesses in more areas than I can count.

I do not mean to deny that there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments. Jot-for-jot incorporation of a provision may entail greater protection of the right at issue and therefore greater freedom for those who hold

it; jot-for-jot incorporation may also yield greater clarity about the contours of the legal rule. See Johnson v. Louisiana, (Douglas, J., dissenting); Pointer, (Goldberg, J., concurring). In a federalist system such as ours, however, this approach can carry substantial costs. When a federal court insists that state and local authorities follow its dictates on a matter not critical to personal liberty or procedural justice, the latter may be prevented from engaging in the kind of beneficent "experimentation in things social and economic" that ultimately redounds to the benefit of all Americans. New State Ice Co. v. Liebmann, (Brandeis, J., dissenting). The costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers.

Furthermore, there is a real risk that, by demanding the provisions of the Bill of Rights apply identically to the States, federal courts will cause those provisions to "be watered down in the needless pursuit of uniformity." Duncan v. Louisiana, n. 21, (Harlan, J., dissenting). When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard. This watering-down risk is particularly acute when we move beyond the narrow realm of criminal procedure and into the relatively vast domain of substantive rights. So long as the requirements of fundamental fairness are always and everywhere respected, it is not clear that greater liberty results from the jot-for-jot application of a provision of the Bill of Rights to the States. Indeed, it is far from clear that proponents of an individual right to keep and bear arms ought to celebrate today's decision.

So far, I have explained that substantive due process analysis generally requires us to consider the term "liberty" in the Fourteenth Amendment, and that this inquiry may be informed by but does not depend upon the content of the Bill of Rights. How should a court go about the analysis, then? Our precedents have established, not an exact methodology, but rather a framework for decisionmaking. In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine.

The basic inquiry was described by Justice Cardozo more than 70 years ago. When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." Palko v. Connecticut, If the practice in question lacks any "oppressive and arbitrary" character, if judicial enforcement of the asserted right would not materially contribute to "a fair and enlightened system of justice," then the claim is unsuitable for substantive due process protection. 325, Implicit in Justice Cardozo's test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. Whether conceptualized as a "rational continuum" of legal precepts, Poe, (Harlan, J., dissenting), or a

seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. In addition to other constraints I will soon discuss, see Part III, infra, historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies,15 and, above all else, the " 'traditions and conscience of our people,' " Palko, (quoting Snyder v. Massachusetts,), are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.

The Court errs both in its interpretation of Palko and in its suggestion that later cases rendered Palko's methodology defunct. Echoing Duncan, the Court advises that Justice Cardozo's test will not be satisfied " 'if a civilized system could be imagined that would not accord the particular protection.' " (quoting 391 U.S., n. 14,). Palko does contain some language that could be read to set an inordinate bar to substantive due process recognition, reserving it for practices without which "neither liberty nor justice would exist." 302 U.S., But in view of Justice Cardozo's broader analysis, as well as the numerous cases that have upheld liberty claims under the Palko standard, such readings are plainly overreadings. We have never applied Palko in such a draconian manner.

Nor, as the Court intimates, see did Duncan mark an irreparable break from Palko, swapping out liberty for history. Duncan limited its discussion to "particular procedural safeguard[s]" in the Bill of Rights relating to "criminal processes," 391 U.S., n. 14, ; it did not purport to set a standard for other types of liberty interests. Even with regard to procedural safeguards, Duncan did not jettison the Palko test so much as refine it: The judge is still tasked with evaluating whether a practice "is fundamental… to ordered liberty," within the context of the "Anglo-American" system. Duncan, n. 14, Several of our most important recent decisions confirm the proposition that substantive due process analysis—from which, once again, "incorporation" analysis derives—must not be wholly backward looking. See, e.g., Lawrence v. Texas, ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (internal quotation marks omitted)); Michael H. v. Gerald D., n. 6, (garnering only two votes for history-driven methodology that "consult[s] the most specific tradition available"); see also post (BREYER, J., dissenting) (explaining that post-Duncan "incorporation" cases continued to rely on more than history).

The Court's flight from Palko leaves its analysis, careful and scholarly though it is, much too narrow to provide a satisfying answer to this case. The Court hinges its entire decision on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms. Relying on Duncan and Glucksberg,

the plurality suggests that only interests that have proved "fundamental from an American perspective," or " 'deeply rooted in this Nation's history and tradition,' " (quoting Glucksberg,), to the Court's satisfaction, may qualify for incorporation into the Fourteenth Amendment. To the extent the Court's opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause, the opinion is seriously mistaken.

A rigid historical test is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms. When the Court applied many of the procedural guarantees in the Bill of Rights to the States in the 1960's, it often asked whether the guarantee in question was "fundamental in the context of the criminal processes maintained by the American States."17 Duncan, n. 14, That inquiry could extend back through time, but it was focused not so much on historical conceptions of the guarantee as on its functional significance within the States' regimes. This contextualized approach made sense, as the choice to employ any given trial-type procedure means little in the abstract. It is only by inquiring into how that procedure intermeshes with other procedures and practices in a criminal justice system that its relationship to "liberty" and "due process" can be determined.

Yet when the Court has used the Due Process Clause to recognize rights distinct from the trial context—rights relating to the primary conduct of free individuals— Justice Cardozo's test has been our guide. The right to free speech, for instance, has been safeguarded from state infringement not because the States have always honored it, but because it is "essential to free government" and "to the maintenance of democratic institutions"—that is, because the right to free speech is implicit in the concept of ordered liberty. Thornhill v. Alabama, 96, ; see also, e.g., Loving, (discussing right to marry person of another race); Mapp v. Ohio, 655-657, (discussing right to be free from arbitrary intrusion by police); Schneider v. State (Town of Irvington), (discussing right to distribute printed matter) While the verbal formula has varied, the Court has largely been consistent in its liberty-based approach to substantive interests outside of the adjudicatory system. As the question before us indisputably concerns such an interest, the answer cannot be found in a granular inspection of state constitutions or congressional debates.

More fundamentally, a rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," Glucksberg, n. 17, then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection Cf. Duncan, (Harlan, J., dissenting) (critiquing "circular[ity]" of historicized test for incorporation). That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of

generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently " 'rooted' "; it countenances the most revolting injustices in the name of continuity,20 for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.

Yet while "the'liberty' specially protected by the Fourteenth Amendment" is "perhaps not capable of being fully clarified," Glucksberg, it is capable of being refined and delimited. We have insisted that only certain types of especially significant personal interests may qualify for especially heightened protection. Ever since "the deviant economic due process cases [were] repudiated," (Souter, J., concurring in judgment), our doctrine has steered away from "laws that touch economic problems, business affairs, or social conditions," Griswold, and has instead centered on "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education," Paul v. Davis, These categories are not exclusive. Government action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, perpetrates gross injustice, or simply lacks a rational basis will always be vulnerable to judicial invalidation. Nor does the fact that an asserted right falls within one of these categories end the inquiry. More fundamental rights may receive more robust judicial protection, but the strength of the individual's liberty interests and the State's regulatory interests must always be assessed and compared. No right is absolute.

Rather than seek a categorical understanding of the liberty clause, our precedents have thus elucidated a conceptual core. The clause safeguards, most basically, "the ability independently to define one's identity," Roberts v. United States Jaycees, "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny," Fitzgerald, 523 F d, and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty.

Another key constraint on substantive due process analysis is respect for the democratic process. If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate. When the Court declined to establish a general right to physician-assisted suicide, for example, it did so in part because "the States [were] currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," rendering judicial intervention both less necessary and potentially more disruptive. Glucksberg, 735, Conversely, we have long appreciated that more "searching" judicial review may

be justified when the rights of "discrete and insular minorities"—groups that may face systematic barriers in the political system—are at stake. United States v. Carolene Products Co., n. 4, Courts have a "comparative … advantage" over the elected branches on a limited, but significant, range of legal matters. Post.

Recognizing a new liberty right is a momentous step. It takes that right, to a considerable extent, "outside the arena of public debate and legislative action." Glucksberg, Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a baseline level of protection. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion.

This sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution. Because the relevant constitutional language is so "spacious," Duncan, I have emphasized that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Collins, Many of my colleagues and predecessors have stressed the same point, some with great eloquence. See, e.g., Casey, ; Moore v. East Cleveland, (plurality opinion); Poe, (Harlan, J., dissenting); Adamson v. California, (Frankfurter, J., concurring). Historical study may discipline as well as enrich the analysis. But the inescapable reality is that no serious theory of Section 1 of the Fourteenth Amendment yields clear answers in every case, and "[n]o formula could serve as a substitute, in this area, for judgment and restraint." Poe, (Harlan, J., dissenting).

Several rules of the judicial process help enforce such restraint. In the substantive due process field as in others, the Court has applied both the doctrine of stare decisis —adhering to precedents, respecting reliance interests, prizing stability and order in the law—and the common-law method—taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before. This restrained methodology was evident even in the heyday of "incorporation" during the 1960's. Although it would have been much easier for the Court simply to declare certain Amendments in the Bill of Rights applicable to the States in toto, the Court took care to parse each Amendment into its component guarantees, evaluating them one by one. This piecemeal approach allowed the Court to scrutinize more closely the right at issue in any given dispute, reducing both the risk and the cost of error.

Relatedly, rather than evaluate liberty claims on an abstract plane, the Court has "required in substantive-due-process cases a'careful description' of the asserted fundamental liberty interest." Glucksberg, (quoting Reno v. Flores, ; Collins, ; Cruzan v. Director, Mo. Dept. of Health,). And just as we have required such careful description from the litigants, we have required of ourselves that we "focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake." Collins, ; see also Stevens, Judicial Restraint, 22 San Diego L.Rev. 437, 446-448 (1985). This does not mean that we must define the asserted right at the most specific level, thereby sapping it of

a universal valence and a moral force it might otherwise have It means, simply, that we must pay close attention to the precise liberty interest the litigants have asked us to vindicate.

Our holdings should be similarly tailored. Even if the most expansive formulation of a claim does not qualify for substantive due process recognition, particular components of the claim might. Just because there may not be a categorical right to physician-assisted suicide, for example, does not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor possibility that some applications of the [New York prohibition on assisted suicide] may impose an intolerable intrusion on the patient's freedom"'). Even if a State's interest in regulating a certain matter must be permitted, in the general course, to trump the individual's countervailing liberty interest, there may still be situations in which the latter "is entitled to constitutional protection." Glucksberg, (STEVENS, J., concurring in judgments).

As this discussion reflects, to acknowledge that the task of construing the liberty clause requires judgment is not to say that it is a license for unbridled judicial lawmaking. To the contrary, only an honest reckoning with our discretion allows for honest argumentation and meaningful accountability.

The question in this case, then, is not whether the Second Amendment right to keep and bear arms (whatever that right's precise contours) applies to the States because the Amendment has been incorporated into the Fourteenth Amendment. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom. And to answer that question, we need to determine, first, the nature of the right that has been asserted and, second, whether that right is an aspect of Fourteenth Amendment "liberty." Even accepting the Court's holding in Heller, it remains entirely possible that the right to keep and bear arms identified in that opinion is not judicially enforceable against the States, or that only part of the right is so enforceable It is likewise possible for the Court to find in this case that some part of the Heller right applies to the States, and then to find in later cases that other parts of the right also apply, or apply on different terms.

As noted at the outset, the liberty interest petitioners have asserted is the "right to possess a functional, personal firearm, including a handgun, within the home." Complaint ¶ 34, App. 23. The city of Chicago allows residents to keep functional firearms, so long as they are registered, but it generally prohibits the possession of handguns, sawed-off shotguns, machine guns, and short-barreled rifles. See Chicago, Ill., Municipal Code § 8-20-050 (2009) Petitioners' complaint centered on their desire to keep a handgun at their domicile—it references the "home" in nearly every paragraph. Petitioners now frame the question that confronts us as "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses." Brief for Petitioners, p. i. But it is our duty "to focus on the allegations in the complaint to determine how petitioner describes the

constitutional right at stake," Collins, and the gravamen of this complaint is plainly an appeal to keep a handgun or other firearm of one's choosing in the home.

Petitioners' framing of their complaint tracks the Court's ruling in Heller. The majority opinion contained some dicta suggesting the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places, as "in case of confrontation." But the Heller plaintiff sought only dispensation to keep an operable firearm in his home for lawful self-defense, see ***, and n. 2), and the Court's opinion was bookended by reminders that its holding was limited to that one issue,*** , ____, 2821-2822; accord, (plurality opinion). The distinction between the liberty right these petitioners have asserted and the Second Amendment right identified in Heller is therefore evanescent. Both are rooted to the home. Moreover, even if both rights have the logical potential to extend further, upon "future evaluation," Heller, it is incumbent upon us, as federal judges contemplating a novel rule that would bind all 50 States, to proceed cautiously and to decide only what must be decided.

While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago. I would not foreclose the possibility that a particular plaintiff—say, an elderly widow who lives in a dangerous neighborhood and does not have the strength to operate a long gun—may have a cognizable liberty interest in possessing a handgun. But I cannot accept petitioners' broader submission. A number of factors, taken together, lead me to this conclusion.

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical, for gun crime has devastated many of our communities. Amici calculate that approximately one million Americans have been wounded or killed by gunfire in the last decade Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. See Heller, 128 S.Ct. (BREYER, J., dissenting). In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide.

Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day— assuming

the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.

The practical impact of various gun-control measures may be highly controversial, but this basic insight should not be. The idea that deadly weapons pose a distinctive threat to the social order—and that reasonable restrictions on their usage therefore impose an acceptable burden on one's personal liberty—is as old as the Republic. As THE CHIEF JUSTICE observed just the other day, it is a foundational premise of modern government that the State holds a monopoly on legitimate violence: "A basic step in organizing a civilized society is to take [the] sword out of private hands and turn it over to an organized government, acting on behalf of all the people." Robertson v. United States ex rel. Watson (dissenting opinion). The same holds true for the handgun. The power a man has in the state of nature "of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up," to a significant extent, "to be regulated by laws made by the society." J. Locke, Second Treatise of Civil Government § 129, p. 64 (J. Gough ed).

Limiting the federal constitutional right to keep and bear arms to the home complicates the analysis but does not dislodge this conclusion. Even though the Court has long afforded special solicitude for the privacy of the home, we have never understood that principle to "infring[e] upon" the authority of the States to proscribe certain inherently dangerous items, for "[i]n such cases, compelling reasons may exist for overriding the right of the individual to possess those materials." Stanley, n. 11, And, of course, guns that start out in the home may not stay in the home. Even if the government has a weaker basis for restricting domestic possession of firearms as compared to public carriage—and even if a blanket, statewide prohibition on domestic possession might therefore be unconstitutional—the line between the two is a porous one. A state or local legislature may determine that a prophylactic ban on an especially portable weapon is necessary to police that line.

Second, the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. Despite the plethora of substantive due process cases that have been decided in the post-Lochner century, I have found none that holds, states, or even suggests that the term "liberty" encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither

petitioners nor their amici make such a contention. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate.

Indeed, in some respects the substantive right at issue may be better viewed as a property right. Petitioners wish to acquire certain types of firearms, or to keep certain firearms they have previously acquired. Interests in the possession of chattels have traditionally been viewed as property interests subject to definition and regulation by the States. Cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. **,** , ____ S.Ct. **,** L.Ed d ____ (2010) (opinion of SCALIA, J.) ("Generally speaking, state law defines property interests"). Under that tradition, Chicago's ordinance is unexceptional.

The liberty interest asserted by petitioners is also dissimilar from those we have recognized in its capacity to undermine the security of others. To be sure, some of the Bill of Rights' procedural guarantees may place "restrictions on law enforcement" that have "controversial public safety implications." (plurality opinion); see also (opinion of SCALIA, J.). But those implications are generally quite attenuated. A defendant's invocation of his right to remain silent, to confront a witness, or to exclude certain evidence cannot directly cause any threat. The defendant's liberty interest is constrained by (and is itself a constraint on) the adjudicatory process. The link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun's bullets are the violence.

Similarly, it is undeniable that some may take profound offense at a remark made by the soapbox speaker, the practices of another religion, or a gay couple's choice to have intimate relations. But that offense is moral, psychological, or theological in nature; the actions taken by the rights-bearers do not actually threaten the physical safety of any other person Firearms may be used to kill another person. If a legislature's response to dangerous weapons ends up impinging upon the liberty of any individuals in pursuit of the greater good, it invariably does so on the basis of more than the majority's " 'own moral code,' " Lawrence, (quoting Casey,). While specific policies may of course be misguided, gun control is an area in which it "is quite wrong … to assume that regulation and liberty occupy mutually exclusive zones—that as one expands, the other must contract." Stevens, 41 U. Miami L.Rev..

Third, the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation. See Municipal Respondents' Brief 21-23 (discussing laws of England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand). That the United States is an international outlier in the permissiveness of its approach to guns does not suggest that our laws are bad laws. It does suggest that this Court may not need to assume responsibility for making our laws still more permissive.

Admittedly, these other countries differ from ours in many relevant respects, including their problems with violent crime and the traditional role that firearms have played in their societies. But they are not so different from the United States that we ought to dismiss their experience entirely. Cf. (plurality opinion); (opinion of SCALIA, J.). The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners' submission that the right to possess a gun of one's choosing is fundamental to a life of liberty. While the "American perspective" must always be our focus, (plurality opinion), it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders.

Fourth, the Second Amendment differs in kind from the Amendments that surround it, with the consequence that its inclusion in the Bill of Rights is not merely unhelpful but positively harmful to petitioners' claim. Generally, the inclusion of a liberty interest in the Bill of Rights points toward the conclusion that it is of fundamental significance and ought to be enforceable against the States. But the Second Amendment plays a peculiar role within the Bill, as announced by its peculiar opening clause Even accepting the Heller Court's view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that "the purpose for which the right was codified" was "to prevent elimination of the militia." Heller, 128 S.Ct.; see also United States v. Miller, (Second Amendment was enacted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"). It was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the Heller Court's efforts to write the Second Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government.

Fifth, although it may be true that Americans' interest in firearm possession and state-law recognition of that interest are "deeply rooted" in some important senses, (internal quotation marks omitted), it is equally true that the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. Federalism is a far "older and more deeply rooted tradition than is a right to carry," or to own, "any particular kind of weapon." C.A 2009) (Easterbrook, C. J.).

The preceding sections have already addressed many of the points made by Justice SCALIA in his concurrence. But in light of that opinion's fixation on this one, it is appropriate to say a few words about Justice SCALIA's broader claim: that his preferred method of substantive due process analysis, a method "that makes the traditions of our people paramount," is both more restrained and more facilitative of democracy than the method I have outlined. Colorful as it is, Justice SCALIA's critique does not have nearly as much force as does his rhetoric. His theory of substantive due process, moreover, comes with its

own profound difficulties.

Although Justice SCALIA aspires to an "objective," "neutral" method of substantive due process analysis, his actual method is nothing of the sort. Under the "historically focused" approach he advocates, numerous threshold questions arise before one ever gets to the history. At what level of generality should one frame the liberty interest in question? See n. 25. What does it mean for a right to be " 'deeply rooted in this Nation's history and tradition,' " (quoting Glucksberg,)? By what standard will that proposition be tested? Which types of sources will count, and how will those sources be weighed and aggregated? There is no objective, neutral answer to these questions. There is not even a theory—at least, Justice SCALIA provides none—of how to go about answering them.

Nor is there any escaping Palko, it seems. To qualify for substantive due process protection, Justice SCALIA has stated, an asserted liberty right must be not only deeply rooted in American tradition, "but it must also be implicit in the concept of ordered liberty." Lawrence, n. 3, (dissenting opinion) (internal quotation marks omitted). Applying the latter, Palko-derived half of that test requires precisely the sort of reasoned judgment—the same multifaceted evaluation of the right's contours and consequences—that Justice SCALIA mocks in his concurrence today.

So does applying the first half. It is hardly a novel insight that history is not an objective science, and that its use can therefore "point in any direction the judges favor," (opinion of SCALIA, J.). Yet 21 years after the point was brought to his attention by Justice Brennan, Justice SCALIA remains "oblivious to the fact that [the concept of'tradition'] can be as malleable and elusive as'liberty' itself." Michael H., (dissenting opinion). Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole. In Heller, Justice SCALIA preferred to rely on sources created much earlier and later in time than the Second Amendment itself, see, e.g., 128 S.Ct. (consulting late 19th-century treatises to ascertain how Americans would have read the Amendment's preamble in 1791); I focused more closely on sources contemporaneous with the Amendment's drafting and ratification No mechanical yardstick can measure which of us was correct, either with respect to the materials we chose to privilege or the insights we gleaned from them.

The malleability and elusiveness of history increase exponentially when we move from a pure question of original meaning, as in Heller, to Justice SCALIA's theory of substantive due process. At least with the former sort of question, the judge can focus on a single legal provision; the temporal scope of the inquiry is (or should be) relatively bounded; and there is substantial agreement on what sorts of authorities merit consideration. With Justice SCALIA's approach to substantive due process, these guideposts all fall away. The judge must

canvas the entire landscape of American law as it has evolved through time, and perhaps older laws as well, see, e.g., Lawrence, (SCALIA, J., dissenting) (discussing " 'ancient roots' " of proscriptions against sodomy (quoting Bowers v. Hardwick,), pursuant to a standard (deeply rootedness) that has never been defined. In conducting this rudderless, panoramic tour of American legal history, the judge has more than ample opportunity to "look over the heads of the crowd and pick out [his] friends," Roper v. Simmons, 543 U.S. 551, 617, (SCALIA, J., dissenting).

My point is not to criticize judges' use of history in general or to suggest that it always generates indeterminate answers; I have already emphasized that historical study can discipline as well as enrich substantive due process analysis. My point is simply that Justice SCALIA's defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be buried in the analysis. At least with my approach, the judge's cards are laid on the table for all to see, and to critique. The judge must exercise judgment, to be sure. When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces But there is also transparency.

Justice SCALIA's approach is even less restrained in another sense: It would effect a major break from our case law outside of the "incorporation" area. Justice SCALIA does not seem troubled by the fact that his method is largely inconsistent with the Court's canonical substantive due process decisions, ranging from Meyerand Piercein the 1920's, to Griswoldin the 1960's, to Lawrencein the 2000's. To the contrary, he seems to embrace this dissonance. My method seeks to synthesize dozens of cases on which the American people have relied for decades. Justice SCALIA's method seeks to vaporize them. So I am left to wonder, which of us is more faithful to this Nation's constitutional history? And which of us is more faithful to the values and commitments of the American people, as they stand today? In 1967, when the Court held in Lovingthat adults have a liberty-based as well as equality-based right to wed persons of another race, interracial marriage was hardly "deeply rooted" in American tradition. Racial segregation and subordination were deeply rooted. The Court's substantive due process holding was nonetheless correct—and we should be wary of any interpretive theory that implies, emphatically, that it was not.

Which leads me to the final set of points I wish to make: Justice SCALIA's method invites not only bad history, but also bad constitutional law. As I have already explained, in evaluating a claimed liberty interest (or any constitutional claim for that matter), it makes perfect sense to give history significant weight: Justice SCALIA's position is closer to my own than he apparently feels comfortable acknowledging. But it makes little sense to give history dispositive weight in every case. And it makes especially little sense to answer questions like

whether the right to bear arms is "fundamental" by focusing only on the past, given that both the practical significance and the public understandings of such a right often change as society changes. What if the evidence had shown that, whereas at one time firearm possession contributed substantially to personal liberty and safety, nowadays it contributes nothing, or even tends to undermine them? Would it still have been reasonable to constitutionalize the right?

The concern runs still deeper. Not only can historical views be less than completely clear or informative, but they can also be wrong. Some notions that many Americans deeply believed to be true, at one time, turned out not to be true. Some practices that many Americans believed to be consistent with the Constitution's guarantees of liberty and equality, at one time, turned out to be inconsistent with them. The fact that we have a written Constitution does not consign this Nation to a static legal existence. Although we should always "pa[y] a decent regard to the opinions of former times," it "is not the glory of the people of America" to have "suffered a blind veneration for antiquity." The Federalist No. 14, p. 99, 104 (C. Rossiter ed. 1961) (J. Madison). It is not the role of federal judges to be amateur historians. And it is not fidelity to the Constitution to ignore its use of deliberately capacious language, in an effort to transform foundational legal commitments into narrow rules of decision.

As for "the democratic process," a method that looks exclusively to history can easily do more harm than good. Just consider this case. The net result of Justice SCALIA's supposedly objective analysis is to vest federal judges— ultimately a majority of the judges on this Court—with unprecedented lawmaking powers in an area in which they have no special qualifications, and in which the give-and-take of the political process has functioned effectively for decades. Why this "intrudes much less upon the democratic process," than an approach that would defer to the democratic process on the regulation of firearms is, to say the least, not self-evident. I cannot even tell what, under Justice SCALIA's view, constitutes an "intrusion."

It is worth pondering, furthermore, the vision of democracy that underlies Justice SCALIA's critique. Because very few of us would welcome a system in which majorities or powerful interest groups always get their way. Under our constitutional scheme, I would have thought that a judicial approach to liberty claims such as the one I have outlined—an approach that investigates both the intrinsic nature of the claimed interest and the practical significance of its judicial enforcement, that is transparent in its reasoning and sincere in its effort to incorporate constraints, that is guided by history but not beholden to it, and that is willing to protect some rights even if they have not already received uniform protection from the elected branches—has the capacity to improve, rather than "[im]peril," our democracy. It all depends on judges' exercising careful, reasoned judgment. As it always has, and as it always will.

Justice BREYER, with whom Justice GINSBURG and Justice SOTOMAYOR join, dissenting. In my view, Justice STEVENS has demonstrated that the Fourteenth Amendment's guarantee of "substantive due process"

does not include a general right to keep and bear firearms for purposes of private self-defense. As he argues, the Framers did not write the Second Amendment with this objective in view. See (dissenting opinion). Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others' lives at risk. See And the use of arms for private self-defense does not warrant federal constitutional protection from state regulation. See The Court, however, does not expressly rest its opinion upon "substantive due process" concerns. Rather, it directs its attention to this Court's "incorporation" precedents and asks whether the Second Amendment right to private self-defense is "fundamental" so that it applies to the States through the Fourteenth Amendment. See I shall therefore separately consider the question of "incorporation." I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as "fundamental" insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government. I therefore conclude that the Fourteenth Amendment does not "incorporate" the Second Amendment's right "to keep and bear Arms." And I consequently dissent.

The Second Amendment says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Two years ago, in District of Columbia v. Heller, 554 U.S. ***, the Court rejected the pre-existing judicial consensus that the Second Amendment was primarily concerned with the need to maintain a "well regulated Militia." Although the Court acknowledged that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right … was codified in a written Constitution," the Court asserted that "individual self defense … was the central component of the right itself." The Court went on to hold that the Second Amendment restricted Congress' power to regulate handguns used for self-defense, and the Court found unconstitutional the District of Columbia's ban on the possession of handguns in the home.*** ,

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in Heller was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history.

In my view, taking Heller as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense. Under this Court's precedents, to incorporate the private self-defense right the majority must show that the right is, e.g., "fundamental to the American scheme of justice," Duncan v. Louisiana. And this it fails to do.

The majority here, like that in Heller, relies almost exclusively upon history to make the necessary showing. But to do so for incorporation purposes is both wrong and dangerous. As Justice STEVENS points out, our society has historically made mistakes— for example, when considering certain 18th- and 19th-century property rights to be fundamental. And in the incorporation context, as elsewhere, history often is unclear about the answers.

Accordingly, this Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration. Rather, the Court has either explicitly or implicitly made clear in its opinions that the right in question has remained fundamental over time. See, e.g., Apodaca v. Oregon, (plurality opinion) (stating that the incorporation "inquiry must focus upon the function served" by the right in question in "contemporary society" (emphasis added)); Duncan v. Louisiana, (noting that the right in question "continues to receive strong support"); Klopfer v. North Carolina, (same). And, indeed, neither of the parties before us in this case has asked us to employ the majority's history-constrained approach. See Brief for Petitioners 67-69 (arguing for incorporation based on trends in contemporary support for the right); Brief for Respondents City of Chicago et al. 23-31 (hereinafter Municipal Respondents) (looking to current state practices with respect to the right).

I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State. I would include among those factors the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions (and the people as well). Is incorporation needed, for example, to further the Constitution's effort to ensure that the government treats each individual with equal respect? Will it help maintain the democratic form of government that the Constitution foresees? In a word, will incorporation prove consistent, or inconsistent, with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises?

Finally, I would take account of the Framers' basic reason for believing the Court ought to have the power of judicial review. Alexander Hamilton feared granting that power to Congress alone, for he feared that Congress, acting as judges, would not overturn as unconstitutional a popular statute that it had recently enacted, as legislators. The Federalist No. 78, p. 405 (G. Carey & J. McClellan eds. 2001) (A.Hamilton) ("This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours, which" can, at times, lead to "serious oppressions of the minor part in the community"). Judges, he thought, may find it easier to resist popular pressure to suppress the basic rights of an unpopular minority. See

United States v. Carolene Products Co., n. 4, That being so, it makes sense to ask whether that particular comparative judicial advantage is relevant to the case at hand. See, e.g., J. Ely, Democracy and Distrust (1980).

How do these considerations apply here? For one thing, I would apply them only to the private self-defense right directly at issue. After all, the Amendment's militia-related purpose is primarily to protect States from federal regulation, not to protect individuals from militia-related regulation. Heller, 128 S.Ct.; see also Miller, Moreover, the Civil War Amendments, the electoral process, the courts, and numerous other institutions today help to safeguard the States and the people from any serious threat of federal tyranny. How are state militias additionally necessary? It is difficult to see how a right that, as the majority concedes, has "largely faded as a popular concern" could possibly be so fundamental that it would warrant incorporation through the Fourteenth Amendment. Hence, the incorporation of the Second Amendment cannot be based on the militia-related aspect of what Heller found to be more extensive Second Amendment rights.

For another thing, as Heller concedes, the private self-defense right that the Court would incorporate has nothing to do with "the reason" the Framers "codified" the right to keep and bear arms "in a written Constitution." 128 S.Ct. (emphasis added). Heller immediately adds that the self-defense right was nonetheless "the central component of the right." In my view, this is the historical equivalent of a claim that water runs uphill. See Part I. But, taking it as valid, the Framers' basic reasons for including language in the Constitution would nonetheless seem more pertinent (in deciding about the contemporary importance of a right) than the particular scope 17th- or 18th-century listeners would have then assigned to the words they used. And examination of the Framers' motivation tells us they did not think the private armed self-defense right was of paramount importance. See Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1164 (1991) ("[T]o see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home," would be "like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge"); see also, e.g., Rakove, The Second Amendment: The Highest Stage of Originalism, 76 Chi.-Kent L.Rev. 103, 127-128 (2000); Brief for Historians on Early American Legal, Constitutional, and Pennsylvania History as Amici Curiae 22-33.

Further, there is no popular consensus that the private self-defense right described in Heller is fundamental. The plurality suggests that two amici briefs filed in the case show such a consensus, see but, of course, numerous amici briefs have been filed opposing incorporation as well. Moreover, every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation. Much of this disagreement rests upon empirical considerations. One side believes the right essential to protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or the other. And the appropriate level of firearm

regulation has thus long been, and continues to be, a hotly contested matter of political debate. See, e.g., Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L.Rev. 191, 201-246 (2008). (Numerous sources supporting arguments and data in Part II-B can be found in the Appendix, infra.)

Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective. We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting "discrete and insular minorities." Carolene Products Co., n. 4. Nor will incorporation help to assure equal respect for individuals. Unlike the First Amendment's rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise a necessary part of the democratic process that the Constitution seeks to establish. See, e.g., Whitney v. California, (Brandeis, J., concurring). Unlike the First Amendment's religious protections, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth and Sixth Amendments' insistence upon fair criminal procedure, and the Eighth Amendment's protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority. Unlike the protections offered by many of these same Amendments, it does not involve matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation. And, unlike the Fifth Amendment's insistence on just compensation, it does not involve a matter where a majority might unfairly seize for itself property belonging to a minority.

Finally, incorporation of the right will work a significant disruption in the constitutional allocation of decisionmaking authority, thereby interfering with the Constitution's ability to further its objectives.

First, on any reasonable accounting, the incorporation of the right recognized in Heller would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government. Private gun regulation is the quintessential exercise of a State's "police power"—i.e., the power to "protec[t] … the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State," by enacting "all kinds of restraints and burdens" on both "persons and property." Slaughter-House Cases, 16 Wall. 36, 62, (internal quotation marks omitted). The Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to this power. See, e.g., Medtronic, Inc. v. Lohr, (noting that States have "great latitude" to use their police powers (internal quotation marks omitted)); Metropolitan Life Ins. Co. v. Massachusetts, A decade ago, we wrote that there is "no better example of the police power" than "the suppression of violent crime." United States v. Morrison, And examples in which the Court has deferred to state legislative judgments in respect to the exercise of the police power are legion.

See, e.g., Gonzales v. Oregon, (assisted suicide); Washington v. Glucksberg, (same); Berman v. Parker, ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless…").

Second, determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make. See, e.g., Los Angeles v. Alameda Books, Inc., (plurality opinion); Turner Broadcasting System, Inc. v. FCC, And it may require this kind of analysis in virtually every case.

Government regulation of the right to bear arms normally embodies a judgment that the regulation will help save lives. The determination whether a gun regulation is constitutional would thus almost always require the weighing of the constitutional right to bear arms against the "primary concern of every government—a concern for the safety and indeed the lives of its citizens." United States v. Salerno, With respect to other incorporated rights, this sort of inquiry is sometimes present. See, e.g., Brandenburg v. Ohio, (per curiam) (free speech); Sherbert v. Verner, (religion); Brigham City v. Stuart, (Fourth Amendment); New York v. Quarles, (Fifth Amendment); Salerno, (bail). But here, this inquiry—calling for the fine tuning of protective rules—is likely to be part of a daily judicial diet.

Given the competing interests, courts will have to try to answer empirical questions of a particularly difficult kind. Suppose, for example, that after a gun regulation's adoption the murder rate went up. Without the gun regulation would the murder rate have risen even faster? How is this conclusion affected by the local recession which has left numerous people unemployed? What about budget cuts that led to a downsizing of the police force? How effective was that police force to begin with? And did the regulation simply take guns from those who use them for lawful purposes without affecting their possession by criminals?

Consider too that countless gun regulations of many shapes and sizes are in place in every State and in many local communities. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government's ability to take special measures during, say, national security emergencies? As the questions suggest, state and local gun regulation can become highly complex, and these "are only a few uncertainties that quickly come to mind."

The difficulty of finding answers to these questions is exceeded only by the importance of doing so. Firearms cause well over 60,000 deaths and injuries in the United States each year. Those who live in urban areas, police officers, women, and children, all may be particularly at risk. And gun regulation may save their lives. Some experts have calculated, for example, that Chicago's handgun ban has saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983. Other experts argue that stringent gun regulations "can help protect police officers operating on the front lines against gun violence," have reduced homicide rates in Washington, D. C., and Baltimore, and have helped to lower New York's crime and homicide rates.

At the same time, the opponents of regulation cast doubt on these studies. And who is right? Finding out may require interpreting studies that are only indirectly related to a particular regulatory statute, say one banning handguns in the home. Suppose studies find more accidents and suicides where there is a handgun in the home than where there is a long gun in the home or no gun at all? To what extent do such studies justify a ban? What if opponents of the ban put forth counter studies?

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone's 18th-century perception that a man's home is his castle. See 4 Blackstone 223. Nor can the plurality so simply reject, by mere assertion, the fact that "incorporation will require judges to assess the costs and benefits of firearms restrictions." How can the Court assess the strength of the government's regulatory interests without addressing issues of empirical fact? How can the Court determine if a regulation is appropriately tailored without considering its impact? And how can the Court determine if there are less restrictive alternatives without considering what will happen if those alternatives are implemented?

Perhaps the Court could lessen the difficulty of the mission it has created for itself by adopting a jurisprudential approach similar to the many state courts that administer a state constitutional right to bear arms. See infra (describing state approaches). But the Court has not yet done so. Cf. Heller, 128 S.Ct. (rejecting an " 'interest-balancing' approach" similar to that employed by the States); (plurality opinion). Rather, the Court has haphazardly created a few simple rules, such as that it will not touch "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," or "laws imposing conditions and qualifications on the commercial sale of arms." Heller, 128 S.Ct.; (plurality opinion). But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible without being able to explain why or how Chicago's handgun ban is different.

The fact is that judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available "tools" for finding and evaluating

the technical material submitted by others. District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. , , ; see also Turner Broadcasting, Judges cannot easily make empirically based predictions; they have no way to gather and evaluate the data required to see if such predictions are accurate; and the nature of litigation and concerns about stare decisis further make it difficult for judges to change course if predictions prove inaccurate. Nor can judges rely upon local community views and values when reaching judgments in circumstances where prediction is difficult because the basic facts are unclear or unknown.

At the same time, there is no institutional need to send judges off on this "mission-almost-impossible." Legislators are able to "amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, They are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article

judges, can be held democratically responsible for their empirically based and value-laden conclusions. We have thus repeatedly affirmed our preference for "legislative not judicial solutions" to this kind of problem, see, e.g., Patsy v. Board of Regents of Fla., just as we have repeatedly affirmed the Constitution's preference for democratic solutions legislated by those whom the people elect.

In New State Ice Co. v. Liebmann, Justice Brandeis stated in dissent:

"Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct [the social problems we face]."

There are 50 state legislatures. The fact that this Court may already have refused to take this wise advice with respect to Congress in Heller is no reason to make matters worse here.

Third, the ability of States to reflect local preferences and conditions—both key virtues of federalism—here has particular importance. The incidence of gun ownership varies substantially as between crowded cities and uncongested rural communities, as well as among the different geographic regions of the country. Thus, approximately 60% of adults who live in the relatively sparsely populated Western States of Alaska, Montana, and Wyoming report that their household keeps a gun, while fewer than 15% of adults in the densely populated Eastern States of Rhode Island, New Jersey, and Massachusetts say the same.

The nature of gun violence also varies as between rural communities and cities. Urban centers face significantly greater levels of firearm crime and homicide, while rural communities have proportionately greater problems with nonhomicide gun deaths, such as suicides and accidents. And idiosyncratic local factors can lead to two cities finding themselves in dramatically different circumstances:

For example, in 2008, the murder rate was 40 times higher in New Orleans than it was in Lincoln, Nebraska.

It is thus unsurprising that States and local communities have historically differed about the need for gun regulation as well as about its proper level. Nor is it surprising that "primarily, and historically," the law has treated the exercise of police powers, including gun control, as "matter[s] of local concern." Medtronic, (internal quotation marks omitted).

Fourth, although incorporation of any right removes decisions from the democratic process, the incorporation of this particular right does so without strong offsetting justification—as the example of Oak Park's handgun ban helps to show. See Oak Park, Ill., Municipal Code, § 27-2-1 (1995). Oak Park decided to ban handguns in 1983, after a local attorney was shot to death with a handgun that his assailant had smuggled into a courtroom in a blanket. Brief for Oak Park Citizens Committee for Handgun Control as Amicus Curiae 1, 21 (hereinafter Oak Park Brief). A citizens committee spent months gathering information about handguns. It secured 6,000 signatures from community residents in support of a ban. -22. And the village board enacted a ban into law.

Subsequently, at the urging of ban opponents the Board held a community referendum on the matter. The citizens committee argued strongly in favor of the ban. -23. It pointed out that most guns owned in Oak Park were handguns and that handguns were misused more often than citizens used them in self-defense. The ban opponents argued just as strongly to the contrary. The public decided to keep the ban by a vote of 8,031 to 6,368. And since that time, Oak Park now tells us, crime has decreased and the community has seen no accidental handgun deaths.

Given the empirical and local value-laden nature of the questions that lie at the heart of the issue, why, in a Nation whose Constitution foresees democratic decisionmaking, is it so fundamental a matter as to require taking that power from the people? What is it here that the people did not know? What is it that a judge knows better?

In sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. Where the incorporation of other rights has been at issue, some of these problems have arisen. But in this instance all these problems are present, all at the same time, and all are likely to be present in most, perhaps nearly all, of the cases in which the constitutionality of a gun regulation is at issue. At the same time, the important factors that favor incorporation in other instances—e.g., the protection of broader constitutional objectives—are not present here. The upshot is that all factors militate against incorporation—with the possible exception of historical factors.

Fundamental Rights

Lochner v. New York

198 U.S. 45 (1905)

This is a writ of error to the county court of Oneida county, in the state of New York (to which court the record had been remitted), to review the judgment of the court of appeals of that state, affirming the judgment of the supreme court, which itself affirmed the judgment of the county court, convicting the defendant of a misdemeanor on an indictment under a statute of that state, known, by its short title, as the labor law. The section of the statute under which the indictment was found is § 110, and is reproduced in the margin1 (together with the other sections of the labor law upon the subject of bakeries, being §§ 111 to 115, both inclusive).

The indictment averred that the defendant 'wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread, and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week,' after having been theretofore convicted of a violation of the name act; and therefore, as averred, he committed the crime of misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not constitute a crime. The demurrer was overruled, and, the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of $50, and to stand committed until paid, not to exceed fifty days in the Oneida county jail. A certificate of reasonable doubt was granted by the county judge of Oneida county, whereon an appeal was taken to the appellate division of the supreme court, fourth department, where the judgment of conviction was affirmed. A further appeal was then taken to the court of appeals, where the judgment of conviction was again affirmed.

'§ 110, Hours of labor in bakeries and confectionery establishments.—No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

'§ 111. Drainage and plumbing of buildings and rooms occupied by bakeries.—All buildings or rooms occupied as biscuit, bread, pie, or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows, or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing, and ventilation of such rooms or buildings.

No cellar or basement, not now used for a bakery, shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

'§ 112. Requirements as to rooms, furniture, utensils, and manufactured products.—Every room used for the manufacture of flour or meal food products shall be at least 8 feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of the room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves, and all other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal products are stored.

'§ 113. Wash rooms and closets; sleeping places.—Every such bakery shall be provided with a proper wash room and water-closet, or water-closets, apart from the bake room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth closet, privy, or ashpit shall be within, or connected directly with, the bake room of any bakery, hotel, or public restaurant.

'No person shall sleep in a room occupied as a bake room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored, or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

'§ 114. Inspection of bakeries.—The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the person owning or conducting such bakeries.

'§ 115. Notice requiring alterations.—If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent, or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly.' [N. Y. Laws 1897, chap 415.]

Mr. Justice Peckham, after making the foregoing statement of the facts, delivered the opinion of the court:

The indictment, it will be seen, charges that the plaintiff in error violated the

110th section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the state of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the supreme court or the court of appeals of the state, which construes the section, in using the word 'required,' as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words 'required' and 'permitted.' The mandate of the statute, that 'no employee shall be required or permitted to work,' is the substantial equivalent of an enactment that 'no employee shall contract or agree to work,' more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana 832, 17 Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas 205, 8 ; Re Kemmler 519, 10 ; Crowley v. Christensen 620, 11 ; Re Converse 796, 11

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the

Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of Holden v. Hardy 780, 18 A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, 'except in cases of emergency, where life or property is in imminent danger.' It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the supreme court of Utah in that case was made by the judge writing the opinion of this court, and approved: 'The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.'

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is

nothing in Holden v. Hardy which covers the case now before us. Nor does Atkin v. Kansas 148, 24 touch the case at bar. The Atkin Case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. v. Harbison 55, 22 is equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of Jacobson v. Massachusetts, decided at this term and reported in 197 U. S. 11, 25 L. ed.——. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case 'of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.' That case is also far from covering the one now before the court.

Petit v. Minnesota 716, 20 was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the

judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the supreme court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the court of appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the court of appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the court of appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in Holden v. Hardy 780, 18 and Jacobson v. Massachusetts L. ed.——.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by

artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections

provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his 'output' was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or pater familias, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthy, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a 'health law,' it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. In the supreme court of New York, in the case of People v. Beattie, appellate division, first department, decided in 1904 (96 App. Div. 383, 89 N. Y. Supp. 193), a statute regulating the trade of horseshoeing, and requiring the person practising such trade to be examined, and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practise such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The

attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (Re Aubry) by the supreme court of Washington in December, 1904. 78 Pac. 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in certain cities was unconstitutional, as an illegitimate exercise of the police power.

The supreme court of Illinois, in Bessette v. People, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also Godcharles v. Wigeman, 113 Pa. 431, 437, 6 Atl. 354; Low v. Rees Printing Co. 41 Neb. 127, 145, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362. In these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. Minnesota v. Barber 455, 3 Inters. Com. Rep. 185, 10 ; Brimmer v. Rebman 862, 3 Inters. Com. Rep. 485, 11 The court looks beyond the mere letter of the law in such cases. Yick Wo v. Hopkins 220, 6

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes dissenting:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts —United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States 679, 24 Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis v. Parker 323, 23 The decision sustaining an eight-hour law for miners is still recent. Holden v. Hardy 780, 18 Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.

It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural

outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Mr. Justice Harlan (with whom Mr. Justice White and Mr. Justice Day concurred) dissenting: While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, equally by the Federal and State courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

In Patterson v. Kentucky, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: 'It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens.' So in Barbier v. Connolly: 'But neither the [14th] Amendment, —broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.'

Speaking generally, the state, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right 'to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation.' This was declared in Allgeyer v. Louisiana, 17 But in the same case it was conceded that the right to contract in relation to persons and property, or to do business, within a state, may be 'regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes.'

So, as said in Holden v. Hardy: 'This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an

enormous increase in the number of occupations which are dangerous, or so far detrimental, to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases Davidson v. New Orleans and Yick Wo. v. Hopkins, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public required, but what measures are necessary for the protection of such interests.' Lawton v. Steele, Referring to the limitations placed by the state upon the hours of workmen, the court in the same case said: 'These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.'

Subsequently, in Gundling v. Chicago, this court said: 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. As stated in Crowley v. Christensen 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."

In St. Louis I. M. & S. R. Co. v. Paul, and in Knoxville Iron Co. v. Harbison it was distinctly adjudged that the right of contract was not 'absolute, but may be subjected to the restraints demanded by the safety and welfare of the state.' Those cases illustrate the extent to which the state may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary. I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import.' this court has recently said, 'an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.' Jacobson v. Massachusetts.

Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In Jacobson v. Massachusetts, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only 'when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. M'Culloch v. Maryland.

Let these principles be applied to the present case. By the statute in question it is provided that 'no employee shall be required, or permitted, to work in a biscuit, bread, or cake bakery, or confectionery establishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.'

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have

a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. Mugler v. Kansas. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each state owes to her citizens (Patterson v. Kentucky); or that it is not promotive of the health of the employees in question (Holden v. Hardy; Lawton v. Steele); or that the regulation prescribed by the state is utterly unreasonable and extravagant or wholly arbitrary (Gundling v. Chicago). Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. Jacobson v. Massachusetts. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the 'Diseases of the Workers' has said: 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard, work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep,—a fact which is highly injurious to his health.' Another writer says: 'The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are palefaced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of

the bakers.'

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker. (p. 52.) In that Report it is also stated that, 'from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers, and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class, improved health, longer life, more content and greater intelligence and inventiveness.' (p. 82.)

Statistics show that the average daily working time among workingmen in different countries is, in Australia, eight hours; in Great Britain, nine; in the United States, nine and three-quarters; in Denmark, nine and three-quarters; in Norway, ten; Sweden, France, and Switzerland, ten and one-half; Germany, ten and one-quarter; Belgium, Italy, and Austria, eleven; and in Russia, twelve hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the state to labor has well said: 'The manner, occasion, and degree in which the state may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science.' Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the states. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to

week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the state of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its original purpose, and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several states when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which 'embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves.' Gibbons v. Ogden, 9 Wheat. 1, 203, A decision that the New York statute is void under the 14th Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the states.

The preservation of the just powers of the states is quite as vital as the preservation of the powers of the general government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employees to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employees and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute

was not void under the 14th Amendment. But it took occasion to say what may well be here repeated: 'The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.' Atkin v. Kansas, 24

The judgment, in my opinion, should be affirmed.

United States v. Carolene Products Co.

304 U.S. 144 (1938)

Justice STONE delivered the opinion of the Court.

The question for decision is whether the 'Filled Milk Act' of Congress of March 4, 1923, c. 262, 42 Stat. 1486, 21 U.S.C. §§ 61 63, 21 U.S.C.A. § 61—63,1 which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Appellee also complains that the statute denies to it equal protection of the laws, and in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product 'is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud on the public.'

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in Hebe Co. v. Shawheld that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the Legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the House Committee on Agriculture, H.R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen.Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public.

There is nothing in the Constitution which compels a Legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their Legislatures to prohibit all like evils, or none. A Legislature may hit at an abuse which it has found, even

Third. We may assume for present purposes that no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the

facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators See Metropolitan Casualty Ins. Co. v. Brownell, and cases cited, The present statutory findings affect appellee no more than the reports of the Congressional committees and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, Borden's Farm Products Co. v. Baldwinand the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. Chastleton Corporation v. SinclairSimilarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a partic- ular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, Railroad Retirement Board v. Alton R. Co., 351, 352, 763, see Whitney v. California, ; cf. Morf v. Bingaman, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. Carmichael v. Southern Coal & Coke Co., 512, 109 A.L.R. 1327; South Carolina State Highway Department v. Barnwell Bros., Inc.decided February 14, 1938. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. Price v. Illinois, ; Hebe Co. v. Shaw; Standard Oil Co. v. Marysville, ; South Carolina v. Barnwell Bros., Inc.citing Worcester County Trust Co. v. Riley The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face, the demurrer should have been overruled and the judgment will be reversed.

Reversed. 4 There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 370, 536, 73 A.L.R. 1484; Lovell v. Griffindecided March 28, 1938. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about

repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon; Nixon v. Condon88 A.L.R. 458; on restraints upon the dissemination of information, see Near v. Minnesota, 722, 632, 633, ; Grosjean v. American Press Co.; Lovell v. Griffin; on interferences with political organizations, see Stromberg v. California, 73 A.L.R. 1484; Fiske v. Kansas; Whitney v. California, ; Herndon v. Lowry; and see Holmes, J., in Gitlow v. New York, ; as to prohibition of peaceable assembly, see De Jonge v. Oregon, Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters39 A.L.R. 468, or national, Meyer v. Nebraska29 A.L.R. 1446; Bartels v. Iowa; Farrington v. Tokushigeor racial minorities. Nixon v. Herndon; Nixon v. Condon; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, ; South Carolina State Highway Department v. Barnwell Bros.decided February 14, 1938, note 2, and cases cited.

Griswold v. Connecticut

381 U.S. 479 (1965)

MR. JUSTICE DOUGLAS delivered the opinion of the Court. Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U. S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. Tileston v. Ullman,318 U. S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of "case or controversy" in Article

of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to Truax v. Raich, where an employee was permitted to assert the rights of his employer; to Pierce v. Society of Sisters, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to Barrows v. Jackson, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see Meyer v. Nebraska; Adler v. Board of Education; NAACP v. Alabama; NAACP v. Button,371 U. S. 415. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish,300 U. S. 379; Olsen v. Nebraska; Lincoln Union v. Northwestern Co.; Williamson v. Lee Optical Co.; Giboney v. Empire Storage Co.. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By Pierce v. Society of Sistersthe right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. Nebraskathe same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. Struthers and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff—indeed the freedom of the entire university community. Sweezy v. New Hampshire,354 U. S. 234, 249; Barenblatt v. United States; Baggett v. Bullitt. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases.

In NAACP v. Alabama, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. NAACP v. Button. In Schware v. Board of Bar Examiners,353 U. S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (id.) and was not action of a kind proving bad moral character. -246.

Those cases involved more than the "right of assembly" —a right that extends to all irrespective of their race or ideology. De Jonge v. Oregon. The right of "association," like the right of belief (Board of Education v. Barnette, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in Boyd v. United States, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."* We recently referred in Mapp v. Ohio,367 U. S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, e. g., Breard v. Alexandria, 644; Public Utilities Comm'n v. Pollak; Monroe v. Pape; Lanza v. New York; Frank v. Maryland; Skinner v. Oklahoma. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring. I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments (see my concurring opinion in Pointer

v. Texas, and the dissenting opinion of MR. JUSTICE BRENNAN in Cohen v. Hurley, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution1 is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts. In Gitlow v. New York, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." (Emphasis added.)

And, in Meyer v. Nebraska, the Court, referring to the Fourteenth Amendment, stated:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . to marry, establish a home and bring up children . ."

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights3 could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

In presenting the proposed Amendment, Madison said: "It has been objected

also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

"In regard to . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis . . But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people."

He further stated, referring to the Ninth Amendment: "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, e converso,that a negation in particular cases implies an affirmation in all others."

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

While this Court has had little occasion to interpret the Ninth Amendment,6 "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." Post. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in Adamson v. California, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, e. g., Bolling v. Sharpe; Aptheker v. Secretary of State; Kent v. Dulles; Cantwell v. Connecticut; NAACP v. Alabama; Gideon v. Wainwright; New York Times Co. v. Sullivan. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . as to be ranked as fundamental." Snyder v. Massachusetts. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . ." Powell v. Alabama. "Liberty" also "gains content from the emanations of . specific [constitutional] guarantees" and "from experience with

the requirements of a free society."

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." Mr. Justice Brandeis, dissenting in Olmstead v. United States, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone— the most comprehensive of rights and the right most valued by civilized men."

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in Meyer v. Nebraskathat the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U. S.. In Pierce v. Society of Sisters, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U. S.. As this Court said in Prince v. Massachusetts, the Meyer and Pierce decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN's statement in his dissenting opinion in Poe v. Ullman: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . Of this whole'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not

show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," post, would nevertheless let it stand on the ground that it is not for the courts to " 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' " Post. Elsewhere, I have stated that "[w]hile I quite agree with Mr. Justice Brandeis that . .'a . State may . serve as a laboratory; and try novel social and economic experiments,' New State Ice Co. v. Liebmann, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens . ." The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida. See Schneiderv. Irvington.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any

"subordinating [state] interest which is compelling" or that it is "necessary . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extramarital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 129 Conn. 84, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State; NAACP v. Alabama; McLaughlin v. Florida. Here, as elsewhere, where, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53 et seq. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." NAACP v. Alabama. See McLaughlin v. Florida.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in Poe v. Ullman.

"Adultery, homosexuality and the like are sexual intimacies which the State forbids . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

My Brother STEWART dissents on the ground that he "can find no . general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." Post. He would require a more explicit guarantee than the one which the Court derives from several con-

stitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, e. g., Bolling v. Sharpe; Aptheker v. Secretary of State; Kent v. Dulles; Carrington v. Rash; Schware v. Board of Bar Examiners; NAACP v. Alabama; Pierce v. Society of Sisters; Meyer v. Nebraska. To the contrary, this Court, for example, in Bolling v. Sharpewhile recognizing that the Fifth Amendment does not contain the "explicit safeguard" of an equal protection clause, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in Schware v. Board of Bar Examinersthe Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed. 1961).

Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961). He also argued, "I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power."

The Ninth Amendment and the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton.

The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There "Certain Rights . Retained by the People"? 37 N. Y. U. L. Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L. J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in United Public Workers v. Mitchell; Tennessee Electric Power Co. v. TVA; and Ashwander v.

TVA. See also Calder v. Bull, 3 Dall. 386, 388; Loan Assn. v. Topeka, 20 Wall. 655, 662-663. In United Public Workers v. Mitchell, the Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment."

In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in Pointer v. Texas, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In Pointer I said that the contrary view would require "this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States."

MR. JUSTICE HARLAN, concurring in the judgment. I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, e. g., my concurring opinions in Pointer v. Texas, and Griffin v. California, and my dissenting opinion in Poe v. Ullman, at pp. 539-545.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut. For reasons stated at length in my dissenting opinion in Poe v. UllmanI believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of

the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause." Rochin v. California.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (post, p. 522). Need one go further than to recall last Term's reapportionment cases, Wesberry v. Sanders, 376 U. S. 1. and Reynolds v. Sims, where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases; 377 U. S..

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See Adamson v. CaliforniaMr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.*

Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. Post, p. 512, n. 4. MR. JUSTICE WHITE, concurring in the judgment. In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I

therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," Meyer v. Nebraska, and "the liberty . to direct the upbringing and education of children," Pierce v. Society of Sisters, and that these are among "the basic civil rights of man." Skinner v. Oklahoma. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. Prince v. Massachusetts. Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooperopinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, Trubek v. Ullman, 147 Conn. 633, 165 A. 2d 158, health, or indeed even of life itself. Buxton v. Ullman, 147 Conn. 48, 156 A. 2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. Tileston v. Ullman, 129 Conn. 84, 26 A. 2d 582. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. State v. Nelson, 126 Conn. 412, 11 A. 2d 856; State v. Griswold, 151 Conn. 544, 200 A. 2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. Yick Wo v. Hopkins; Skinner v. Oklahoma,316 U. S. 535; Schware v. Board of Bar Examiners; McLaughlin v. Florida.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny," Skinner v. Oklahoma,316 U. S. 535, 541, and "must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. Little Rock. See also McLaughlin v. Florida. But such statutes, if reasonably neces-

sary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. Zemel v. Rusk, 381 U. S. 1.*

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. Allied Stores of Ohio v. Bowers; Martin v. Walton,368 U. S. 25, 28 (DOUGLAS, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See Schware v. Board of Bar Examiners. Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A. 2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. Yick Wo v. Hopkins. Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This "undeviating policy . throughout all the long years . bespeaks more than prosecutorial paralysis." Poe v. Ullman. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will

comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. Dent v. West Virginia; Jacobson v. Massachusetts; Douglas v. Noble; Meyer v. Nebraska; Pierce v. Society of Sisters; Schware v. Board of Bar Examiners; Aptheker v. Secretary of State; Zemel v. Rusk, 381 U. S. 1. The traditional due process test was well articulated, and applied, in Schware v. Board of Bar Examinersa case which placed no reliance on the specific guarantees of the Bill of Rights.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Dent v. West Virginia. Cf. Slochower v. Board of Education; Wieman v. Updegraff. And see Ex parte Secombe, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Douglas v. Noble; Cummings v. Missouri, 4 Wall. 277, 319-320. Cf. Nebbia v. New York. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." 353 U. S.. Cf. Martin v. WaltonDOUGLAS, J., dissenting).

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting. I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my

Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U. S. 1; NAACP v. Button. But speech is one thing; conduct and physical activities are quite another. See, e. g., Cox v. Louisiana; Cox v. Louisiana; -584 (concurring opinion); Giboney v. Empire Storage & Ice Co.; cf. Reynolds v. United States,98 U. S. 145, 163-164. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See e. g., New York Times Co. v. Sullivan concurring opinion); cases collected in City of El Paso v. Simmons, n. 1 (dissenting opinion); Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN2 and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others

which mean the same thing,4 are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of Marbury v. Madison, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination —a power which was specifically denied to federal courts by the convention that framed the Constitution.

Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that of a number of others which they do not bother to name, e. g., Lochner v. New York, Coppage v. Kansas, 236 U. S. 1, Jay Burns Baking Co. v. Bryan, and Adkins v. Children's Hospital. The two they do cite and quote from, Meyer v. Nebraska, and Pierce v. Society of Sisters, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in Lochner v. New Yorkone of the cases on which he relied in Meyer, along with such other long-discredited decisions as, e. g., Adams v. Tanner, and Adkins v. Children's Hospital. Meyer held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools And in Pierce,relying principally on Meyer, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U. S.. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later

decisions applying the First Amendment to the State through the Fourteenth,8 I merely point out that the reasoning stated in Meyer and Pierce was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as NAACP v. Button, Shelton v. Tucker, and Schneider v. State,308 U. S. 147, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms See Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the very least, I suppose, that every state criminal statute— since it must inevitably curtail "liberty" to some extent— would be suspect, and would have to be justified to this Court.

My Brother GOLDBERG has adopted the recent discovery12 that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment14 to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Bother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure."15 That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but

rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e. g., Lochner v. New York,198 U. S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish; Olsen v. Nebraska ex rel. Western Reference & Bond Assn., and many other opinions See also Lochner v. New YorkHolmes, J., dissenting).

In Ferguson v. Skrupa, this Court two years ago said in an opinion joined by all the Justices but one that

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even bothering to hear argument, this Court overruled Tyson & Brother v. Banton, which had held state laws regulating ticket brokers to be a denial of due process of law Gold v. DiCarlo. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the Lochner, Coppage, Adkins, Burns line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

"[I]t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." Calder v. Bull, 3 Dall. 386, 399 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in Adamson v. California (dissenting opinion):

"Since Marbury v. Madison, 1 Cranch 137, was decided, the practice has been

firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of'natural law' deemed to be above and undefined by the Constitution is another.'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' Federal Power Commission v. Pipeline Co., 601, n. 4."21(Footnotes omitted.)

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

From the footnotes:

A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which "shocks the conscience," Rochin v. California, sufficiently to "shock itself into the protective arms of the Constitution," Irvine v. California concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," Rochin, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," Malinski v. New York concurring opinion), or to "the community's sense of fair play and decency," Rochin. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . contracts," Lochner v. New York. States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," Haley v. Ohio separate opinion), or with "fundamental notions of fairness and justice," See also, e. g., Wolf v. Colorado ("rights basic to our free society"); Hebert v. Louisiana ("fundamental principles of liberty and

justice"); Adkins v. Children's Hospital ("arbitrary restraint of . liberties"); Betts v. Brady ("denial of fundamental fairness, shocking to the universal sense of justice"); Poe v. Ullman (dissenting opinion) ("intolerable and unjustifiable"). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." Linkletter v. Walker, post, p. 618.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting. Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare Lochner v. New York, with Ferguson v. Skrupa. My Brothers HARLAN and WHITE to the contrary, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." No soldier has been quartered in any house There has been

no search, and no seizure Nobody has been compelled to be a witness against himself.

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG'S concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," United States v. Darby,312 U. S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annual a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitation upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action, and some members of the Court have held the view that the adoption of the Fourteenth Amendment made every provision of the first eight amendments fully applicable against the States. See Adamson v. California (dissenting opinion of MR. JUSTICE BLACK).

U. S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amend-

ment relating to religion, then most criminal laws would be invalidated. See, e. g., the Ten Commandments. The Bible, Exodus 20:2-17 (King James).

If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

Cases like Shelton v. Tuckerand Bates v. Little Rock, relied upon in the concurring opinions today, dealt with true First Amendment rights of association and are wholly inapposite here. See also, e. g., NAACP v. Alabama; Edwards v. South Carolina. Our decision in McLaughlin v. Florida, is equally far afield. That case held invalid under the Equal Protection Clause, a state criminal law which discriminated against Negroes. The Court does not say how far the new constitutional right of privacy announced today extends. See, e. g., Mueller, Legal Regulation of Sexual Conduct; Ploscowe, Sex and the Law. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

See Reynolds v. Sims. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7. 2

Washington v. Glucksberg

521 U.S. 702 (1997)

Chief Justice REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self-murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev.Code 9A (1) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine. —§§9A (2) and 9A (1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." Wash. Rev.Code §70 (1).

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A.

Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban. 3 In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that Wash Rev.Code 9A (1) (1994) is, on its face, unconstitutional.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." Relying primarily on Planned Parenthood v. Caseyand Cruzan v. Director, Missouri Dept. of Healththe District Court agreed, 850 F.Supp., and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." 5 The District Court also decided that the Washington statute violated the Equal Protection Clause's requirement that ""all persons similarly situated . be treated alike."' (quoting Cleburne v. Cleburne Living Center, Inc.,).

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that " [i]n the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction." Compassion in Dying v. Washington, The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. Compassion in Dying v. Washington, Like the District Court, the en banc Court of Appeals emphasized our Casey and Cruzan decisions. 79 F d. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, -812, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death-that there is, in short, a constitutionally-recognized"right to die."' After" [w]eighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." 837. 6 The court did not reach the District Court's equal-protection holding. 7 We granted certiorari, 519 U.S. —-, and now reverse.

We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. See, e.g., Casey, 112 S.Ct.; Cruzan, 110 S.Ct.; Moore v. East Cleveland, (plurality opinion) (noting importance of "careful"respect for the teachings of history" '). In almost every State-indeed, in almost every western democracy-it is a crime to assist a suicide. 8 The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Cruzan, 110 S.Ct. (" [T]he States-indeed, all civilized nations-demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the

majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see Stanford v. Kentucky, (" [T]he primary and most reliable indication of [a national] consensus is . the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide-and, therefore, of assisting suicide-are consistent and enduring themes of our philosophical, legal, and cultural heritages. See generally, Marzen, O'Dowd, Crone & Balch, Suicide: A Constitutional Right?, 24 Duquesne L.Rev. 1, 17-56 (1985) (hereinafter Marzen); New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 77-82 (May 1994) (hereinafter New York Task Force).

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that " [j]ust as a man may commit felony by slaying another so may he do so by slaying himself." 2 Bracton on Laws and Customs of England 423 (f) (G. Woodbine ed., S. Thorne transl., 1968). The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the king; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . [only] his movable goods [were] confiscated." -424 (f). Thus, " [t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was . introduced into English common law."10 Centuries later, Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers, referred to suicide as"self-murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure . ." 4 W. Blackstone, Commentaries Blackstone emphasized that "the law has . ranked [suicide] among the highest crimes," ibid, although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "borde[r] a little upon severity."

For the most part, the early American colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that " [s]elf-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 19 (J. Cushing ed). Virginia also required ignominious burial for suicides, and their estates were forfeit to the crown. A. Scott, Criminal Law in Colonial Virginia 108, and n. 93, 198, and n. 15 (1930).

Over time, however, the American colonies abolished these harsh common-law

penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example. Cruzan, 110 S.Ct. (SCALIA, J., concurring). Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796 that

" [t]here can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting [of] a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender . . -[Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, A System of the Laws of the State of Connecticut 304 (1796). This statement makes it clear, however, that the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing. Cruzan, 110 S.Ct. (SCALIA, J., concurring). Nonetheless, although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong. See, e.g., Bigelow v. Berkshire Life Ins. Co., (suicide is "an act of criminal self-destruction"); Von Holden v. Chapman, 87 A.D d 66, 70N.Y.S d 623, 626-627 (1982); Blackwood v. Jones, 111 Fla. 528, 532, 149 So. 600, 601 (1933) ("No sophistry is tolerated . which seek[s] to justify self-destruction as commendable or even a matter of personal right").

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th century treatise on the laws of Connecticut, stated that " [i]f one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, A Digest of the Laws of the State of Connecticut 270 (1823). This was the well established common-law view, see In re Joseph G., 34 Cal d 429, 434Cal.Rptr. 163, 166, 667 P d 1176, 1179 (1983); Commonwealth v. Mink, 123 Mass. 422, 428 (1877) (""Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder"') (quoting Chief Justice Parker's charge to the jury in Commonwealth v. Bowen, 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who cause[d] [his death]," 3 J. Stephen, A History of the Criminal Law of England 16 (1883); see 1 F. Wharton, Criminal Law §§451-452 (9th ed. 1885); Martin v. Commonwealth, 184 Va. 1009, 1018S.E d 43, 47 (1946) (""The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable" '). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, " [t]he life of those to whom life ha[d] become a burden-of those who [were] hopelessly diseased or fatally wounded-nay, even the lives of criminals condemned to death, [were] under the protection of law,

equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." Blackburn v. State, 23 Ohio St. 146, 163 (1872); see Bowen (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, §4, 1828 N.Y. Laws 19 (codified N.Y.Rev.Stat. pt. 4, ch. 1, tit. 2, art. 1, §7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Marzen 73-74. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." -77. By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. See Cruzan, 110 S.Ct. (SCALIA, J., concurring). The Field Penal Code was adopted in the Dakota Territory in 1877, in New York in 1881, and its language served as a model for several other western States' statutes in the late 19th and early 20th centuries. Marzen 76, 212-213. California, for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code's. 11 In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide bans. 12 The Code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." American Law Institute, Model Penal Code §210 Comment 5, p. 100 (Official Draft and Revised Comments 1980).

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 16-18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. See Vacco v. Quill, — U.S. —-, ———, ———, — L.Ed d —-; 79 F d; People v. Kevorkian, 447 Mich. 436, 478-480, and nn. 53N.W d 714, 731-732, and nn. 53-56 (1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case, Wash. Rev.Code §9A (1994), was enacted in 1975 as part of a revision of that State's criminal code. Four years later, Washington passed its Natural Death Act, which specifically stated that

the "withholding or withdrawal of life-sustaining treatment . shall not, for any purpose, constitute a suicide" and that " [n]othing in this chapter shall be construed to condone, authorize, or approve mercy killing . . " Natural Death Act, 1979 Wash. Laws, ch. 112, §§8(1), p. 11 (codified at Wash. Rev.Code §§70 (1), 70 (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. 13 Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. 1992 Wash. Laws, ch. 98, §10; Wash. Rev.Code §70 (1994).

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted. 15 And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See Iowa Code Ann. §§707A 707A (Supp); R.I. Gen. Laws §§11-60-3 (Supp). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pub.L. 105Stat. 23 (codified U.S.C. §14401 et seq).

Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law-an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen-was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." New York Task Force vii. Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. -119. After studying physician-assisted suicide, however, the Task Force unanimously concluded that " [l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable . . -[T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved."

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, (Due Process Clause "protects individual liberty against"certain government actions regardless of the fairness of the procedures used to implement

them"') (quoting Daniels v. Williams,). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. Reno v. Flores, ; Casey, In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the"liberty" specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia; to have children, Skinner v. Oklahoma ex rel. Williamson; to direct the education and upbringing of one's children, Meyer v. Nebraska; Pierce v. Society of Sisters; to marital privacy, Griswold v. Connecticut; to use contraception, ibid; Eisenstadt v. Baird; to bodily integrity, Rochin v. Californiaand to abortion, Casey. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins, By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," ibid, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, Moore, 97 S.Ct. (plurality opinion).

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," 97 S.Ct. (plurality opinion); Snyder v. Massachusetts, ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 326, Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Flores, 113 S.Ct.; Collins, 112 S.Ct.; Cruzan, Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," Collins, that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe ."fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S.,

Justice SOUTER, relying on Justice Harlan's dissenting opinion in Poe v. Ullman, would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those"arbitrary impositions' or "purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment," post, at ___ (quoting Poe, (Harlan, J., dissenting)) In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly above___, has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment-never fully clarified, to be sure, and perhaps not capable of being fully clarified-have at least been

carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement-that a challenged state action implicate a fundamental right-before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that " [p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," 79 F d, or, in other words, " [i]s there a right to die?," Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," Brief for Respondents 7, and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death," As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although Cruzan is often described as a "right to die" case, see 79 F d; — U.S., at —-, 117 S.Ct. (STEVENS, J., concurring in judgment) (Cruzan recognized "the more specific interest in making decisions about how to confront an imminent death"), we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." Cruzan, 110 S.Ct.; 110 S.Ct. (O'CONNOR, J., concurring) (" [A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at issue in this case prohibits"aid[ing] another person to attempt suicide," Wash. Rev.Code §9A (1) (1994), and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed above___-___, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See Jackman v. Rosenbaum Co., ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it"); Flores, 113 S.Ct. ("The mere novelty of such a claim is reason enough to doubt that"substantive due process' sustains it").

Respondents contend, however, that the liberty interest they assert is consistent with this Court's substantive-due-process line of cases, if not with this Nation's history and practice. Pointing to Casey and Cruzan, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," Brief of Respondents 12, and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy,"

; see Casey, 112 S.Ct. ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." Brief for Respondents 10. The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to Casey and Cruzan.

In Cruzan, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, "ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request. Cruzan, We began with the observation that " [a]t common law, even the touching of one person by another without consent and without legal justification was a battery." We then discussed the related rule that "informed consent is generally required for medical treatment." After reviewing a long line of relevant state cases, we concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." Next, we reviewed our own cases on the subject, and stated that " [t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Therefore, "for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." 110 S.Ct.; see 110 S.Ct. (O'CONNOR, J., concurring). We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment.

Respondents contend that in Cruzan we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," Brief for Respondents 23, and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication," Similarly, the Court of Appeals concluded that "Cruzan, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's own death."

The right assumed in Cruzan, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the deci-

sion to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. See Vacco v. Quill, — U.S., at ———, In Cruzan itself, we recognized that most States outlawed assisted suicide-and even more do today-and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide.

Respondents also rely on Casey. There, the Court's opinion concluded that "the essential holding of Roe v. Wade should be retained and once again reaffirmed." Casey, We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. In reaching this conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime."

The Court of Appeals, like the District Court, found Casey "'highly instructive"' and "'almost prescriptive"' for determining "'what liberty interest may inhere in a terminally ill person's choice to commit suicide"':

"Like the decision of whether or not to have an abortion, the decision how and when to die is one of"the most intimate and personal choices a person may make in a lifetime,' a choice "central to personal dignity and autonomy."' 79 F d. Similarly, respondents emphasize the statement in Casey that:

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Casey, Brief for Respondents 12. By choosing this language, the Court's opinion in Casey described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. 19 The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise." Casey, 112 S.Ct. (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, San Antonio Independent School Dist. v. Rodriguez, and Casey did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See Heller v. Doe, ; Flores, This requirement is unquestionably met here. As the court below recognized, 79 F d, 20 Washington's assisted-suicide ban implicates a number of state interests. 21 See 49 F d; Brief for State of California et al. as Amici Curiae 26-29; Brief for United States as Amicus Curiae 16-27.

First, Washington has an "unqualified interest in the preservation of human life." Cruzan, The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See 110 S.Ct.; Model Penal Code §210 Comment 5 (" [T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of an other"). 22 This interest is symbolic and aspirational as well as practical:

"While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131-132.

Respondents admit that " [t]he State has a real interest in preserving the lives of those who can still contribute to society and enjoy life." Brief for Respondents 35, n. 23. The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." 79 F d. Washington, however, has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. See United States v. Rutherford, (". . Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the"quality' of life that a particular individual may enjoy," Cruzan, This remains true, as Cruzan makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. See Washington State Dept. of Health, Annual Summary of Vital Statistics 1991, pp. 29-30 (Oct) (suicide is a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force 10, 23-33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. See 79 F d; (Beezer, J., dissenting) ("The state recognizes

suicide as a manifestation of medical and psychological anguish"); Marzen 107-146.

Those who attempt suicide-terminally ill or not-often suffer from depression or other mental disorders. See New York Task Force 13 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10-11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) (" [I]ntolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. H. Hendin, Seduced by Death: Doctors, Patients and the Dutch Cure 24-25 (1997) (suicidal, terminally ill patients"usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177-178. The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," 79 F d, the American Medical Association, like many other medical and physicians' groups, has concluded that " [p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics §2 (1994); see Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2233 (1992) (" [T]he societal risks of involving physicians in medical interventions to cause patients' deaths is too great"); New York Task Force 103-109 (discussing physicians' views). And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 355-356 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain").

Next, the State has an interest in protecting vulnerable groups-including the poor, the elderly, and disabled persons-from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." 79

F d. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. Cruzan, Similarly, the New York Task Force warned that " [l]egalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." New York Task Force 120; see Compassion in Dying, 49 F d (" [A]n insidious bias against the handicapped-again coupled with a cost-saving mentality-makes them especially in need of Washington's statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." 49 F d. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's. See New York Task Force 101-102; Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, 20 (discussing prejudice toward the disabled and the negative messages euthanasia and assisted suicide send to handicapped patients).

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down Washington's assisted-suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F d. Washington insists, however, that the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44-47. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." Compassion in Dying, 49 F d; see Kevorkian, 447 Mich., n. 41, 527 N.W d, n. 41. The Court of Appeals' decision, and its expansive reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself," 79 F d, n. 120; that "in some instances, the patient may be unable to self-administer the drugs and . administration by the physician . may be the only way the patient may be able to receive them," ; and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide. n. 140. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. 23 Washington's ban on assisting suicide prevents such erosion.

This concern is further supported by evidence about the practice of euthana-

sia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. -21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991); H. Hendin, Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," New York Task Force 145, and concluded that the "risk of . abuse is neither speculative nor distant," Washington, like most other States, reasonably ensures against this risk by banning, rather than regulating, assisting suicide. See United States v. 12 200-ft Reels of Super 8MM Film, ("Each step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance").

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev.Code §9A (1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F d.

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, concurring in the judgment.

Three terminally ill individuals and four physicians who sometimes treat terminally ill patients brought this challenge to the Washington statute making it a crime "knowingly . [to] ai[d] another person to attempt suicide," Wash. Rev.Code §9A (1994), claiming on behalf of both patients and physicians that it would violate substantive due process to enforce the statute against a doctor who acceded to a dying patient's request for a drug to be taken by the patient

to commit suicide. The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause of the Fourteenth Amendment. Poe v. Ullman, (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.

Although the terminally ill original parties have died during the pendency of this case, the four physicians who remain as respondents here1 continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help. 2 See, e.g., Southern Pacific Terminal Co. v. ICC, (question was capable of repetition yet evading review). The case reaches us on an order granting summary judgment, and we must take as true the undisputed allegations that each of the patients was mentally competent and terminally ill, and that each made a knowing and voluntary choice to ask a doctor to prescribe "medications . to be self-administered for the purpose of hastening . death." Complaint ¶2 The State does not dispute that each faced a passage to death more agonizing both mentally and physically, and more protracted over time, than death by suicide with a physician's help, or that each would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain. Each doctor in this case claims to encounter patients like the original plaintiffs who have died, that is, mentally competent, terminally ill, and seeking medical help in "the voluntary self-termination of life." ¶2 -2 While there may be no unanimity on the physician's professional obligation in such circumstances, I accept here respondents' representation that providing such patients with prescriptions for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical practice. Hence, I take it to be true, as respondents say, that the Washington statute prevents the exercise of a physician's "best professional judgment to prescribe medications to [such] patients in dosages that would enable them to act to hasten their own deaths." ¶2 ; see also App. 35, 55.

In their brief to this Court, the doctors claim not that they ought to have a right generally to hasten patients' imminent deaths, but only to help patients who have made "personal decisions regarding their own bodies, medical care, and, fundamentally, the future course of their lives," Brief for Respondents 12, and who have concluded responsibly and with substantial justification that the brief and anguished remainders of their lives have lost virtually all value to them. Respondents fully embrace the notion that the State must be free to impose reasonable regulations on such physician assistance to ensure that the patients they assist are indeed among the competent and terminally ill and that each has made a free and informed choice in seeking to obtain and use a fatal drug.

In response, the State argues that the interest asserted by the doctors is beyond constitutional recognition because it has no deep roots in our history and traditions. Brief for Petitioners 21-25. But even aside from that, without disputing that the patients here were competent and terminally ill, the State insists

that recognizing the legitimacy of doctors' assistance of their patients as contemplated here would entail a number of adverse consequences that the Washington Legislature was entitled to forestall. The nub of this part of the State's argument is not that such patients are constitutionally undeserving of relief on their own account, but that any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail.

First, the State argues that the right could not be confined to the terminally ill. Even assuming a fixed definition of that term, the State observes that it is not always possible to say with certainty how long a person may live. It asserts that " [t]here is no principled basis on which [the right] can be limited to the prescription of medication for terminally ill patients to administer to themselves" when the right's justifying principle is as broad as "'merciful termination of suffering."' (citing Y. Kamisar, Are Laws Against Assisted Suicide Unconstitutional?, Hastings Center Report 32, 36-37 (May-June 1993)). Second, the State argues that the right could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty, Brief for Petitioners 34, and suggesting further that no principled distinction is possible between a competent patient acting independently and a patient acting through a duly appointed and competent surrogate, Next, according to the State, such a right might entail a right to or at least merge in practice into "other forms of life-ending assistance," such as euthanasia. -47. Finally, the State believes that a right to physician assistance could not easily be distinguished from a right to assistance from others, such as friends, family, and other health-care workers. The State thus argues that recognition of the substantive due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address.

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the Fourteenth Amendment guarantees against denial without due process of law, 3 they are not claiming some sort of procedural defect in the process through which the statute has been enacted or is administered. Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action. Although this practice has neither rested on any single textual basis nor expressed a consistent theory (or, before Poe v. Ullman, a much articulated one), a brief overview of its history is instructive on two counts. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial

review found in Justice Harlan's dissent in Poe,4 on which I will dwell further on, while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim.

Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating Magna Carta's guarantee of "the law of the land." On the basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. Goshen v. Stonington, 4 Conn. 209, 225-226 (1822). In the same period, a specialized court of equity, created under a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the state constitution's "law of the land" clause. Bank of the State v. Cooper, 10 Tenn. 599, 2 Yerg. 599, 602-608 (1831) (Green, J.); Yer. (Peck, J.); -623 (Kennedy, J.). And the middle of the 19th century brought the famous Wynehamer case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the state's due process clause. Wynehamer v. People, 13 N.Y. 378, 486-487 (1856). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property. (Comstock, J.).

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification of the Fourteenth Amendment, by making it clear on several occasions that it too had no doubt of the judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative acts under review. See, e.g., Wilkinson v. Leland, 2 Pet. 627, 656-661, ; Calder v. Bull, 3 Dall. 386, 386-395, (opinion of Chase, J.); see also Corfield v. Coryell, 6 F. Cas. 546, 550-552, No. 3,230 (1823). But in Fletcher v. Peck, 6 Cranch 87, the Court went further. It struck down an act of the Georgia legislature that purported to rescind a sale of public land ab initio and reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, ex post facto laws, laws impairing contracts in Article I, §10 of the Constitution; and "general principles which are common to our free institutions," by which Chief Justice Marshall meant that a simple deprivation of property by the State could not be

an authentically "legislative" act. Fletcher, 6 Cranch,

Fletcher was not, though, the most telling early example of such review. For its most salient instance in this Court before the adoption of the Fourteenth Amendment was, of course, the case that the Amendment would in due course overturn, Dred Scott v. Sandford, 19 How. 393, Unlike Fletcher, Dred Scott was textually based on a due process clause (in the Fifth Amendment, applicable to the national government), and it was in reliance on that clause's protection of property that the Court invalidated the Missouri Compromise. 19 How.. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, -452, the implication being that the government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history needs no recounting here.

After the ratification of the Fourteenth Amendment, with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in due process clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley's dissent in the Slaughter-House Cases, 16 Wall. 36, in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such rights may be "arbitrarily assailed," Wall.. 6 After that, opinions comparable to those that preceded Dred Scott expressed willingness to review legislative action for consistency with the Due Process Clause even as they upheld the laws in question. See, e.g., Bartemeyer v. Iowa, 18 Wall. 129, 133-135, ; Munn v. Illinois, ; Railroad Comm'n Cases, ; Mugler v. Kansas, See generally Corwin, Liberty Against Government (surveying the Court's early Fourteenth Amendment cases and finding little dissent from the general principle that the Due Process Clause authorized judicial review of substantive statutes).

The theory became serious, however, beginning with Allgeyer v. Louisianawhere the Court invalidated a Louisiana statute for excessive interference with Fourteenth Amendment liberty to contract, -593, and offered a substantive interpretation of "liberty," that in the aftermath of the so-called Lochner Era has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that Fourteenth Amendment liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." " [W]e do not intend to hold that in no such case can the State exercise its police power," the Court added, but " [w]hen and how far such power may be legit-

imately exercised with regard to these subjects must be left for determination to each case as it arises." Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of Dred Scott. Allgeyer was succeeded within a decade by Lochner v. New Yorkand the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. Compare, e.g., 25 S.Ct. (finding New York's maximum-hours law for bakers "unreasonable and entirely arbitrary") and Adkins v. Children's Hospital of D.C., (holding a minimum wage law "so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States") with West Coast Hotel Co. v. Parrish, (overruling Adkins and approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). As the parentheticals here suggest, while the cases in the Lochner line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of Dred Scott in their absolutist implementation of the standard they espoused.

Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review, beginning with Meyer v. NebraskaWithout referring to any specific guarantee of the Bill of Rights, the Court invoked precedents from the Slaughter-House Cases through Adkins to declare that the Fourteenth Amendment protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." The Court then held that the same Fourteenth Amendment liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable interference by the States, with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was, "arbitrary and without reasonable relation to any end within the competency of the State," See also Pierce v. Society of Sisters, (finding that a statute that all but outlawed private schools lacked any "reasonable relation to some purpose within the competency of the State"); Palko v. Connecticut, ("even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts"; "Is that [injury] to which the statute has subjected [the appellant] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?") (citation and internal quotation marks omitted).

After Meyer and Pierce, two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, Skinner v. Oklahoma ex rel. Williamsonwhere the Court emphasized the "fundamental" nature of individual choice about procreation

and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny," in this Court's Fourteenth Amendment law. See Skinner, that is, added decisions regarding procreation to the list of liberties recognized in Meyer and Pierce and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. Poe, The second major opinion leading to the modern doctrine was Justice Harlan's Poe dissent just cited, the conclusion of which was adopted in Griswold v. Connecticutand the authority of which was acknowledged in Planned Parenthood of Southeastern Pa. v. CaseySee also n. 4. The dissent is important for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgement of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before Dred Scott and has continued after the repudiation of Lochner's progeny, most notably on the subjects of segregation in public education, Bolling v. Sharpe, interracial marriage, Loving v. Virginia, marital privacy and contraception, Carey v. Population Services Int'l, Griswold v. Connecticut, abortion, Planned Parenthood of Southeastern Pa. v. Casey, 869, (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), Roe v. Wade, personal control of medical treatment, Cruzan v. Director, Mo. Dept. of Health, (O'CONNOR, J., concurring); 110 S.Ct. (Brennan, J., dissenting); 110 S.Ct. (STEVENS, J., dissenting); see also 110 S.Ct. (majority opinion), and physical confinement, Foucha v. Louisiana, This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See Marbury v. Madison, 1 Cranch 137, Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." Poe, 7 The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law."

Following the first point of the Poe dissent, on the necessity to engage in the sort of examination we conduct today, the dissent's second and third implicitly address those cases, already noted, that are now condemned with virtual unanimity as disastrous mistakes of substantive due process review. The second of

the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable. Part III, below, deals with this second point, and also with the dissent's third, which takes the form of an object lesson in the explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness.

My understanding of unenumerated rights in the wake of the Poe dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See Planned Parenthood of Southeastern Pa. v. Casey, That understanding begins with a concept of "ordered liberty," Poe, (Harlan, J.); see also Griswold, comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," Poe, (Harlan, J., dissenting).

"Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." See also Moore v. East Cleveland, (plurality opinion of Powell, J.) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful"respect for the teachings of history [and] solid recognition of the basic values that underlie our society"') (quoting Griswold, 85 S.Ct. (Harlan, J., concurring)).

After the Poe dissent, as before it, this enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. See, e.g., United States v. Carolene Products Co., (economic legislation "not . unconstitutional unless . facts . preclude the assumption that it rests upon some

rational basis"); see also Poe, 548, 1779-1780 (Harlan, J., dissenting) (referring to usual "presumption of constitutionality" and ordinary test "going merely to the plausibility of [a statute's] underlying rationale"). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requir[ing] particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. Skinner v. Oklahoma [ex rel. Williamson]; Bolling v. Sharpe, [347 U.S. 497,]," ; that is, interests in liberty sufficiently important to be judged "fundamental," ; see also (citing Corfield v. Coryell, 4 Wash. C.C. 371, 380 (C.C.E.D.Pa)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. Poe, (Harlan, J., dissenting) (an "enactment involv[ing] . a most fundamental aspect of"liberty' . [is] subjec[t] to "strict scrutiny"') (quoting Skinner v. Oklahoma ex rel. Williamson, 62 S.Ct.); 8Reno v. Flores, (reaffirming that due process "forbids the government to infringe certain"fundamental' liberty interests . unless the infringement is narrowly tailored to serve a compelling state interest").

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." Poe (Harlan, J., dissenting). ""We may not draw on our merely personal and private notions and disregard the limits . derived from considerations that are fused in the whole nature of our judicial process . [,] considerations deeply rooted in reason and in the compelling traditions of the legal profession."' S.Ct. (quoting Rochin v. California,); see also Palko v. Connecticut, 58 S.Ct. (looking to ""principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"') (quoting Snyder v. Massachusetts,).

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a court's business here. The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. See, e.g., Poe, (Harlan, J., dissenting); Youngberg v. Romeo, It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have

a constitutional right. See Cruzan v. Director, Mo. Dept. of Health, 110 S.Ct. (" [D]etermining that a person has a "liberty interest' under the Due Process Clause does not end the inquiry;"whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests"') (quoting Youngberg v. Romeo, 102 S.Ct.).

The Poe dissent thus reminds us of the nature of review for reasonableness or arbitrariness and the limitations entailed by it. But the opinion cautions against the repetition of past error in another way as well, more by its example than by any particular statement of constitutional method: it reminds us that the process of substantive review by reasoned judgment, Poe, is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.

Although the Poe dissent disclaims the possibility of any general formula for due process analysis (beyond the basic analytic structure just described), see 544, 1777-1778, Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. See also Casey, 112 S.Ct. ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment"). When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. As in any process of rational argumentation, we recognize that when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred. So the Court in Dred Scott treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. See Dred Scott v. Sandford, 19 How..

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," Poe (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken. "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come." (Harlan, J., dissenting) (inter-

nal quotation marks omitted). Exact analysis and characterization of any due process claim is critical to the method and to the result.

So, in Poe, Justice Harlan viewed it as essential to the plaintiffs' claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom. This detail in fact served two crucial and complementary functions, and provides a lesson for today. It rescued the individuals' claim from a breadth that would have threatened all state regulation of contraception or intimate relations; extramarital intimacy, no matter how privately practiced, was outside the scope of the right Justice Harlan would have recognized in that case. See -553, It was, moreover, this same restriction that allowed the interest to be valued as an aspect of a broader liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it, a liberty exemplified in constitutional provisions such as the Third and Fourth Amendments, in prior decisions of the Court involving unreasonable intrusions into the home and family life, and in the then-prevailing status of marriage as the sole lawful locus of intimate relations. 551, 1781. 11 The individuals' interest was therefore at its peak in Poe, because it was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies), and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions.

On the other side of the balance, the State's interest in Poe was not fairly characterized simply as preserving sexual morality, or doing so by regulating contraceptive devices. Just as some of the earlier cases went astray by speaking without nuance of individual interests in property or autonomy to contract for labor, so the State's asserted interest in Poe was not immune to distinctions turning (at least potentially) on the precise purpose being pursued and the collateral consequences of the means chosen, see -548, It was assumed that the State might legitimately enforce limits on the use of contraceptives through laws regulating divorce and annulment, or even through its tax policy, , but not necessarily be justified in criminalizing the same practice in the marital bedroom, which would entail the consequence of authorizing state enquiry into the intimate relations of a married couple who chose to close their door, -549, See also Casey, 112 S.Ct. (strength of State's interest in potential life varies depending on precise context and character of regulation pursuing that interest).

The same insistence on exactitude lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counterclaims, and the demand for fitness and proper tailoring of a restrictive statute is just another way of testing the legitimacy of the generality at which the government sets up its justification. 12 We may therefore classify Justice Harlan's example of proper analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications. But

whatever the categories in which we place the dissent's example, it stands in marked contrast to earlier cases whose reasoning was marked by comparatively less discrimination, and it points to the importance of evaluating the claims of the parties now before us with comparable detail. For here we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances. And the claimants are met with the State's assertion, among others, that rights of such narrow scope cannot be recognized without jeopardy to individuals whom the State may concededly protect through its regulations. Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and drugs to be administered by the patient to end life promptly. Complaint ¶3 They accordingly claim that a physician must have the corresponding right to provide such aid, contrary to the provisions of Wash. Rev.Code §9A (1994). I do not understand the argument to rest on any assumption that rights either to suicide or to assistance in committing it are historically based as such. Respondents, rather, acknowledge the prohibition of each historically, but rely on the fact that to a substantial extent the State has repudiated that history. The result of this, respondents say, is to open the door to claims of such a patient to be accorded one of the options open to those with different, traditionally cognizable claims to autonomy in deciding how their bodies and minds should be treated. They seek the option to obtain the services of a physician to give them the benefit of advice and medical help, which is said to enjoy a tradition so strong and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy. PCS

The dominant western legal codes long condemned suicide and treated either its attempt or successful accomplishment as a crime, the one subjecting the individual to penalties, the other penalizing his survivors by designating the suicide's property as forfeited to the government. See 4 W. Blackstone, Commentaries - (commenting that English law considered suicide to be "ranked . among the highest crimes" and deemed persuading another to commit suicide to be murder); see generally Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquense L.Rev. 1, 56-63 (1985). While suicide itself has generally not been considered a punishable crime in the United States, largely because the common-law punishment of forfeiture was rejected as improperly penalizing an innocent family, see -99, most States have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. See generally 13 Criminal prohibitions on such assistance remain widespread, as exemplified in the Washington statute in question here.

The principal significance of this history in the State of Washington, according to respondents, lies in its repudiation of the old tradition to the extent of elim-

inating the criminal suicide prohibitions. Respondents do not argue that the State's decision goes further, to imply that the State has repudiated any legitimate claim to discourage suicide or to limit its encouragement. The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to life in various circumstances or in the perceived legitimacy of taking one's own. See, e.g., Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in Euthanasia Examined 225, 229 (J. Keown ed); CeloCruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, 18 Am. J.L. & Med. 369, 375 (1992); Marzen, O'Dowd, Crone, & Balch 24 Duquesne L.Rev.___-___. Thus it may indeed make sense for the State to take its hands off suicide as such, while continuing to prohibit the sort of assistance that would make its commission easier. See, e.g., American Law Institute, Model Penal Code §210 Comment 5 (1980). Decriminalization does not, then, imply the existence of a constitutional liberty interest in suicide as such; it simply opens the door to the assertion of a cognizable liberty interest in bodily integrity and associated medical care that would otherwise have been inapposite so long as suicide, as well as assisting a suicide, was a criminal offense.

This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, " [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs. Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, Cruzan v. Director, Mo. Dept. of Health, as well as a right generally to resist enforced medication, see Washington v. Harper, 229, 1040-1041, Thus " [i]t is settled now . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . bodily integrity." Casey, 112 S.Ct. (citations omitted); see also Cruzan, 110 S.Ct.; 110 S.Ct. (O'CONNOR, J., concurring); Washington v. Harper, 110 S.Ct.; Winston v. Lee, ; Rochin v. California, Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, Cruzan, 110 S.Ct. ("we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"), and the affirmative right to obtain medical intervention to cause abortion, see Casey, 896, 2830; cf. Roe v. Wade.

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In Roe v. Wade, the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," for a pregnant woman was unconstitutional insofar as it prevented her from "terminat[ing] her pregnancy by an abortion"performed by a competent, licensed physician, under safe, clinical conditions,"' and in striking down the statute we stressed the importance of the relationship between patient and physician, see 156, 728.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, see Casey, 112 S.Ct. (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) Roe, the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in Roe recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. See 93 S.Ct.; see also Griswold v. Connecticut, 85 S.Ct. ("This law . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"); see generally R. Cabot, Ether Day Address, Boston Medical and Surgical J. 287, 288 (1920). This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

Respondents argue that the State has in fact already recognized enough evolving examples of this tradition of patient care to demonstrate the strength of their claim. Washington, like other States, authorizes physicians to withdraw life-sustaining medical treatment and artificially delivered food and water from patients who request it, even though such actions will hasten death. See Wash. Rev.Code §§70 70 (1994); see generally Notes to Uniform Rights of the Terminally Ill Act, 9B U.L.A. 168-169 (Supp) (listing state statutes). The State

permits physicians to alleviate anxiety and discomfort when withdrawing artificial life-supporting devices by administering medication that will hasten death even further. And it generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding.

The argument supporting respondents' position thus progresses through three steps of increasing forcefulness. First, it emphasizes the decriminalization of suicide. Reliance on this fact is sanctioned under the standard that looks not only to the tradition retained, but to society's occasional choices to reject traditions of the legal past. See Poe v. Ullman, (Harlan, J., dissenting). While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, see, e.g., American Law Institute, Model Penal Code §210 Comment 1, pp. 92-93, and n. 7 (1980), the State's rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State's own act of decriminalization gives a freedom of choice much like the individual's option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to choose in spite of the interest a State may legitimately invoke in discouraging the practice, just as suicide is now subject to choice, despite a state interest in discouraging it. The third step is to emphasize that respondents claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State's in discouraging suicide were to be recognized at all. Respondents base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course. There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.

In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim, see Poe, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

The State has put forward several interests to justify the Washington law as applied to physicians treating terminally ill patients, even those competent to make responsible choices: protecting life generally, Brief for Petitioners 33, discouraging suicide even if knowing and voluntary, -38, and protecting terminally

ill patients from involuntary suicide and euthanasia, both voluntary and non-voluntary, -35.

It is not necessary to discuss the exact strengths of the first two claims of justification in the present circumstances, for the third is dispositive for me. That third justification is different from the first two, for it addresses specific features of respondents' claim, and it opposes that claim not with a moral judgment contrary to respondents', but with a recognized state interest in the protection of nonresponsible individuals and those who do not stand in relation either to death or to their physicians as do the patients whom respondents describe. The State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. The State thus argues, essentially, that respondents' claim is not as narrow as it sounds, simply because no recognition of the interest they assert could be limited to vindicating those interests and affecting no others. The State says that the claim, in practical effect, would entail consequences that the State could, without doubt, legitimately act to prevent.

The mere assertion that the terminally sick might be pressured into suicide decisions by close friends and family members would not alone be very telling. Of course that is possible, not only because the costs of care might be more than family members could bear but simply because they might naturally wish to see an end of suffering for someone they love. But one of the points of restricting any right of assistance to physicians, would be to condition the right on an exercise of judgment by someone qualified to assess the patient's responsible capacity and detect the influence of those outside the medical relationship.

The State, however, goes further, to argue that dependence on the vigilance of physicians will not be enough. First, the lines proposed here (particularly the requirement of a knowing and voluntary decision by the patient) would be more difficult to draw than the lines that have limited other recently recognized due process rights. Limiting a state from prosecuting use of artificial contraceptives by married couples posed no practical threat to the State's capacity to regulate

contraceptives in other ways that were assumed at the time of Poe to be legitimate; the trimester measurements of Roe and the viability determination of Casey were easy to make with a real degree of certainty. But the knowing and responsible mind is harder to assess. 16 Second, this difficulty could become the greater by combining with another fact within the realm of plausibility, that physicians simply would not be assiduous to preserve the line. They have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient were technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care. Whether acting from compassion or under some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well. 17 The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

Respondents propose an answer to all this, the answer of state regulation with teeth. Legislation proposed in several States, for example, would authorize physician-assisted suicide but require two qualified physicians to confirm the patient's diagnosis, prognosis, and competence; and would mandate that the patient make repeated requests witnessed by at least two others over a specified time span; and would impose reporting requirements and criminal penalties for various acts of coercion. See App. to Brief for State Legislators as Amici Curiae 1a-2a.

But at least at this moment there are reasons for caution in predicting the effectiveness of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve unacceptable suffering. See C. Gomez, Regulating Death 40-43 (1991). There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshall evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. See, e.g., H. Hendin, Seduced By Death 75-84 (1997) (noting many cases in which decisions intended to end the life of a fully competent patient were made without a request from the patient and without consulting the patient); Keown, Euthanasia in the Netherlands: Sliding Down the Slippery Slope?, in Euthanasia Examined 261, 289 (J. Keown ed

) (guidelines have "proved signally ineffectual; non-voluntary euthanasia is now widely practised and increasingly condoned in the Netherlands"); Gomez. This evidence is contested. See, e.g., R. Epstein, Mortal Peril 322 (1997) ("Dutch physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases"); R. Posner, Aging and Old Age 242, and n. 23 (1995) (noting fear of "doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic"); Van der Wal, Van Eijk, Leenen, & Spreeuwenberg, Euthanasia and Assisted Suicide, 2, Do Dutch Family Doctors Act Prudently?, 9 Family Practice 135 (1992) (finding no serious abuse in Dutch practice). The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following conditions are met: there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question.

The capacity of the State to protect the others if respondents were to prevail is, however, subject to some genuine question, underscored by the responsible disagreement over the basic facts of the Dutch experience. This factual controversy is not open to a judicial resolution with any substantial degree of assurance at this time. It is not, of course, that any controversy about the factual predicate of a due process claim disqualifies a court from resolving it. Courts can recognize captiousness, and most factual issues can be settled in a trial court. At this point, however, the factual issue at the heart of this case does not appear to be one of those. The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States. See, e.g., Ore.Rev.Stat. Ann. §§127 et seq.

—(Supp); App. to Brief for State Legislators as Amici Curiae 1a (listing proposed statutes).

I do not decide here what the significance might be of legislative foot-dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, e.g., Bolling v. SharpeNow, it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions. See Casey, Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

Roe v. Wade

410 U.S. 113 (1973)

Mr. Justice BLACKMUN delivered the opinion of the Court. This Texas federal appeal and its Georgia companion, Doe v. Boltonpresent constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York, :

'(The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code,1 Vernon's Ann.P.C. These make it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' Similar statutes are in existence in a majority of the States Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev.Stat., c. 8, Arts. 536-541 (1879); Texas Rev.Crim.Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by 'medical advice for the purpose of saving the life of the mother.'

Jane Roe,4 a single woman who was residing in Dallas County, Texas, instituted

this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue 'on behalf of herself and all other women' similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,5 a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a 'neural-chemical' disorder; that her physician had 'advised her to avoid pregnancy until such time as her condition has materially improved' (although a pregnancy at the present time would not present 'a serious risk' to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue 'on behalf of themselves and all couples similarly situated.'

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but

that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the 'fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,' and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (N.D.Tex).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941, It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovanand Gunn v. University Committeeare to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is property here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n; Florida Lime and Avocado Growers, Inc. v. Jacobsen; 80-81, It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton.

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that 'personal stake in the outcome of the controversy,' Baker v. Carr, that insures that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,' Flast v. Cohen, and Sierra Club v. Morton, ? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit

with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, CA2 1971); Crossen v. Breckenridge, -839 (CA6 1971); Poe v. Menghini, 339 F.Supp. 986, 990-991 (D.C.Kan. 1972). See Truax v. RaichIndeed, we do not read the appellee's brief as really asserting anything to the contrary. The 'logical nexus between the status asserted and the claim sought to be adjudicated,' Flast v. Cohen, and the necessary degree of contentiousness, Golden v. Zwicklerare both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,6 or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. United States v. Munsingwear, Inc.; Golden v. Zwickler; SEC v. Medical Committee for Human Rights But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, See Moore v. Ogilvie, ; Carroll v. President and Commissioners of Princess Anne, 351, ; United States v. W. T. Grant Co.,

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

'(I)n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion . .'

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were

also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a 'potential future defendant' and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in Samuels v. Mackellcompels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in Samuels v. Mackelland in Younger v.

Harris; Boyle v. Landry; Perez v. Ledesma; and Byrne v. KaralexisSee also Dombrowski v. PfisterWe note, in passing, that Younger and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. The Does. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for 'other highly personal reasons.' But they 'fear . they may face the prospect of becoming parents.' And if pregnancy ensues, they 'would want to terminate' it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immedi-

ate and present injury, only an alleged 'detrimental effect upon (their) marital happiness' because they are forced to 'the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.' Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. Younger v. Harris, 91 S.Ct.; Golden v. Zwickler, 89 S.Ct.; Abele v. Markle, 452 F d; Crossen v. Breckenridge, 446 F d. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, investment Co. Institute v. Camp; Association of Data Processing Service Organizations, Inc. v. Camp; and Epperson v. ArkansasSee also Truax v. Raich The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut; Eisenstadt v. Baird; (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 85 S.Ct. (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1.. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,9 and that

'it was resorted to without scruple.'10 The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

1. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described as the Father of Medicine, the 'wisest and the greatest practitioner of his art,' and the 'most important and most complete medical personality of antiquity,' who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?13 The Oath varies somewhat according to the particular translation, but in any translation the content is clear: 'I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,'14 or 'I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.'

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Boltonit represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:16 The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, 'echoes Pythagorean doctrines,' and '(i)n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.'

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) 'give evidence of the violation of almost every one of its injunctions.'18 But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Phthagorean ethic. The Oath 'became the nucleus of all medical ethics' and 'was applauded as the embodiment of truth.' Thus, suggests Dr. Edelstein, it is 'a Pythagorean

manifesto and not the expression of an absolute standard of medical conduct.'

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and reversed statement of medical ethics.

1. The common law. It is undisputed that at common law, abortion performed before 'quickening'-the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy20-was not an indictable offense The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became 'formed' or recognizably human, or in terms of when a 'person' came into being, that is, infused with a 'soul' or 'animated.' A loose concensus evolved in early English law that these events occurred at some point between conception and live birth This was 'mediate animation.' Although Christian theology and the canon law came to fix the point of animation days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman 'quick with childe' is 'a great misprision, and no murder.'24 Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), 'modern law' took a less severe view A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,27 others followed Coke in stating that abortion of a quick fetus was a 'misprision,' a term they translated to mean 'misdemeanor.'28 That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that

abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

1. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the 'quickening' distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of 'the life of a child capable of being born alive.' It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense 'unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.'

A seemingly notable development in the English law was the case of Rex v. Bourne, (1939) 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge MacNaghten referred to the 1929 Act, and observed that that Act related to 'the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature.' He concluded that the 1861 Act's use of the word 'unlawfully,' imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase 'preserving the life of the mother' broadly, that is, 'in a reasonable sense,' to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. -694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) 'that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated,' or (b) 'that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.' The Act also provides that, in making this determination, 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment.' It also permits a physician, without the concurrence of others, to terminate a pregnancy where

he is of the good-faith opinion that the abortion 'is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.'

1. The American law. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman 'quick with child.'29 The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860 In 1828, New York enacted legislation31 that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it 'shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.' By 1840, when Texas had received the common law,32 only eight American States had statutes dealing with abortion It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. 35 Three States permitted abortions that were not 'unlawfully' performed or that were not 'without lawful justification,' leaving interpretation of those standards to the courts In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230 ,37 set forth as Appendix B to the opinion in Doe v. Bolton.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th

century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

1. The position of the American Medical Association. The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am.Med.Assn. 73-78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion 'with a view to its general suppression.' It deplored abortion and its frequency and it listed three causes of 'this general demoralization':

'The first of these causes is a wide-spread popular ignorance of the true character of the crime-a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.'The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . .'The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.'

The Committee then offered, and the Association adopted, resolutions protesting 'against such unwarrantable destruction of human life,' calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies 'in pressing the subject.'

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, 'We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.' 22 Trans. of the Am.Med.Assn. 258 (1871). It proffered resolutions, adopted by the Association, -39, recommending, among other things, that it 'be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child-if that be possible,' and calling 'the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females-aye, and men also, on this important question.'

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human

Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is 'documented medical evidence' of a threat to the health or life of the mother, or that the child 'may be born with incapacitating physical deformity or mental deficiency,' or that a pregnancy 'resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient,' two other physicians 'chosen because of their recognized professional competency have examined the patient and have concurred in writing,' and the procedure 'is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.' The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was 'to be considered consistent with the principles of ethics of the American Medical Association.' This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted 'polarization of the medical profession on this controversial issue'; division among those who had testified; a difference of opinion among AMA councils and committees; 'the remarkable shift in testimony' in six months, felt to be influenced 'by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;' and a feeling 'that this trend will continue.' On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent,' in contrast to 'mere acquiescence to the patient's demand.' The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles Proceedings of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion.

1. The position of the American Public Health Association. In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

'a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.'b. An important function of counseling should be to simplify and expedite the provision of abortion services; if should not delay the obtaining of these services.'c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.'d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.'e. Contraception and/or sterilization should be discussed with each abortion patient.' Recommended Standards

for Abortion Services, 61 Am.J.Pub.Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that 'are recognized as important':

'a. the skill of the physician,'b. the environment in which the abortion is performed, and above all'c. The duration of pregnancy, as determined by uterine size and confirmed by menstrual history.'

It was said that 'a well-equipped hospital' offers more protection 'to cope with unforeseen difficulties than an office or clinic without such resources. . The factor of gestational age is of overriding importance.' Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay 'is probably the safest practice.' An abortion in an extramural facility, however, is an acceptable alternative 'provided arrangements exist in advance to admit patients promptly if unforeseen complications develop.' Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have 'adequate training.'

1. The position of the American Bar Association. At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin The Conference has appended an enlightening Prefatory Note.

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman,

that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy,

The third reason is the State's interest-some phrase it in terms of duty-in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. 45 The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and

fetus Proponents of this view point out that in many States, including Texas,49 by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another They claim that adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, ; in the Fourth and Fifth Amendments, Terry v. Ohio, Katz v. United States, ; Boyd v. United Statessee Olmstead v. United States, (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 85 S.Ct.; in the Ninth Amendment, 85 S.Ct. (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, ; procreation, Skinner v. Oklahoma, ; contraception, Eisenstadt v. Baird, 92 S.Ct.; 463-, 1043-1044 (White, J., concurring in result); family relationships, Prince v. Massachusetts, ; and child rearing and education, Pierce v. Society of Sisters, Meyer v. Nebraska.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the

woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts (vaccination); Buck v. Bell (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. Others have sustained state statutes.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary

to support a compelling state interest, and that, although the appellee presented 'several compelling justifications for state presence in the area of abortions,' the statutes outstripped these justifications and swept 'far beyond any areas of compelling state interest.' 314 F.Supp.. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument On the other hand, the appellee conceded on reargument52 that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause. 'Person' is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art, I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3 in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emoulument Clause, Art, I, § 9, cl. 8; in the Electros provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application All this, together with our observationthat throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D.Pa); Byrn v. New York City Health & Hospitals Corp., 31 N.Y d 194, 335 N.Y.S d 390, 286 N.E d 887 (1972), appeal docketed, No. 72-434; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn), appeal docketed, No. 72-730. Cf. Cheaney v. State, Ind., 285 N.E d; Montana v. Rogers, CA7 1960), aff'd sub nom. Montana v. Kennedy; Keeler v. Superior Court, 2 Cal d 619, 87 Cal.Rptr. 481, 470 P d 617 (1970); State v. Dickinson, 28 Ohio St d 65, 275 N.E d 599 (1971). Indeed, our decision in United States v. Vuitchinferentially is to the same effect, for we there would

not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478(24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics It appears to be the predominant, though not the unanimous, attitude of the Jewish faith It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid Viability is usually placed at about seven months (28 weeks) but may occur earlier, even weeks The Aristotelian theory of 'mediate animation,' that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from the moment of conception The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view

are posed, however, by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs.

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before life birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. 65 Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'

With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those 'procured or attempted by medical advice for the purpose of saving the life of the mother,' sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, 'saving' the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch,

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

1. For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

1. The State may define the term 'physician,' as it has been employed in the preceding paragraphs of this Part of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Boltonprocedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. Zwickler v. Koota, 389 U.S 241, 252-255, ; Dombrowski v. PfisterWe are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under Dombrowski and refined in Younger v. Harris, We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

Affirmed in part and reversed in part.

Planned Parenthood v. Casey

505 U.S. 833 (1992)

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court and delivered the opinion of the Court

with respect to Parts I, II, III, V—A, V—C, and VI, an opinion with respect to Part V—E, in which Justice Stevens joins, and an opinion with respect to Parts IV, V—B, and V—D.

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, Roe v. Wade, that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule Roe. See Brief for Respondents 104-117; Brief for United States as Amicus Curiae 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990). Relevant portions of the Act are set forth in the Appendix. Infra. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3-day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F. Supp. 1323 (ED Pa. 1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. We granted certiorari. 502 U. S. 1056 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F. 2d— 698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling Roe v. Wade. Tr. of Oral Arg. 5-6. We disagree with that analysis; but we acknowledge that our decisions after Roe cast doubt upon the meaning

and reach of its holding. Further, The Chief Justice admits that he would overrule the central holding ofRoe and adopt the rational relationship test as the sole criterion of constitutionality. See post, 966. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by Roe,principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams. As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Whitney v. California (concurring opinion). "[T]he guaranties of due process, though having their roots in Magna Carta's'per legem terrae' and considered as procedural safeguards'against executive usurpation and tyranny,' have in this country'become bulwarks also against arbitrary legislation."' Poe v. Ullman (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting Hurtado v. California).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e. g., Duncan v. Louisiana (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See Adamson v. California (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See Michael H. v. Gerald D., n. 6 (1989) (opinion of Scalia, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in Turner v. Safley (1987); in Carey v. Population Services International (1977); in Griswold v. Connecticut (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, -488 (Goldberg, J., joined by Warren, C. J., and Brennan, J., concurring) (expressly relying on due process), -502 (Harlan, J., concurring in judgment) (same), -507 (White, J., concurring in judgment) (same); in Pierce v. Society of Sisters (1925); and in Meyer v. Nebraska (1923).

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amdt. 9. As the second Justice Harlan recognized:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not

reach in Poe v. Ullman, but the Court adopted his position four Terms later in Griswold v. Connecticut. In Griswold, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See Eisenstadt v. Baird. Constitutional protection was extended to the sale and distribution of contraceptives in Carey v. Population Services International. It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, see Carey v. Population Services International; Moore v. East Cleveland; Eisenstadt v. Baird; Loving v. Virginia; Griswold v. Connecticut; Skinner v. Oklahoma ex rel. Williamson; Pierce v. Society of Sisters; Meyer v. Nebraskaas well as bodily integrity, see, e. g., Washington v. Harper (1990); Winstonv. Lee; Rochin v. California.

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code.

The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." Poe v. Ullman (opinion dissenting from dismissal on jurisdictional grounds).

See also Rochin v. California (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of termi-

nating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, e. g., Ferguson v. Skrupa,372 U. S. 726 (1963); Williamson v. Lee Optical of Okla., Inc.. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See West Virginia Bd. of Ed. v. Barnette; Texas v. Johnson.

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird(emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of

the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in Roe relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in Griswold, Eisenstadt, and Carey. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

It was this dimension of personal liberty that Roe sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. Roe was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting prenatal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in Roe itself and in decisions following it.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that Roe should be overruled, the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis. We turn now to that doctrine.

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such

continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisisis not an "inexorable command," and certainly it is not such in every constitutional case, see Burnet v. Coronado Oil & Gas Co. (1932) (Brandeis, J., dissenting). See also Payne v. Tennessee (Souter, J., joined by Kennedy, J., concurring); Arizona v. Rumsey. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, Swift & Co. v. Wickham; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e. g., United States v. Title Ins. & Trust Co.; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see Patterson v. McLean Credit Union (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, e. g., Burnet (Brandeis, J., dissenting).

So in this case we may enquire whether Roe's central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Although Roe has engendered opposition, it has in no sense proven "unworkable," see Garcia v. San Antonio Metropolitan Transit Authority, representing as it does a simple limitation beyond which a state law is unenforceable. While Roe has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see Payne v. Tennes- see, where advance planning of great precision is most obviously a necessity, it is no cause

for surprise that some would find no reliance worthy of consideration in support of Roe.

While neither respondents nor their amici in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for Roe's holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be de minimis. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for 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. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e. g., R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.

No evolution of legal principle has left Roe's doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left Roe behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that Roe stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The Roe Court itself placed its holding in the succession of cases most prominently exemplified by Griswold v. Connecticut. See Roe. When it is so seen, Roe is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, e. g., Carey v. Population Services International; Moore v. East Cleveland.

Roe, however, may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with

Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. Cruzan v. Director, Mo. Dept. of Health; cf., e. g., Riggins v. Nevada; Washington v. Harper; see also, e. g., Rochin v. California; Jacobson v. Massachusetts (1905).

Finally, one could classify Roe as sui generis. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see Akron v. Akron Center for Reproductive Health, Inc.Akron I), and by a majority of five in 1986, see Thornburgh v. American College of Obstetricians and Gynecologists,476 U. S. 747, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in Webster v. Reproductive Health Services, although two of the present authors questioned the trimester framework in a way consistent with our judgment today, a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of Roe.

Nor will courts building upon Roe be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of Roe was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including Skinner v. Oklahoma ex rel. Williamson; Griswold; Loving v. Virginia, 388 U. S. 1 (1967); and Eisenstadt v. Baird,405 U. S. 438 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." Poe v. Ullman (Harlan, J., dissenting). As we described in Carey v. Population Services Internationalthe liberty which encompasses those decisions

"includes'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions'relating to marriage, procreation, contraception, family relationships, and child rearing and education."' 431 U. S. (citations omitted).

The soundness of this prong of the Roe analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in Roe, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet Roe has been sensibly relied upon to counter any such suggestions. E. g., Arnold v. Board of Education of Escambia County, Ala., CA11 1989)(relying upon Roe and concluding that government officials violate the Constitution by coercing a minor to have an abortion); Avery v. County of Burke, CA4 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also In re Quinlan,

70 N. J. 10, 355 A. 2d 647 (relying on Roe in finding a right to terminate medical treatment), cert. denied sub nom. Garger v. New Jersey). In any event, because Roe's scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under Griswold and later cases, any error in Roe is unlikely to have serious ramifications in future cases.

We have seen how time has overtaken some of Roe's factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see Akron I, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare Roe, with Webster (opinion of Rehnquist, C. J.); see Akron I, and n. 5 (O'Connor, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of Roe's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of Roe to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since Roe was decided; which is to say that no change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

The sum of the precedential enquiry to this point shows Roe's underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left Roe's central holding a doctrinal remnant; Roe portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal stare decisis analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming Roe's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

In a less significant case, stare decisis analysis could, and would, stop at the point we have reached. But the sustained and widespread debate Roe has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with Lochner v. New York, which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. (dissenting opinion). The Lochner decisions were exemplified by Adkins v. Children's Hospital of District of Columbia, in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, West Coast Hotel Co. v. Parrish, signaled the demise of Lochner by overruling Adkins. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in Adkins rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See West Coast Hotel Co.. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of laissez faire was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that West Coast Hotel announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with Plessy v. Ferguson, holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The Plessy Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Whether, as a matter of historical fact, the Justices in the Plessy majority believed this or not, see 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in Brown v. Board of Education (Brown I). As one commentator observed, the question before the Court in Brown was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J.

421, 427 (1960).

The Court in Brown addressed these facts of life by observing that whatever may have been the understanding in Plessy's time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U. S.. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think Plessy was wrong the day it was decided, see Plessy (Harlan, J., dissenting), we must also recognize that the Plessy Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine Plessy was on this ground alone not only justified but required.

West Coast Hotel and Brown each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of Roe's central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, e. g., Mitchell v. W. T. Grant Co. (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); Mapp v. Ohio (Harlan, J., dissenting).

The examination of the conditions justifying the repudiation of Adkins by West Coast Hotel and Plessy by Brown is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would

be paid for overruling. Our analysis would not be complete, however, without explaining why overruling Roe's central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good

faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of Brown and Roe. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. Brown v. Board of Education (Brown II) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in Brown I,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the

issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at Roe, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that

is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of stare decisis.Any judicial act of line-drawing may seem somewhat arbitrary, but Roe was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See Thornburgh v. American College of Obstetricians and Gynecologists; Akron I Although we must overrule those parts of Thornburgh and Akron I which, in our view, are inconsistent with Roe's statement that the State has a legitimate interest in promoting the life or potential life of the unborn, see infra, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of Roe. It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See Roe v. Wade. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life. The Roe Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." Roe. The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in Roe. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the Roe Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in Roe's wake we are satisfied that the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its

holding. And we have concluded that the essential holding of Roe should be reaffirmed.

Yet it must be remembered that Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." Roe. That portion of the decision in Roe has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, e. g., Akron I. Not all of the cases decided under that formulation can be reconciled with the holding in Roeitself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon Roe, as against the later cases.

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. Roe. Most of our cases since Roe have involved the application of rules derived from the trimester framework. See, e. g., Thornburgh v. American College of Obstetricians and Gynecologists; Akron I.

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expre
central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of Roe. See Webster v. Reproductive Health Services (opinion of Rehnquist, C. J.); (O'Connor, J., concurring in part and concurring

in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in Roe, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in Roe itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in Roe.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. Anderson v. Celebrezze; Norman v. Reed.

The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

For the most part, the Court's early abortion cases adhered to this view. In Maherv. Roe (1977), the Court explained: "Roe did not declare an unqualified'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See also Doe v. Bolton ("[T]he interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); Bellotti I (State may not "impose undue burdens upon a minor capable of giving an informed consent"); Harris v. McRae (citing Maher). Cf. Carey v. Population Services International ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").

These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion "without interference from the State." Planned Parenthood of Central Mo. v.

Danforth. All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. It is, as a consequence, not surprising that despite the protestations contained in the original Roe opinion to the effect that the Court was not recognizing an absolute right, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by Roe is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird. Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in Roe's terms, in practice it undervalues the State's interest in the potential life within the woman.

Roe v. Wade was express in its recognition of the State's "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life." 410 U. S.. The trimester framework, however, does not fulfill Roe's own promise that the State has an interest in protecting fetal life or potential life. Roe began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. Before viability, Roe and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. Webster (opinion of Rehnquist, C. J.); Akron I (O'Connor, J., dissenting).

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual

Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. McCleskey v. Zant (attempting "to define the doctrine of abuse of the writ with more precision" after acknowledging tension among earlier cases). In our considered judgment, an undue burden is an unconstitutional burden. See Akron II (opinion of Kennedy, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. See, e. g., Akron I (O'Connor, J., dissenting). The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See infra (addressing Pennsylvania's parental consent requirement).

Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

1. To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right. (d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman

from making the ultimate decision to terminate her pregnancy before viability.(e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade,410 U. S..

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion, but refine the undue burden analysis in accordance with the principles articulated above. We now consider the separate statutory sections at issue.

Because it is central to the operation of various other requirements, we begin with the statute's definition of medical emergency. Under the statute, a medical emergency is

"[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." 18 Pa. Cons. Stat. § 3203 (1990).

Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of Roe forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U. S.. See also Harris v. McRae.

The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. 744 F. Supp.. Yet, as the Court of Appeals observed, 947 F. 2d, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. It stated: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." As we said in Brockett v. Spokane Arcades, Inc. (1985): "Normally, . we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. Palmer v. Hoffman. This " 'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able

to interpret the laws of their respective States.' " Frisby v. Schultz (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

We next consider the informed consent requirement. 18 Pa. Cons. Stat. § 3205 (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. See Planned Parenthood of Central Mo. v. Danforth. In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all previability regulations designed to further the State's interest in fetal life.

In Akron I, we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information "designed to influence the woman's informed choice between abortion or childbirth." As we later described the Akron I holding in Thornburghv. American College of Obstetricians and Gynecologists, there were two purported flaws in the Akron ordinance: the information was designed to dissuade the woman from having an abortion and the ordinance imposed "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient . ."

To the extent Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with Roe's acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of Akron I and Thornburgh. Those decisions, along with Danforth, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. E. g., Danforth. It cannot

be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. A requirement that the physician make available information similar to that mandated by the statute here was described in Thornburgh as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U. S.. We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the holdings of Akron I and Thornburgh to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Our prior cases also suggest that the "straitjacket," Thornburgh(quoting Danforth, n. 8), of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." 18 Pa. Cons. Stat. § 3205 (1990). In this respect, the statute does not prevent the physician from exercising his or her medical judgment.

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The

doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see Wooley v. Maynard, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. Whalen v. Roe. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The Pennsylvania statute also requires us to reconsider the holding in Akron I that the State may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. 462 U. S.. Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See Williamson v. Lee Optical of Okla., Inc.. Thus, we uphold the provision as a reasonable means to ensure that the woman's consent is informed.

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in Akron I invalidating a parallel requirement. In Akron I we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." 462 U. S.. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of antiabortion protestors demonstrating outside a clinic." 744 F. Supp.. As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment," Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. In light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of Roe, however, has not suggested that there is a constitutional right to abortion on demand. See, e. g., Doe v. Bolton. Rather, the right protected by Roe is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent

requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right Roe protects. The informed consent requirement is not an undue burden on that right.

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute. These included:

"273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. .

. .

"279. The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. .

. .

"281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. .

"282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion. .

"283. The required filing of the spousal consent form would require plaintiff-clinics to change their counseling procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality

of these revelations could not be guaranteed, since the woman's records are not immune from subpoena. .

"284. Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. .

"285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous. .

"286. Married women, victims of battering, have been killed in Pennsylvania and throughout the United States. .

"287. Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. .

"288. In a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife. .

"289. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. . The battering husband may deny parentage and use the pregnancy as an excuse for abuse. .

"290. Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her. A battered woman, therefore, is highly unlikely to disclose the violence against her for fear of retaliation by the abuser. .

"291. Even when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. .

. .

"294. A woman in a shelter or a safe house unknown to her husband is not'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances.

"295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted. .

"296. It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief. .

"297. The marital rape exception to section 3209 cannot be claimed by women who are victims of coercive sexual behavior other than penetration. The 90-day reporting requirement of the spousal sexual assault statute, 18 Pa. Con. Stat. Ann. § 3218(c), further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident. .

"298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of whether the section applies to them." 744 F. Supp. (footnote omitted).

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted their wives during the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "[r]esearchers on family violence agree that the true incidence of partner violence is probably double the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific Affairs, Violence Against Women 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. -4; Shields & Hanneke, Battered Wives' Reactions to Marital Rape, in The Dark Side of Families: Current Family Violence Research 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. Violence Against Women.

Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. L. Walker, The Battered Woman Syndrome 27-28 (1984). Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Herbert, Silver, & Ellard, Coping with an Abusive Relationship: I. How and Why do Women Stay?, 53 J. Marriage & the Family 311 (1991). Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Aguirre, Why Do They Return? Abused Wives in Shelters, 30 J. Nat. Assn. of Social Workers 350, 352 (1985). Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8 percent of all homicide victims in the United States are killed by their spouses. Mercy & Saltzman, Fatal Violence Among

Spouses in the United States, 1976Am. J. Public Health 595 (1989). Thirty percent of female homicide victims are killed by their male partners. Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess., 3 (1990).

The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence. Ryan & Plutzer, When Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 J. Marriage & the Family 41, 44 (1989).

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a

substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. See Brief for Respondents 83-86. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See Miami Herald Publishing Co. v. Tornillo. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Respondents' argument itself gives implicit recognition to this principle, at one of its critical points. Respondents speak of the one percent of women seeking abortions who are married and would choose not to notify their husbands of their plans. By selecting as the controlling class women who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, § 3209's real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. See, e. g., Akron II; Bellotti v. Baird (Bellotti II); Planned Parenthood of Central Mo. v. Danforth. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests

at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest . in his wife's pregnancy and in the growth and development of the fetus she is carrying." Danforth. With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. Stanley v. Illinois (1972); see also Quilloin v. Walcott; Caban v. Mohammed; Lehr v. Robertson. If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. Cruzan v. Director, Mo. Dept. of Health. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." Danforth. This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird (emphasis in original). The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In Bradwell v. State, 16 Wall. 130 (1873), three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the

family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a woman's role within the family, the Court held in Danforth that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. 428 U. S.. The principles that guided the Court in Danforth should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in Danforth. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all,if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the Danforth Court held it did not justify—a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that § 3209 is invalid.

We next consider the parental consent provision. Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she

and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

The only argument made by petitioners respecting this provision and to which our prior decisions do not speak is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it for the reasons given above. Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family. See Hodgson (opinion of Stevens, J.).

Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public.

For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. See 18 Pa. Cons. Stat. §§ 3207, 3214 (1990). In all events, the identity of each woman who has had an abortion remains confidential.

In Danforth, we held that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here, except that relating to

spousal notice, are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's "reason for failure to provide notice" to her husband. § 3214(a)(12). This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

The judgment in No. 91-902 is affirmed. The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability.

It is so ordered.

Justice Stevens, concurring in part and dissenting in part. The portions of the Court's opinion that I have joined are more important than those with which I disagree. I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement.

The Court is unquestionably correct in concluding that the doctrine of stare decisishas controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits The central holding of Roe v. Wade, has been a "part of our law" for almost two decades. Planned Parenthood of Central Mo. v. Danforth (Stevens, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in Griswold v. Connecticut. See also Carey v. Population Services International, 702 (1977) (White, J., concurring in part and concurring in result). The societal costs of overruling Roe at this late date would be enormous. Roe is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

Stare decisis also provides a sufficient basis for my agreement with the joint

opinion's reaffirmation of Roe's postviability analysis. Specifically, I accept the proposition that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U. S.; see I also accept what is implicit in the Court's analysis, namely, a reaffirmation of Roe's explanation of why the State's obligation to protect the life or health of the mother must take precedence over any duty to the unborn. The Court in Roe carefully considered, and rejected, the State's argument "that the fetus is a'person' within the language and meaning of the Fourteenth Amendment." 410 U. S.. After analyzing the usage of "person" in the Constitution, the Court concluded that that word "has application only postnatally." Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." From this holding, there was no dissent, see ; indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

My disagreement with the joint opinion begins with its understanding of the trimester framework established in Roe. Contrary to the suggestion of the joint opinion, it is not a "contradiction" to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake.

First, it is clear that, in order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest. See Thornburgh v. American College of Obstetricians and Gynecologists (Stevens, J., concurring); see generally Webster v. Reproductive Health Services (1989) (Stevens, J., concurring in part and dissenting in part). Moreover, as discussed above, the state interest in potential human life is not an interest in loco parentis, for the fetus is not a person.

Identifying the State's interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is

intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population,3 believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See, e. g., Rochin v. California; Skinner v. Oklahoma ex rel. Williamson. This right is neutral on the question of abortion: The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia. The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. Whalen v. Roe,429 U. S. 589, 598-600 (1977). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul." Thornburgh,476 U. S.. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may "`"expres[s] a preference for normal childbirth,"`" that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs throughout our decisions concerning reproductive freedom. In general, Roe's requirement that restrictions on abortions before viability be justified by the State's interest in maternal health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring written informed consent, see Planned

Parenthood of Central Mo. v. Danforth; limited recordkeeping and reporting, see ; and pathology reports, see Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft; as well as various licensing and qualification provisions, see, e. g., Roe; Simopoulos v. Virginia. Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see Bigelow v. Virginia, or by "requir[ing] the delivery of information designed'to influence the woman's informed choice between abortion or childbirth."' Thornburgh; see also Akron v. Akron Center for Reproductive Health, Inc. (1983).

In my opinion, the principles established in this long line of cases and the wisdom reflected in Justice Powell's opinion for the Court in Akron (and followed by the Court just six years ago in Thornburgh) should govern our decision today. Under these principles, Pa. Cons. Stat. §§ 3205(a)(2)(i)—(iii) (1990) of the Pennsylvania statute are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the Commonwealth is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth to influence the woman's choice in any way. If anything, such requirements enhance,rather than skew, the woman's decisionmaking.

The 24-hour waiting period required by §§ 3205(a)(1)—(2) of the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the Commonwealth's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the Commonwealth's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24-hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the Commonwealth

to view with skepticism the ability of minors to make decisions, see Hodgson v. Minnesota,4 none of those reasons applies to an adult woman's decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see so we must reject the notion that a woman is less capable of deciding matters of gravity. Cf. Reed v. Reed.

In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.

Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

In my opinion, a correct application of the "undue burden" standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.

The 24-hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of the burden that the 24-hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is,in my opinion, "undue" because there is no evidence that such a delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In these cases, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child-support payments. §§ 3205(a)(2)(i)—(iii). The statute requires that this information be given to all women seeking abor-

tions, including those for whom such information is clearly useless, such as those who are married, those who have undergone the procedure in the past and are fully aware of the options, and those who are fully convinced that abortion is their only reasonable option. Moreover, the statute requires physicians to inform all of their patients of "[t]he probable gestational age of the unborn child." § 3205(a)(1)(ii). This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester7 when fetal age has less relevance than when the fetus nears viability. Nor can the information required by the statute be justified as relevant to any "philosophic" or "social" argument, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in § 3205(a)(1)(ii) and §§ 3205(a)(2)(i)—(iii) do not serve a useful purpose and thus constitute an unnecessary— and therefore undue—burden on the woman's constitutional liberty to decide to terminate her pregnancy.

Accordingly, while I disagree with Parts IV, V—B, and V—D of the joint opinion,8 I join the remainder of the Court's opinion.

It is sometimes useful to view the issue of stare decisis from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in Roe v.Wade. Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Justices Blackmun, O'Connor, Kennedy, Souter, and myself. Only four—all of whom happen to be on the Court today—have reached the opposite conclusion.

Professor Dworkin has made this comment on the issue: "The suggestion that states are free to declare a fetus a person. . assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

". . If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill. . Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women." Unenumerated Rights: Whether and How Roe Should be Overruled, 59 U. Chi. L. Rev. 381, 400— 401 (1992).

The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the

sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.

As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from Akron v. Akron Center for Reproductive Health, Inc., which involved "a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion." Hodgson, n. 35.

The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see is misplaced; what matters is not only the effect of a regulation but also the reason for the regulation. As I explained in Hodgson: "In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, Shapiro v. Thompson, or deny prisoners the right to marry, Turner v. Safley (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. Turner v. Safley; Loving v. Virginia. In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, e. g., Maher v. Roe; cf. Webster v. Reproductive Health Services (1989) (O'Connor, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing'obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."'

The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied. For that reason, I discount both Justice Scalia's comments on past descriptions of the standard, see post (opinion concurring in judgment in part and dissenting in part), and the attempt to give it crystal clarity in the joint opinion. The several opinions supporting the judgment in Griswold v. Connecticut, are less illuminating than the central holding of the

case, which appears to have passed the test of time. The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

Although I agree that a parental-consent requirement (with the appropriate bypass) is constitutional, I do not join Part V—D of the joint opinion because its approval of Pennsylvania's informed parental-consent requirement is based on the reasons given in Part V—B, with which I disagree. Justice Blackmun, concurring in part, concurring in the judgment in part, and dissenting in part. I join Parts I, II, III, V—A, V—C, and of the joint opinion of Justices O'Connor, Kennedy, and Souter, ante.

Three years ago, in Webster v. Reproductive Health Services, four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of Roe and the darkness of the plurality was a single, flickering flame. Decisions since Webster gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright.

I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before Webster. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'Connor and Kennedy postponed reconsideration of Roe v. Wade, the authors of the joint opinion today join Justice Stevens and me in concluding that "the essential holding of Roe v. Wade should be retained and once again reaffirmed." In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."

A fervent view of individual liberty and the force of stare decisis have led the Court to this conclusion. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," — a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted. See Included within this realm of liberty is " 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a

child.' " quoting Eisenstadt v. Baird (emphasis in original). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." (emphasis added). Finally, the Court today recognizes that in the case of abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."

The Court's reaffirmation of Roe's central holding is also based on the force of stare decisis. "[N]o erosion of principle going to liberty or personal autonomy has left Roe's central holding a doctrinal remnant; Roe portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." Indeed, the Court acknowledges that Roe's limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it." In the 19 years since Roe was decided, that case has shaped more than reproductive planning—"[a]n entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." The Court understands that, having "call[ed] the contending sides . to end their national division by accepting a common mandate rooted in the Constitution," a decision to overrule Roe "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice In determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (emphasis added). The Court reaffirms: "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether "in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." And in applying its test, the Court remains sensitive to the unique role of women in the decision making process. Whatever may have been the practice when the Fourteenth Amendment was adopted, the Court observes, "[w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried,

from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."

Lastly, while I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. See, e. g., I am confident that in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion."

Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest judicial scrutiny. Our precedents and the joint opinion's principles require us to subject all non-de-minimis abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . ." Union Pacific R. Co. v. Botsford. Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. See These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. Eisenstadt. In Roe v. Wade, this Court correctly applied these principles to a woman's right to choose abortion.

State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See, e. g., Winston v. Lee (invalidating surgical removal of bullet from murder suspect); Rochin v. California (invalidating stomach pumping).

Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no

less an impact on a woman's life than decisions about contraception or marriage. 410 U. S.. Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices." Carey v. Population Services International.

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. See, e. g., Mississippi Univ. for Women v. Hogan (1982); Craig v. Boren (1976) The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."

The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. Griswold v. Connecticut. We have applied this principle specifically in the context of abortion regulations. Roe v. Wade.

Roe implemented these principles through a framework that was designed "to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact," Roe identified two relevant state interests: "an interest in preserving and protecting the health of the pregnant woman" and an interest in "protecting the potentiality of human life." 410 U. S.. With respect to the State's interest in the health of the mother, "the'compelling' point . is at approximately the end of the first trimester," because it is at that point that the mortality rate in abortion approaches that in childbirth. With respect to the State's interest in potential life, "the'compelling' point is at viability," because it is at that point that the fetus "presumably has the capability of meaningful life outside the mother's womb." In order to fulfill the requirement of narrow tailoring, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered." Akron v. Akron Center for Reproductive Health, Inc..

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in Roe. Strict scrutiny

of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach. The factual premises of the trimester framework have not been undermined, see Webster (Blackmun, J., dissenting), and the Roe framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

Nonetheless, three criticisms of the trimester framework continue to be uttered. First, the trimester framework is attacked because its key elements do not appear in the text of the Constitution. My response to this attack remains the same as it was in Webster:

"Were this a true concern, we would have to abandon most of our constitutional jurisprudence. [T]he'critical elements' of countless constitutional doctrines nowhere appear in the Constitution's text . . The Constitution makes no mention, for example, of the First Amendment's'actual malice' standard for proving certain libels, see New York Times Co. v. Sullivan.. . Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the Roe framework, these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government."

The second criticism is that the framework more closely resembles a regulatory code than a body of constitutional doctrine. Again, my answer remains the same as in Webster:

"[I]f this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence. . Are [the distinctions entailed in the trimester framework] any finer, or more'regulatory,' than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a'release time' program permitting public-school students to leave school grounds during school hours to receive religious instruction does not violate the Establishment Clause, even though a release-time program permitting religious instruction on school grounds does violate the Clause? Compare Zorach v. Clauson, with Illinois ex rel. Mc- Collum v. Board of Education of School Dist. No. 71, Champaign County. . Similarly, in a Sixth Amendment case, the Court held that although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, Geders v. United States, that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony. Perry v. Leeke.

"That numerous constitutional doctrines result in narrow differentiations be-

tween similar circumstances does not mean that this Court has abandoned adjudication in favor of regulation." -550.

The final, and more genuine, criticism of the trimester framework is that it fails to find the State's interest in potential human life compelling throughout pregnancy. No Member of this Court—nor for that matter, the Solicitor General, see Tr. of Oral Arg. 42—has ever questioned our holding in Roe that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U. S.. Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution. Nor, consistent with our Establishment Clause, can it be a theological or sectarian interest. See Thornburgh v. American College of Obstetricians and Gynecologists (Stevens, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See (Stevens, J., concurring in part and dissenting in part).

But while a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women. Again, I stand by the views I expressed in Webster:

"I remain convinced, as six other Members of this Court 16 years ago were convinced, that the Roe framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows'quickening'—the point at which a woman feels movement in her womb—and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy." 492 U. S..

Roe's trimester framework does not ignore the State's interest in prenatal life. Like Justice Stevens, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." But

"[s]erious questions arise . when a State attempts to persuade the woman to

choose childbirth over abortion. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments." (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

As the joint opinion recognizes, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." In sum, Roe's requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's constitutional right with the State's legitimate interests.

Application of the strict scrutiny standard results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, stare decisis requires that we again strike them down.

This Court has upheld informed- and written-consent requirements only where the State has demonstrated that they genuinely further important health-related state concerns. See Planned Parenthood of Central Mo. v. Danforth (1976). A State may not, under the guise of securing informed consent, "require the delivery of information'designed to influence the woman's informed choice between abortion or childbirth."' Thornburgh, quoting Akron,462 U. S.. Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an " 'undesired and uncomfortable straitjacket.' " Thornburgh, quoting Danforth, n. 8.

Measured against these principles, some aspects of the Pennsylvania informed-consent scheme are unconstitutional. While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare Pa. Cons. Stat. §§ 3205(a)(i)-(iii) (1990) with Akron, n. 37, I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than a counselor. The District Court found that the physician-only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366-387, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

Sections 3205(a)(2)(i)-(iii) of the Act further requires that the physician or a qualified nonphysician inform the woman that printed materials are available from the Commonwealth that describe the fetus and provide information about

medical assistance for childbirth, information about child support from the father, and a list of agencies offering adoption and other services as alternatives to abortion. Thornburgh invalidated biased patient-counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in these cases:

"[T]he listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

"The requirements . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this . for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." 476 U. S. (citation omitted).

"This type of compelled information is the antithesis of informed consent," and goes far beyond merely describing the general subject matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose."

The 24-hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts. 744 F. Supp. 1323, 1378-1379 (ED Pa. 1990). In Akron this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest.

As Justice Stevens insightfully concludes, the mandatory delay rests either on

outmoded or unacceptable assumptions about the decision making capacity of women or the belief that the decision to terminate the pregnancy is presumptively wrong. The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this information—of the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic.

Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. 744 F. Supp.. Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "significant state interest in conditioning an abortion . that is not present in the case of an adult." Danforth (emphasis added). The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, § 3206 is not narrowly drawn to serve that interest.

Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under Danforth, in which this Court held that recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. -81. The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the Commonwealth's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. 744 F. Supp.. The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest in maternal health. I therefore agree with

the District Court's conclusion that the confidential reporting requirements are unconstitutional insofar as they require the name of the referring physician and the basis for his or her medical judgment.

In sum, I would affirm the judgment in No. 91-902 and reverse the judgment in No. 91-744 and remand the cases for further proceedings.

At long last, The Chief Justice and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases." Post. If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from The Chief Justice's opinion.

The Chief Justice's criticism of Roe follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. Post. This constricted view is reinforced by The Chief Justice's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in Michael H. v. Gerald D., where the plurality found no fundamental right to visitation privileges by an adulterous father, or in Bowers v. Hardwick, where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the " 'firing [of] a gun . into another person's body.' " Post. In The Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called sexual deviates Given The Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than The Chief Justice's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental—for The Chief Justice, only women's psychological health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision. Post. In short, The Chief Justice's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does The Chief Justice give any serious consideration to the doctrine of stare decisis. For The Chief Justice, the facts that gave rise to Roe are surprisingly simple: "women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children." Post. This characterization of the issue thus allows The Chief Jus-

tice quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take virtually immediate account of" a decision overruling Roe. Post (internal quotation marks omitted).

The Chief Justice's narrow conception of individual liberty and stare decisis leads him to propose the same standard of review proposed by the plurality in Webster."States may regulate abortion procedures in ways rationally related to a legitimate state interest. Williamson v. Lee Optical of Oklahoma, Inc.; cf. Stanley v. Illinois (1972)." Post. The Chief Justice then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must " 'show that no set of circumstances exists under which the [provision] would be valid.' " Post, quoting Ohio v. Akron Center for Reproductive Health. In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to anyone. Finally, in applying his standard to the spousal-notification provision, The Chief Justice contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. Post, n. 2. Yet throughout the explication of his standard, The Chief Justice never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest—a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, with no exception for the life of the mother, "could raise very serious questions." Tr. of Oral Arg. 48. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." If, as The Chief Justice contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a State's prohibiting the sins of the father from being visited upon his offspring?

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

In one sense, the Court's approach is worlds apart from that of The Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

As I shall explain, the joint opinion and I disagree on the appropriate standard of review for abortion regulations. I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard.

I also join the Court's decision to uphold the medical emergency provision. As the Court notes, its interpretation is consistent with the essential holding ofRoe that "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." As is apparent in my analysis below, however, this exception does not render constitutional the provisions which I conclude do not survive strict scrutiny.

As the joint opinion acknowledges, this Court has recognized the vital liberty interest of persons in refusing unwanted medical treatment. Cruzan v. Director, Mo. Dept. of Health. Just as the Due Process Clause protects the deeply personal decision of the individual to refuse medical treatment, it also must protect the deeply personal decision to obtain medical treatment, including a woman's decision to terminate a pregnancy.

A growing number of commentators are recognizing this point. See, e. g., L. Tribe, American Constitutional Law § 15-10, pp. 1353-1359 (2d ed. 1988); Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 350-380 (1992); Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 31-44 (1992); cf. Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 788-791 (1989) (similar analysis under the rubric of privacy); MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L. J. 1281, 1308-1324 (1991).

To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives. See, e. g., Planned Parenthood of Central Mo. v. Danforth, 79-81 (1976) (upholding requirements of a woman's written consent and record keeping). But the Court today reaffirms the essential principle of Roe that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." Under Roe, any more than de minimis interference is undue.

The joint opinion agrees with Roe's conclusion that viability occurs or 24 weeks at the earliest. Compare with Roe v. Wade.

While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the

joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." Because the State's information must be "calculated to inform the woman's free choice, not hinder it," the measures must be designed to ensure that a woman's choice is "mature and informed," not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the manner of presentation in order to inflict "psychological abuse," designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the life of the unborn."

The Court's decision in Hodgson v. Minnesota, validating a 48-hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24-hour delay is imposed on an adult woman. See -450, n. 35; Ohio v. Akron Center for Reproductive Health, Inc.. Moreover, the statute in Hodgson did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

Because this information is so widely known, I am confident that a developed record can be made to show that the 24-hour delay, "in a large fraction of the cases in which [the restriction] is relevant, . will operate as a substantial obstacle to a woman's choice to undergo an abortion."

The judicial-bypass provision does not cure this violation. Hodgson is distinguishable, since these cases involve more than parental involvement or approval—rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face-to-face meeting with the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place any restriction on a young woman's right to an abortion,however irrational,simply because it has provided a judicial bypass.

Obviously, I do not share The Chief Justice's views of homosexuality as sexual deviance. See Bowers, n. 2.

Justice Scalia urges the Court to "get out of this area," post, and leave questions regarding abortion entirely to the States, post. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, Justice Scalia is uncharacteristically naive if he thinks that overruling Roe and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate

and prohibit abortion in a post-Roe world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, but beats a wholesale retreat from the substance of that case. We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases. We would adopt the approach of the plurality in Webster v. Reproductive Health Services, and uphold the challenged provisions of the Pennsylvania statute in their entirety.

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate Roe; this case involves the regulation of abortions rather than their outright prohibition." Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in Webster v. Reproductive Health Servicesand Hodgson v. Minnesota, the Court of Appeals concluded that Justice O'Connor's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. 947 F. 2d ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting Marks v. United States (internal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in Roe v. Wadein which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother We agree with the Court of Appeals that our decision in Roe is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion. But, as the Court of Appeals found, the state of our post-Roe decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that

line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of Roe, Justices O'Connor, Kennedy, and Souter adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

In Roe, the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . and that it has still another important and legitimate interest in protecting the potentiality of human life." 410 U. S. (emphasis omitted). In the companion case of Doe v. Bolton, the Court referred to its conclusion in Roe "that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U. S.. But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after Roe, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a number of decisions, however, the Court has substantially limited the States in their ability to impose such requirements. With regard to parental notice requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. H. L. v. Matheson (1981). Recently, however, we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to two parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. Hodgson v. Minnesota.

We have treated parental consent provisions even more harshly. Three years after Roe, we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket provision. . requiring the consent of a parent." Planned Parenthood of Central Mo. v. Danforth. In Bellotti v. Baird, the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her

best interests. In light of Bellotti, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of Bellotti, see Akron v. Akron Center for Reproductive Health, Inc. (1983). We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In Roe, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances. Because neither Roenor Doe involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. Roe v. Wade, n. 67. But three years later, in Danforth, the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. Planned Parenthood of Central Mo. v. Danforth.

States have also regularly tried to ensure that a woman's decision to have an abortion is an informed and well-considered one. In Danforth, we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision] be made with full knowledge of its nature and consequences." Since that case, however, we have twice invalidated state statutes designed to impart such knowledge to a woman seeking an abortion. In Akron, we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. Akronv. Akron Center for Reproductive Health. More recently, in Thornburgh v. American College of Obstetricians and Gynecologists, we struck down a more limited Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." Even when a State has sought only to provide information that, in our view, was consistent with the Roe framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. Akron v. Akron Center for Reproductive Health. In Akron as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. -451.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be per-

formed in outpatient clinics, see Simopoulos v. Virginia,we concluded in Akron and Ashcroft that a State could not require that such abortions be performed only in hospitals. See Akron v. Akron Center for Reproductive Health; Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft. Despite the fact that Roe expressly allowed regulation after the first trimester in furtherance of maternal health, " 'present medical knowledge,' " in our view, could not justify such a hospitalization requirement under the trimester framework. Akron v. Akron Center for Reproductive Health (quoting Roe v. Wade). And in Danforth, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. 428 U. S..

Although Roe allowed state regulation after the point of viability to protect the potential life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In Colautti v. Franklin, the Court struck down a statute that governed the determination of viability. -397. In the process, we made clear that the trimester framework incorporated only one definition of viability—ours—as we forbade States to decide that a certain objective indicator—"be it weeks of gestation or fetal weight or any other single factor"—should govern the definition of viability. In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See -401; see also Thornburgh v. American College of Obstetricians and Gynecologists,476 U. S. (invalidating a similar regulation). In Thornburgh, the Court struck down Pennsylvania's requirement that a second physician be present at post viability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. -771. Regulations governing the treatment of aborted fetuses have met a similar fate. In Akron, we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 462 U. S. (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon Roe in imposing ever greater restrictions on the States. See Thornburgh v. American College of Obstetricians and Gynecologists (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in Roe is readily apparent"); (White, J., dissenting) ("[T]he majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in Roe"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See Ohio v. Akron Center for Reproductive Health; Hodgson v. Minnesota; Webster v. Reproductive Health Services.

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following Marks v. United States, it concluded that in light of Webster and Hodgson, the strict scrutiny standard

enunciated in Roe was no longer applicable, and that the "undue burden" standard adopted by Justice O'Connor was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in Roe, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See Payne v. Tennessee (1991) (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative action is practically impossible" (internal quotation marks omitted)); Garcia v. San Antonio Metropolitan Transit Authority, 557 (1985).

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." Palko v. Connecticut. Three years earlier, in Snyder v. Massachusetts, we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ; see also Michael H. v. Gerald D. (plurality opinion) (citing the language from Snyder). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint. In Pierce v. Society of Sisters, we held that it included a parent's right to send a child to private school; in Meyer v. Nebraska, we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, Loving v. Virginia, 388 U. S. 1 (1967); a right to procreate, Skinner v. Oklahoma ex rel. Williamson; and a right to use contraceptives, Griswold v. Connecticut; Eisenstadt v. Baird. But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

In Roe v. Wade, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S.. We are now of the view that, in terming this right fundamental, the Court in Roe read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." Harris v. McRae. The abortion decision must therefore "be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." Thornburgh v. American College of Obstetricians and Gynecologists (White, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See Michael H. v. Gerald D., n. 4 (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its

discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when Roe was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. Roe v. Wade (Rehnquist, J., dissenting). On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in Roe when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in Bowers v. Hardwick:

"Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following Roe is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." Webster v. Reproductive Health Services (plurality opinion). The Court in Roe reached too far when it analogized the right to abort a fetus to the rights involved in Pierce, Meyer, Loving, and Griswold, and thereby deemed the right to abortion fundamental.

The joint opinion of Justices O'Connor, Kennedy, and Souter cannot bring itself to say that Roe was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its holding." Instead of claiming that Roe was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of stare decisis. This discussion of the principle of stare decisis appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing

with Roe. Roe decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. Roe decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. ; see Roe v. Wade. Roe analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decision making for 19 years. The joint opinion rejects that framework.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of Roe that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. Roe continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following Roe, such as Akron v. Akron Center for Reproductive Health, Inc., and Thornburgh v. American College of Obstetricians and Gynecologists, are frankly overruled in part under the "undue burden" standard expounded in the joint opinion.

In our view, authentic principles of stare decisis do not require that any portion of the reasoning in Roe be kept intact. "Stare decisis is not . a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. Burnet v. Coronado Oil & Gas Co. (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depar[t] from a proper understanding" of the Constitution. Garcia v. San Antonio Metropolitan Transit Authority; see United States v. Scott (" '[I]n cases involving the Federal Constitution, . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function' " (quoting Burnet v. Coronado Oil & Gas Co. (Brandeis, J., dissenting))); Smith v. Allwright. Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, e. g., West Virginia Bd. of Ed. v. Barnette; Erie R. Co. v. Tompkins (1938).

The joint opinion discusses several stare decisis factors which, it asserts, point toward retaining a portion of Roe. Two of these factors are that the main "factual underpinning" of Roe has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. Of course, what might be called the basic facts which gave rise to Roe have remained the same—women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to Roe will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the

question. And surely there is no requirement, in considering whether to depart from stare decisis in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that Roe and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. But there is no indication that these components of Roe are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "[c]onsiderations in favor of stare decisis are at their acme." Payne v. Tennessee. But, as the joint opinion apparently agrees, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by Roe,and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of Roe, as "reproductive planning could take virtually immediate account of" this action. The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since Roe has led to "two decades of economic and social developments" that would be undercut if the error of Roe were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in reliance upon Roe, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the Roe decision over the last 19 years and have "ordered their thinking and living around" it. As an initial matter, one might inquire how the joint opinion can view the "central holding" of Roe as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see Plessy v. Ferguson, or that "liberty" under the Due Process Clause protected "freedom of

contract," see Adkins v. Children's Hospital of District of Columbia; Lochner v. New York. The "separate but equal" doctrine lasted 58 years after Plessy, and Lochner's protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See Brown v. Board of Education (rejecting the "separate but equal" doctrine); West Coast Hotel Co. v. Parrish (overruling Adkins v. Children's Hospitalin upholding Washington's minimum wage law).

Apparently realizing that conventional stare decisis principles do not support its position, the joint opinion advances a belief that retaining a portion of Roe is necessary to protect the "legitimacy" of this Court. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolve[s] the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases," its decision is exempt from reconsideration under established principles of stare decisis in constitutional cases. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the original decision has died away.

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of stare decisis when urged to reconsider earlier decisions. Over the past 21 years, for example,

the Court has overruled in whole or in part 34 of its previous constitutional decisions. See Payne v. Tennessee, and n. 1 (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to Roe. (discussing Lochner v. New Yorkand Plessy v. Ferguson). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose not to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See West Coast Hotel Co. v. Parrish; Brown v. Board of Education. One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to Roe. There is no reason to think that either Plessy or Lochner produced the sort of public protest when they were decided that Roe did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, Roe, so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the decision at all costs lest it seem to be retreating under fire. Public protests should not alter the normal application of stare decisis, lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between Roe, on the one hand, and Plessy and Lochner, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling Plessy in Brown on a deeply divisive issue. And our decision in West Coast Hotel,which overruled Adkins v. Children's Hospitaland Lochner, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition by stubbornly refusing to reexamine the Lochner rationale, lest it lose legitimacy by appearing to "overrule under fire." The joint opinion agrees that the Court's stature would have been seriously damaged if in Brown and West Coast Hotel it had dug in its heels and refused to apply normal principles of stare decisis to the earlier decisions. But the opinion contends that the Court was entitled to overrule Plessy and Lochner in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, post hoc rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in Lochner only because the Depression had convinced "most people" that constitutional protection of contractual freedom contributed to an economy that failed to protect the welfare of all. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the LochnerCourt did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simple believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." Lochner v. New York. Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in Holden v. Hardy, and other States followed suit shortly afterwards, see, e. g., Muller v. Oregon; Bunting v. Oregon. These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at any wage.

When the Court finally recognized its error in West Coast Hotel, it did not engage in the post hoc rationalization that the joint opinion attributes to it today; it did not state that Lochner had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his Lochner dissent, that "[t]he Constitution does not speak of freedom of contract." West Coast Hotel Co. v. Parrish; Lochnerv. New York (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in Brown. In fact, the opinion lauds Brown in comparing it to Roe. This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in Plessy because of its "intensely divisive" character. To us, adherence to Roe today under the guise of "legitimacy" would seem to resemble more closely adherence to Plessy on the same ground. Fortunately, the Court did not choose that option in Brown, and instead frankly repudiated Plessy. The joint opinion concludes that such repudiation was justified only because of newly

discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided Plessy, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." Plessy v. Ferguson. It is clear that the same arguments made before the Court in Brown were made in Plessy as well. The Court in Brown simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of Brown is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the Plessy Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of stare decisis is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrender[ing] to political pressure" when it overrules a controversial decision, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to adhere to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision. The decision in Roehas engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on Roe can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court should make its decisions with a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both Brown and West Coast Hotel, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in

some recent capital cases, and in Bowers v. Hardwick, have also engendered demonstrations in opposition. The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their protests will only cement in place a decision which by normal standards of stare decisis should be reconsidered. Nearly a century ago, Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," 57 Albany L. J. 166, 169 (1898). This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion— the "undue burden" standard. As indicated above, Roe v. Wade adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time Roe was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result in the sort of "simple limitation," easily applied, which the joint opinion anticipates. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. Griswold v. Connecticut (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. But the authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," Justice Stevens would hold that they do.

Furthermore, while striking down the spousal notice regulation, the joint opinion would uphold a parental consent restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that

parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of stare decisis and "legitimacy" is this: Roe v. Wade stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither stare decisis nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in Webster. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. Williamson v. Lee Optical of Oklahoma, Inc.; cf. Stanley v. Illinois (1972). With this rule in mind, we examine each of the challenged provisions.

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 18 Pa. Cons. Stat. § 3205 (1990). Section 3205(a)(1) requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable gestational age; and (iii) the medical risks involved in carrying her pregnancy to term. Section 3205(a)(2) requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; and (iii) the child's father is liable for child support. The Act also imposes a 24-hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'Connor, Kennedy, and Souter, JJ.

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See Thornburgh v. American College of Obstetricians and Gynecologists. Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an

abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." (White, J., dissenting).

We conclude that this provision of the statute is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision.

Section 3205(a)(1) requires a physician to disclose certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." 947 F. 2d. We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." Akron v. Akron Center for Reproductive Health, Inc.. An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See -446, n. 37 (required disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." 947 F. 2d.

Section 3205(a)(2) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." -705. And petitioners do not claim that the information required to be disclosed by statute is in any way false or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and noninflammatory." We conclude that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, Thornburgh v. American College of Obstetricians and Gynecologists (O'Connor, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. (White, J., dissenting) ("[T]he ostensible objective of Roe v. Wade is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in Thornburgh this Court struck down informed consent requirements similar to the ones at issue here. See -764. It is clear, however,

that while the detailed framework of Roe led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, . or for any other surgical procedure except abortion." Webster v. Reproductive Health Services (plurality opinion) (citing Thornburgh v. American College of Obstetricians and Gynecologists (White, J., dissenting); (Burger, C. J., dissenting)). In light of our rejection of Roe's "fundamental right" approach to this subject, we do not regard Thornburgh as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24-hour mandatory waiting period is unconstitutional. See Akron v. Akron Center for Reproductive Health, Inc.. Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting period requirements do not apply in the case of a medical emergency. See 18 Pa. Cons. Stat. §§ 3205(a), (b) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own." (O'Connor, J., dissenting).

In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she must either furnish the consent of one of her parents, or must opt for the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, or determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical emergency.

This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft (upholding parental consent requirement with a similar judicial bypass option); Akron v. Akron Center for Reproductive Health, Inc. (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); Bellotti v. Baird.

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack

of judgment may sometimes impair their ability to exercise their rights wisely." Hodgson v. Minnesota (opinion of Stevens, J.). A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." Ohio v. Akron Center for Reproductive Health (opinion of Kennedy, J.); see also Planned Parenthood of Central Mo. v. Danforth (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. 18 Pa. Cons. Stat. § 3209 (1990). See Appendix to opinion of O'Connor, Kennedy, and Souter, JJ.

We first emphasize that Pennsylvania has not imposed a spousal consent requirement of the type the Court struck down in Planned Parenthood of Central Mo. v. Danforth. Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." But the provision here involves a much less intrusive requirement of spousal notification, not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." Hodgson v. Minnesota (Kennedy, J., concurring in judgment in part and dissenting in part); see H. L. v. Matheson, n. 17. Danforth thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. 947 F. 2d. For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she

would suffer bodily injury as a result of the notification. 18 Pa. Cons. Stat. § 3209(b) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." United States v. Salerno. Thus, it is not enough for petitioners to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. Ohio v. Akron Center for Reproductive Health. Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." (internal quotation marks omitted). This they have failed to do.

The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See Planned Parenthood of Central Mo. v. Danforth ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); (White, J., concurring in part and dissenting in part); Skinner v. Oklahoma ex rel. Williamson. The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "[t]he Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion." (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." 18 Pa. Cons. Stat. § 3209(a) (1990). This Court has previously recognized "the importance of the marital relationship in our society." Planned Parenthood of Central Mo. v. Danforth. In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decision making, and thereby fosters marital integrity. See Labine v. Vincent ("[T]he power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord

and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See Planned Parenthood of Central Mo. v. Danforth (Stevens, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counter productive) ordinarily does not render the statute unconstitutional or even constitutionally suspect." Thornburgh v. American College of Obstetricians and Gynecologists (White, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See Harris v. McRae ("It is not the mission of this Court or any other to decide whether the balance of competing interests . is wise social policy").

The Act also imposes various reporting requirements. Section 3214(a) requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See 18 Pa. Cons. Stat. §§ 3214(a)(1), (5), (10) (1990). See Appendix to opinion of O'Connor, Kennedy, and Souter, JJ., The District Court found that these reports are kept completely confidential. 947 F. 2d. We further conclude that these reporting requirements rationally further the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion facility to file a report with its name and address, as well as the names and addresses of any parent, subsidiary, or affiliated organizations. 18 Pa. Cons. Stat. § 3207(b) (1990). Section 3214(f) further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility received state funds within the preceding 12 months. See Appendix to opinion of O'Connor, Kennedy, and Souter, JJ., Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate

state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. As the Court of Appeals observed, "[w]hen a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." 947 F. 2d. These reporting requirements rationally further this legitimate state interest.

Finally, petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See 18 Pa. Cons. Stat. §§ 3205(a), 3206(a), 3209(c) (1990). The Act defines a "medical emergency" as

"[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." § 3203.

Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer— preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See 947 F. 2d. Finding that "[t]he Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in Thornburgh, one which the Court made reference to with apparent approval. 476 U. S. ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so") We find that the interpretation of the Court of Appeals in these cases is eminently reasonable, and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It

bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If,as we believe,these do,their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

Two years after Roe, the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. Judgment of February 25, 1975, 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to Roe v. Wade, 9 John Marshall J. Prac. & Proc. 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of Roe in striking down a law that restricted abortion. Morgentaler v. Queen, 1 S. C. R. 30, 44 D. L. R. 4th 385 (1988).

The joint opinion of Justices O'Connor, Kennedy, and Souter appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision. In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. 744 F. Supp. 1323, 1360 (ED Pa. 1990). In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision. The joint opinion puts to one side these situations where the regulation imposes no obstacle at all,and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See 744 F. Supp.. For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands

(and do not qualify for an exception). This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

The definition in use at that time provided as follows: "'Medical emergency.'That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa. Stat.Ann., Tit § 3203(Purdon 1983).

Justice Scalia, with whom The Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in Webster v. Reproductive Health Services (opinion concurring in part and concurring in judgment), and Ohio v. Akron Center for Reproductive Health (Akron II) (concurring opinion). The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." The Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," —but the crucial part of that qualification is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—with which entire societies of reasonable people disagree—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed Akron II (Scalia, J., concurring).

The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," (citing Michael H. v. Gerald D.,491 U. S. 110, 127, n. 6 (1989) (opinion of Scalia, J.)). That is not, however, what Michael H. says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "cur[b] the discretion of federal judges," is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Act on did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.

Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

"The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in Roe v. Wade. Today's opinion describes the methodology of Roe, quite accurately, as weighing against the woman's interest the State's " 'important and legitimate interest in protecting the potentiality of human life.' " (quoting Roe). But "reasoned judgment" does not begin by begging the question, as Roe and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, e. g., Roe; Planned Parenthood of Central Mo. v. Danforth; Colautti v. Franklin; Akron v. Akron Center for Reproductive Health, Inc. (Akron I); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft. The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer Roe came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

The authors of the joint opinion, of course, do not squarely contend that Roe

v. Wade was a correct application of "reasoned judgment"; merely that it must be followed, because of stare decisis. 871. But in their exhaustive discussion of all the factors that go into the determination of when stare decisis should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies .. in its legitimacy, a product of substance and perception," the "substance" part of the equation demands that plain error be acknowledged and eliminated. Roe was plainly wrong—even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," ; it involves a "most intimate and personal choic[e]," ; it is "central to personal dignity and autonomy," ; it "originate[s] within the zone of conscience and belief," ; it is "too intimate and personal" for state interference, ; it reflects "intimate views" of a "deep, personal character," ; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," ; and it concerns a particularly " 'important decisio[n],' " (citation omitted) But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see Bowers v. Hardwick) has held are not entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:

"[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." Dred Scott v. Sandford, 19 How. 393, 621 (1857) (dissenting opinion).

"Liberty finds no refuge in a jurisprudence of doubt." One might have feared

to encounter this august and sonorous phrase in an opinion defending the real Roe v. Wade, rather than the revised version fabricated today by the authors of the joint opinion. The shortcomings of Roe did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion—which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by Justice O'Connor in her dissent in Akron I. See Because the three Justices now wish to "set forth a standard of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." ; see also An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." This latter statement cannot possibly mean what it says. Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not unduly hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

The ultimately standard less nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As The Chief Justice points out, Roe's strict-scrutiny standard "at least had a recognized basis in constitutional law at the time Roe was decided," while "[t]he same cannot be said for the'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see R. A. V. v. St. Paul (1992); Employment

Div., Dept. of Human Resources of Ore. v. Smith (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which directly regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has consciously and directly regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in Roe."

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n. 3is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in Justice O'Connor's earlier opinions. Those opinions stated that a statute imposes an "undue burden" if it imposes "absolute obstacles or severe limitations on the abortion decision," Akron I (dissenting opinion) (emphasis added). Those strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is "undue" if it merely imposes a "substantial" obstacle to abortion decisions. Justice O'Connor has also abandoned (again without explanation) the view she expressed in Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relate[s] to the preservation and protection of maternal health," (citation and internal quotation marks omitted). In today's version, even health measures will be upheld only "if they do not constitute an undue burden," (emphasis added). Gone too is Justice O'Connor's statement that "the State possesses compelling interests in the protection of potential human life throughout pregnancy," Akron I(dissenting opinion); instead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest, (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of Roe. See Akron I, n. 1.) And "viability" is no longer the "arbitrary" dividing line previously decried by Justice O'Connor in Akron I, ; the Court now announces that "the attainment of viability may continue to serve as the critical fact," It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

Because the portion of the joint opinion adopting and describing the undue

burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases. Thus, the joint opinion would uphold the 24-hour waiting period contained in the Pennsylvania statute's informed consent provision, because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk," The three Justices therefore conclude that "on the record before us, we are not convinced that the 24-hour waiting period constitutes an undue burden." The requirement that a doctor provide the information pertinent to informed consent would also be upheld because "there is no evidence on this record that [this requirement] would amount in practical terms to a substantial obstacle to a woman seeking an abortion." Similarly, the joint opinion would uphold the reporting requirements of the Act, §§ 3207, 3214, because "there is no showing on the record before us" that these requirements constitute a "substantial obstacle" to abortion decisions. But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle." Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length.

I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice But what is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, e. g., 893, 901. We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standard less nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue"—subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

To the extent I can discern any meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not

regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevent[s] a significant number of women from obtaining an abortion," ; whether a "significant number of women . are likely to be deterred from procuring an abortion," ; and whether the regulation often "deters" women from seeking abortions, We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of Roe for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As Justice Blackmun recognizes (with evident hope), the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference for childbirth over abortion," Reason finds no refuge in this jurisprudence of confusion.

"While we appreciate the weight of the arguments . that Roe should be overruled, the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis."

The Court's reliance upon stare decisis can best be described as contrived. It insists upon the necessity of adhering not to all of Roe, but only to what it calls the "central holding." It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis, and I confess never to have heard of this new, keep-what-you-want-and-throwaway-the-rest version. I wonder whether, as applied to Marbury v. Madison, 1 Cranch 137 (1803), for example, the new version of stare decisis would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in Marbury) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court has saved the "central holding" of Roe, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to Roeas the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of Roe, since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging stare decisis, that Roe"has in no sense proven'unworkable,"' I suppose

the Court is entitled to call a "central holding" whatever it wants to call a "central holding"—which is, come to think of it, perhaps one of the difficulties with this modified version of stare decisis. I thought I might note, however, that the following portions of Roe have not been saved:

- Under Roe, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice. Thornburgh,476 U. S.; Akron I. Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional.
- Under Roe, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. Akron I. Under the "undue burden" regime (as applied today, at least) it is not.
- Under Roe, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. Akron I. Under the "undue burden" regime (as applied today, at least) it is not.
- Under Roe, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. Thornburgh. Under the "undue burden" regime (as applied today, at least) it generally is not.

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe . its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."

The Court's description of the place of Roe in the social history of the United States is unrecognizable. Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before Roe v. Wade was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-Roe, moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, Roe created a

vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution guarantees abortion, how can it be bad?"—not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray Roe as the states manlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any Pax Roeana, that the Court's new majority decrees.

"[T]o overrule under fire . would subvert the Court's legitimacy . .". . To all those who will be . tested by follow-ing, the Court implicitly undertakes to remain stead- fast . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and . the commitment [is not] obsolete. .

"[The American people's] belief in themselves as . a people [who aspire to live according to the rule of law] is not readily separable from their under- standing of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges— leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.

"The judiciary . has . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . ."

The Federalist No. 78, pp. 393-394 (G. Wills ed. 1982). Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior Courts,"), with the more democratic views of a more humble man:

"[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still

for the Court's lengthy lecture upon the virtues of "constancy," of "remain[ing] steadfast," , and adhering to "principle," ante, passim. Among the five Justices who purportedly adhere to Roe, at most three agree upon the principle that constitutes adherence (the joint opinion's "undue burden" standard)—and that principle is inconsistent with Roe. See 410 U. S. To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. See n. 4; see. It is beyond me how the Court expects these accommodations to be accepted "as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." The only principle the Court "adheres" to, it seems to me, is the principle that the Court must be seen as standing by Roe. That is not a principle of law (which is what I thought the Court was talking about), but a principle of Realpolitik—and a wrong one at that.

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced— against overruling, no less—by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by Roe. In my history book, the Court was covered with dishonor and deprived of legitimacy by Dred Scott v. Sandford, 19 How. 393 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by West Coast Hotel Co. v. Parrish, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both Dred Scott and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, Dred Scott was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for Lochner v. New York and Roe v. Wade." D. Currie, The Constitution in the Supreme Court 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution has an evolving meaning, see ; that the Ninth Amendment's reference to "othe[r]" rights is not a disclaimer, but a charter for action, ; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of Roe, to protest our saying that the Constitution

requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little they intimidate us.

Of course, as The Chief Justice points out, we have been subjected to what the Court calls " 'political pressure' " by both sides of this issue. Maybe today's decision not to overrule Roe will be seen as buckling to pressure from that direction. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is legally right by asking two questions: (1) Was Roe correctly decided? (2) Has Roe succeeded in producing a settled body of law? If the answer to both questions is no, Roe should undoubtedly be overruled.

In truth, I am as distressed as the Court is—and expressed my distress several years ago, see Webster—about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is,that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court—not just those mentioned in the text or established in the traditions of our society. Why even the Ninth Amendment—which says only that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through "reasoned judgment."

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, Lee v. Weisman; if, as

I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. Justice Blackmun not only regards this prospect with equanimity, he solicits it.

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in Dred Scott. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the

losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

The Court's suggestion, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See Loving v. Virginia ("In the case at bar, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also (Stewart, J., concurring in judgment). The enterprise launched in Roe v. Wade, by contrast, sought to establish —in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text. There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor.It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

Justice Blackmun's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices, "ante; it is a matter "central to personal dignity and au choice having serious and personal consequences of major importance to [a woman's] future,"' ; the authority to make this "traumatic and yet empowering decisio[n]" is "an element of basic human dignity," ; and it is "nothing less than a matter of conscience,"

The joint opinion is clearly wrong in asserting, that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in Justice Blackmun's opinion for the Court in Bellotti v. Baird (Bellotti I), was not by way of setting forth the standard of unconstitutionality, as Justice O'Connor's later opinions did, but by way of expressing the conclusion of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several non majority opinions, see, e. g., Bellotti v. Baird (Bellotti II); Carey v. Population Services International (opinion concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in Akron v. Akron Center for Reproductive Health, Inc., n. 1 (1983) (Akron I) The joint opinion's reliance on Maher v. Roe, and Harris v. McRae, is entirely misplaced, since those cases did not involve regulation of abortion, but mere refusal to fund it. In any event, Justice O'Connor's earlier formulations have apparently now proved unsatisfactory to the three Justices, who—in the name of stare decisis no less—today find it

necessary to devise an entirely new version of "undue burden" analysis. See

The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, e. g., Akron I (O'Connor, J., dissenting) ("The'undue burden' . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting'compelling state interest' standard"); see also Hodgson v. Minnesota (1990) (O'Connor, J., concurring in part and concurring in judgment in part); Thornburgh v. American College of Obstetricians and Gynecologists (O'Connor, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in Webster v. Reproductive Health Services, which adopted the rational-basis test, could join an opinion expressly adopting the undue burden test. See (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous citation of the plurality opinion in Ohio v. Akron Center for Reproductive Health (Akron II) (opinion of Kennedy, J.), as applying the undue burden test. See (using this citation to support the proposition that "two of us"—i. e., two of the authors of the joint opinion—have previously applied this test). In fact, Akron

does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, or otherwise unconstitutional, burden." 497 U. S. (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under any standard, including the undue burden test, amounts to adopting the undue burden test as the exclusive standard. The Court's citation of Hodgson as reflecting Justice Kennedy's and Justice O'Connor's "shared premises," is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case.I joined Justice Kennedy's opinions in both Hodgson and Akron II; I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

Of course Justice O'Connor was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. Because this additional factfinding pertains to matters that surely are "subject to reasonable dispute," Fed. Rule Evid. 201(b), the joint opinion must be operating on the premise that these are "legislative" rather than "adjudicative" facts, see Rule 201(a). But if a court can find an undue burden simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

Justice Blackmun's effort to preserve as much of Roe as possible leads him to read the joint opinion as more "constan[t]" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non-de-minimis" abortion regulations, but that could only be true if a "substantial obstacle," (joint opinion), were the same thing as a non-de-minimis obstacle—which it plainly is not. 2

Reynolds v. Sims

377 U.S. 533 (1964)

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

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under the Equal Protection Clause of the Federal Constitution, the existing and two legislative proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures

On August 26, 1961, the original plaintiffs (appellees in No. 23), residents, taxpayers and voters of Jefferson County, Alabama, filed a complaint in the United States District Court for the Middle District of Alabama, in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama Legislature. Defendants below (appellants in No. 23), sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, as well as under 28 U.S.C. § 1343(3).

The complaint stated that the Alabama Legislature was composed of a Senate of 35 members and a House of Representatives of 106 members. It set out relevant portions of the 1901 Alabama Constitution, which prescribe the number of members of the two bodies of the State Legislature and the method of apportioning the seats among the State's 67 counties, and provide as follows:

Art. IV, Sec. 50. 'The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative.'

Art. IX, Sec. 197. 'The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives.'

Art. IX, Sec. 198. 'The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.'

Art. IX, Sec. 199. 'It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative.'

Art. IX, Sec. 200. 'It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.'

Art. XVIII, Sec. 284. 'Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.'

The maximum size of the Alabama House was increased from 105 to 106 with the creation of a new county in 1903, pursuant to the constitutional provision which states that, in addition to the prescribed 105 House seats, each county thereafter created shall be entitled to one representative. Article IX, §§ 202 and 203, of the Alabama Constitution established precisely the boundaries of

the State's senatorial and representative districts until the enactment of a new reapportionment plan by the legislature. These 1901 constitutional provisions, specifically describing the composition of the senatorial districts and detailing the number of House seats allocated to each county, were periodically enacted as statutory measures by the Alabama Legislature, as modified only by the creation of an additional county in 1903, and provided the plan of legislative apportionment existing at the time this litigation was commenced.

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied 'equal suffrage in free and equal elections and the equal protection of the laws' in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution. The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which 'clearly demonstrates that no reapportionment shall be effected'; that representation at any future constitutional convention would be established by the legislature, making it unlikely that the membership of any such convention would be fairly representative; and that, while the Alabama Supreme Court had found that the legislature had not complied with the State Constitution in failing to reapportion according to population decennially,4 that court had nevertheless indicated that it would not interfere with matters of legislative reapportionment.

Plaintiffs requested that a three-judge District Court be convened With respect to relief, they sought a declaration that the existing constitutional and statutory provisions, establishing the present apportionment of seats in the Alabama Legislature, were unconstitutional under the Alabama and Federal Constitutions, and an injunction against the holding of future elections for legislators until the legislature reapportioned itself in accordance with the State Constitution. They further requested the issuance of a mandatory injunction, effective until such time as the legislature properly reapportioned, requiring the conducting of the 1962 election for legislators at large over the entire State, and any other relief which 'may seem just, equitable and proper.'

A three-judge District Court was convened, and three groups of voters, taxpayers and residents of Jefferson, Mobile, and Etowah Counties were permitted to intervene in the action as intervenor-plaintiffs. Two of the groups are cross-appellants in Nos. 27 and 41. With minor exceptions, all of the intervenors adopted the allegations of and sought the same relief as the original plaintiffs.

On March 29, 1962, just three days after this Court had decided Baker v. Car-

rplaintiffs moved for a preliminary injunction requiring defendants to conduct at large the May 1962 Democratic primary election and the November 1962 general election for members of the Alabama Legislature. The District Court set the motion for hearing in an order stating its tentative views that an injunction was not required before the May 1962 primary election to protect plaintiffs' constitutional rights, and that the Court should take no action which was not 'absolutely essential' for the protection of the asserted constitutional rights before the Alabama Legislature had had a 'further reasonable but prompt opportunity to comply with its duty' under the Alabama Constitution.

On April 14, 1962, the District Court, after reiterating the views expressed in its earlier order, reset the case for hearing on July 16, noting that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. 205 F.Supp. 245. Relying on our decision in Baker v. Carr, the Court found jurisdiction, justiciability and standing. It stated that it was taking judicial notice of the facts that there had been population changes in Alabama's counties since 1901, that the present representation in the State Legislature w § not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution Continuing, the Court stated that if the legislature complied with the Alabama constitutional provision requiring legislative representation to be based on population there could be no objection on federal constitutional grounds to such an apportionment. The Court further indicated that, if the legislature failed to act, or if its actions did not meet constitutional standards, it would be under a 'clear duty' to take some action on the matter prior to the November 1962 general election. The District Court stated that its 'present thinking' was to follow an approach suggested by MR. JUSTICE CLARK in his concurring opinion in Baker v. Carr—awarding seats released by the consolidation or revamping of existing districts to counties suffering 'the most egregious discrimination,' thereby releasing the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan, and allowing eventual dismissal of the case. Subsequently, plaintiffs were permitted to amend their complaint by adding a further prayer for relief, which asked the District Court to reapportion the Alabama Legislature provisionally so that the rural strangle hold would be relaxed enough to permit it to reapportion itself.

On July 12, 1962, an extraordinary session of the Alabama Legislature adopted two reapportionment plans to take effect for the 1966 elections. One was a proposed constitutional amendment, referred to as the '67-Senator Amendment.' 9 It provided for a House of Representatives consisting of 106 members, apportioned by giving one seat to each of Alabama's 67 counties and distributing the others according to population by the 'equal proportions' method Using this formula, the constitutional amendment specified the number of representatives allotted to each county until a new apportionment could be made on the basis of the 1970 census. The Senate was to be composed of 67 members, one from each county. The legislation provided that the proposed amendment should be

submitted to the voters for ratification at the November 1962 general election.

The other reapportionment plan was embodied in a statutory measure adopted by the legislature and signed into law by the Alabama Governor, and was referred to as the 'Crawford-Webb Act.'11 It was enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should fail of passage by a majority of the State's voters, or should the federal courts refuse to accept the proposed amendment (though not rejected by the voters) as effective action in compliance with the requirements of the Fourteenth Amendment. The act provided for a Senate consisting of 35 members, representing 35 senatorial districts established along county lines, and altered only a few of the former districts. In apportioning the 106 seats in the Alabama House of Representatives, the statutory measure gave each county one seat, and apportioned the remaining 39 on a rough population basis, under a formula requiring increasingly more population for a county to be accorded additional seats. The Crawford-Webb Act also provided that it would be effective 'until the legislature is reapportioned according to law,' but provided no standards for such a reapportionment. Future apportionments would presumably be based on the existing provisions of the Alabama Constitution which the statute, unlike the proposed constitutional amendment, would not affect.

The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census, and the number of representatives allocated to each county under each of the three plans at issue in the litigation—the existing apportionment (under the 1901 constitutional provisions and the current statutory measures substantially reenacting the same plan), the proposed 67-Senator constitutional amendment, and the Crawford-Webb Act. Under all three plans, each senatorial district would be represented by only one senator.

On July 21, 1962, the District Court held that the inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been 'generally conceded' by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. 208 F.Supp. 431. Under the existing provisions, applying 1960 census figures, only 25 % of the State's totel population resided in districts represented by a majority of the members of the Senate, and only 25 % lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giv-

ing of more than one Senate seat to any one county,13 Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people.

The Court then considered both the proposed constitutional amendment and the Crawford-Webb Act to ascer- tain whether the legislature had taken effective action to remedy the unconstitutional aspects of the existing apportionment. In initially summarizing the result which it had reached, the Court stated:

'This Court has reached the conclusion that neither the '67-Senator Amendment,' nor the 'Crawford-Webb Act' meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the (federal constitutional) test.'

The Court stated that the apportionment of one senator to each county, under the proposed constitutional amendment, would 'make the discrimination in the Senate even more invidious than at present.' Under the 67-Senator Amendment, as pointed out by the court below, '(t)he present control of the Senate by members representing 25 % of the people of Alabama would be reduced to control by members representing 19 % of the people of the State,' the 34 smallest counties, with a total population of less than that of Jefferson County, would have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution (since a vote of two-fifths of the members of one house can defeat a proposal to amend the Alabama Constitution). Noting that the 'only conceivable rationalization' of the senatorial apportionment scheme is that it was based on equal representation of political subdivisions within the State and is thus analogous to the Federal Senate, the District Court rejected the analogy on the ground that Alabama counties are merely involuntary political units of the State created by statute to aid in the administration of state government. In finding the so-called federal analogy irrelevant, the District Court stated:

'The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties.'

The Court also noted that the senatorial apportionment proposal 'may not have complied with the State Constitution,' since not only is it explicitly provided that the population basis of legislative representation 'shall not be changed by constitutional amendments,'17 but the Alabama Supreme Court had previously indicated that that requirement could probably be altered only by constitutional convention The Court concluded, however, that the apportionment of seats in the Alabama House, under the proposed constitutional amendment, was 'based

upon reason, with a rational regard for known and accepted standards of apportionment.'19 Under the proposed apportionment of representatives, each of the 67 counties was given one seat and the remaining 39 were allocated on a population basis. About 43% of the State's total population would live in counties which could elect a majority in that body. And, under the provisions of the 67-Senator Amendment, while th maximum population-variance ratio was increased to about 59-to-1 in the Senate, it was significantly reduced to about 4 -to-1 in the House of Representatives. Jefferson County was given 17 House seats, an addition of 10, and Mobile County was allotted eight, an increase of five. The increased representation of the urban counties was achieved primarily by limiting the State's 55 least populous counties to one House seat each, and the net effect was to take 19 seats away from rural counties and allocate them to the more populous counties. Even so, serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative.

Turning next to the provisions of the Crawford-Webb Act, the District Court found that its apportionment of the 106 seats in the Alabama House of Representatives, by allocating one seat to each county and distributing the remaining 39 to the more populous counties in diminishing ratio to their populations, was 'totally unacceptable.'20 Under this plan, about 37% of the State's total population would reside in counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 persons while representatives from eight rural counties would each represnet less than 20,000 people. The Court regarded the senatorial apportionment provided in the Crawford-Webb Act as 'a step in the right direction, but an extremely short step,' and but a 'slight improvement over the present system of representation.'21 The net effect of combining a few of the less populous counties into two-county districts and splitting up several of the larger districts into smaller ones would be merely to increase the minority which would be represented by a majority of the members of the Senate from 25 % to only 27 % of the State's population The Court pointed out that, under the Crawford-Webb Act, the vote of a person in the senatorial district consisting of Bibb and Perry Counties would be worth 20 times that of a citizen in Jefferson County, and that the vote of a citizen in the six smallest districts would be worth 15 or more times that of a Jefferson County voter. The Court concluded that the Crawford-

Webb Act was 'totally unacceptable' as a 'piece of permanent legislation' which, under the Alabama Constitution, would have remained in effect without alteration at least until after the next decennial census.

Under the detailed requirements of the various constitutional provisions relating to the apportionment of seats in the Alabama Senate and House of Representatives, the Court found, the membership of neither house can be apportioned solely on a population basis, despite the provision in Art. XVIII, § 284, which

states that '(r)epresentation in the legislature shall be based upon population.' In dealing with the conflicting and somewhat paradoxical requirements (under which the number of seats in the House in limited to 106 but each of the 67 counties is required to be given at least one representative, and the size of the Senate is limited to 35 but it is required to have at least one-fourth of the members of the House, although no county can be given more than one senator), the District Court stated its view that 'the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature' is the previously referred to language of § 284. The Court stated that the detailed requirements of Art. IX, §§ 197—200, 'make it obvious that in neither the House nor the Senate can representation be based strictly and entirely upon population.

The result may well be that representation according to population to some extent must be required in both Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions.'

The District Court then directed its concern to the providing of an effective remedy. It indicated that it was adopting and ordering into effect for the November 1962 election a provisional and temporary reapportionment plan composed of the provisions relating to the House of Representatives contained in the 67-Senator Amendment and the provisions of the Crawford-Webb Act relating to the Senate. The Court noted, however, that '(t)he proposed reapportionment of the Senate in the 'Crawford-Webb Act,' unacceptable as a piece of permanent legislation, may not even break the strangle hold.' Stating that it was retaining jurisdiction and deferring any hearing on plaintiffs' motion for a permanent injunction 'until the Legislature, as provisionally reapportioned * * *, has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature,' the Court emphasized that its 'moderate' action was designed to break the strangle hold by the smaller counties on the Alabama Legislature and would not suffice as a permanent reapportionment. On July 25, 1962, the Court entered its decree in accordance with its previously stated determinations, concluding that 'plaintiffs are denied equal protection by virtue of the debasement of their votes, since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself (as required by law).' It enjoined the defendant state officials from holding any future elections under any of the apportionment plans that it had found invalid, and stated that the 1962 election of Alabam legislators could validly be conducted only under the apportionment scheme specified in the Court's order.

After the District Court's decision, new primary elections were held pursuant to legislation enacted in 1962 at the same special session as the proposed constitutional amendment and the Crawford-Webb Act, to be effective in the event the Court itself ordered a particular reapportionment plan into immediate effect.

The November 1962 general election was likewise conducted on the basis of the District Court's ordered apportionment of legislative seats, as Mr. Justice Black refused to stay the District Court's order. Consequently, the present Alabama Legislature is apportioned in accordance with the temporary plan prescribed by the District Court's decree. All members of both houses of the Alabama Legislature serve four-year terms, so that the next regularly scheduled election of legislators will not be held until 1966. The 1963 regular session of the Alabama Legislature produced no legislation relating to legislative apportionment,24 and the legislature, which meets biennially, will not hold another regular session until 1965.

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. 25 No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people,26 or as a result of a constitutional convention convened after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.

Notices of appeal to this Court from the District Court's decision were timely filed by defendants below (appellants in No. 23) and by two groups of intervenor-plaintiffs (cross-appellants in Nos. 27 and 41). Appellants in No. 23 contend that the District Court erred in holding the existing and the two proposed plans for the apportionment of seats in the Alabama Legislature unconstitutional, and that a federal court lacks the power to affirmatively reapportion seats in a state legislature. Cross-appellants in No. 27 assert that the court below erred in failing to compel reapportionment of the Alabama Senate on a population basis as allegedly required by the Alabama Constitution and the Equal Protection Clause of the Federal Constitution. Cross-appellants in No. 41 contend that the District Court should have required and ordered into effect the apportionment of seats in both houses of the Alabama Legislature on a population basis. We noted probable jurisdiction on June 10,

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbroughand to have their votes counted, United States v. MosleyIn Mosley the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection as the right to put a ballot in a box.' 238 U.S., The right to vote can neither be denied outright, Guinn v. United StatesLane v. Wilsonnor destroyed by alteration of ballots, see United States v. Classic, nor diluted by ballot-box stuffing Ex parte SieboldL.Ed. 717, United States v. SaylorAs the Court stated in Classic, 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters

within a state to cast their ballots and have them counted * * *.' 313 U.S., Racially based gerrymandering, Gomillion v. Lightfootand the conducting of white primaries, Nixon v. HerndonNixon v. CondonSmith v. AllwrightTerry v. Adamsboth of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. 28 The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In Baker v. Carrwe held that a claim asserted under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts. The spate of similar cases filed and decided by lower courts since our decision in Baker amply shows that the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States In Baker, a suit involving an attack on the apportionment of seats in the Tennessee Legislature, we remanded to the District Court, which had dismissed the action, for consideration on the merits. We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies. Rather, we simply stated:

'Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.'

We indicated in Baker, however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:

'Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.'

Subsequent to Baker, we remanded several cases to the courts below for reconsideration in light of that decision.

In Gray v. Sanderswe held that the Georgia county unit system, applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where

they resided. After indicating that the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex, we stated:

'How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote whatever their race, whatever their sex, whatever their occu- pation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.'

Continuing, we stated that 'there is no indication in the Constitution that home-site or occupation affords a permissible basis for distinguishing between qualified voters within the State.' And, finally, we concluded: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.'

We stated in Gray, however, that that case, 'unlike Baker v. Carr, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State legislatu e in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives.

Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population.'

Of course, in these cases we are faced with the problem not presented in Gray—that of determining the basic standards and stating the applicable guidelines for implementing our decision in Baker v. Carr.

In Wesberry v. Sandersdecided earlier this Term, we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjusticiable questions and should not be dismissed generally for 'want of equity.' We determine that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.

In that case we decided that an apportionment of congressional seats which 'contracts the value of some votes and expands that of others' is unconstitutional, since 'the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote * * *.' We

concluded that the constitutional prescription for election of members of the House of Representatives 'by the People,' construed in its historical context, 'means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.' We further stated:

'It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.'

We found further, in Wesberry, that 'our Constitution's plain objective' was that 'of making equal repre- sentation for equal numbers of people the fundamental goal * * *.' We concluded by stating:

'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.'

Gray and Wesberry are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. Gray, though not determinative here since involving the weighting of votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections. And our decision in Wesberry was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are t be chosen 'by the People,' while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the insant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States

v. Bathgate, '(t)he right to vote is personal * * *.'39 While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like Skinner v. Oklahomasuch a case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., 541, Undoubtedly, the right of suffrage is a fundamental mat- ter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in Yick Wo v. Hopkinsthe Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.'

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could ote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method

or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.' Lane v. Wilson, ; Gomillion v. Lightfoot, As we stated in Wesberry v. Sanders:

'We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would run counter to our fundamental ideas of democratic government.'

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal

Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citi- zens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legisla-

tors. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, Brown v. Board of Educationor economic status, Griffin v. People of State of IllinoisDouglas v. People of State of CaliforniaOur constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consid r factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in Gomillion v. Lightfoot:

'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.

A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

1.

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the sea § in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote

for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State. Since, under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone Al- though the District Court presumably found the apportionment of the Alabama House of Representatives under the 67-Senator Amendment to be acceptable, we conclude that the deviations from a strict population basis are too egregious to permit us to find that that body, under this proposed plan, was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained. Although about 43% of the State's total population would be required to comprise districts which could elect a majority in that body, only 39 of the 106 House seats were actually to be distributed on a population basis, as each of Alabama's 67 counties was given at least one representative, and population-variance ratios of close to 5-to-1 would have existed. While mathematical nicety is not a constitutional requisite, one could hardly conclude that the Alabama House, under the proposed constitutional amendment, had been apportioned sufficiently on a population basis to be sustainable under the requirements of the Equal Protection Clause. And none of the other apportionments of seats in either of the bodies of the Alabama Legislature under the three plans considered by the District Court, came nearly as close to approaching the required constitutional standard as did that of the House of Representatives under the 67-Senator Amendment.

Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States. At the time this litigation was commenced, there had been no reappor- tionment of seats in the Alabama Legislature for over 60 years Legislative inaction, coupled with the unavailability of any political or judicial remedy,47 had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism. Consistent failure by the Alabama Legislature to comply with state constitutional requirements as to the frequency of reapportionment and the bases of legislative representation resulted in a minority strangle hold on the State Legislature. Inequality of representation in one house added to the inequality in the other. With the crazy-quilt existing apportionment virtually conceded to be invalid, the Alabama Legislature offered two proposed plans for consideration by the District Court, neither of which was to be effective until 1966 and neither of which provided for the apportionment of even one of the two houses on a population basis. We find that the court below did not err in holding that neither of these proposed reapportionment schemes, considered as a whole 'meets the necessary constitutional requirements.' And we conclude that the District Court acted properly in considering these two proposed plans,

although neither was to become effective until the 1966 election and the proposed constitutional amendment was scheduled to be submitted to the State's voters in November 1962.

Consideration by the court below of the two proposed plans was clearly necessary in determining whether the Alabama Legislature had acted effectively to correct the admittedly existing malapportionment, and in ascertaining what sort of judicial relief, if any, should be afforded.

1.

Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further. However, one of the proposed plans, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation folowed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population. Seats in the Alabama House, under the proposed constitutional amendment, are distributed by giving each of the 67 counties at least one, with the remaining 39 seats being allotted among the more populous counties on a population basis. This scheme, at least at first glance, appears to resemble that prescribed for the Federal House of Representatives, where the 435 seats are distributed among the States on a population basis, although each State, regardless of its population, is given at least one Congressman. Thus, although there are substantial differences in underlying rationale and result,49 the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress.

Much has been written since our decision in Baker v. Carr about the applicability of the so-called federal analogy to state legislative apportionment arrangements After considering the matter, the court below concluded that no conceivable analogy could be drawn between the federal scheme and the apportionment of seats in the Alabama Legislature under the proposed con- stitutional amendment We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic Arising from unique historical cir umstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.' But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. In rejecting an asserted analogy to the federal electoral college in Gray v. Sanderswe stated: an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.'

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) and the territory over which they shall be exercised rests in the absolute discretion of the state.' The relationship of the States to the Federal Government could hardly be less analogous.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a 'republican form of government.' We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legisla-

ture to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis. VI.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

In Wesberry v. Sandersthe Court stated that congressional representation must

be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry—equality of popu- lation among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would e constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle ws not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall. 36, 78—79, Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember58 or floterial districts Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone,61 nor economic or other sorts of group interests, are permissible factors in attempting to justify disparties from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from

the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

One of the arguments frequently offered as a basis for upholding a State's legislative apportionment arrangement, despite substantial disparities from a population basis in either or both houses, is grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle. Proponents of this argument contend that congressional approval of such schemes, despite their disparities from population-bas d representation, indicates that such arrangements are plainly sufficient as establishing a 'republican form of government.' As we

stated in Baker v. Carr, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards Nevertheless, it is not inconsistent with this view to hold that, despite congressional approval of state legislative apportionment plans at the time of admission into the Union, even though deviating from the equal-population principle here enunciated, the Equal Protection Clause can and does require more. And an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization. In any event, congressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States,65 often honored more in the breach than the observance, however, Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought, was in 1901. Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

Although general provisions of the Alabama Constitution provide that the apportionment of seats in both houses of the Alabama Legislature should be on a population basis, other more detailed provisions clearly make compliance with both sets of requirements impossible. With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportion-

ment schem is embodied in its constitution or in statutory provisions. In those States where the alleged malapportionment has resulted from noncompliance with state constitutional provisions which, if complied with, would result in an apportionment valid under the Equal Protection Clause, the judicial task of providing effective relief would appear to be rather simple. We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. 66 Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'

We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate

only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying he constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.

We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid,68 was an appropriate and well-considered exercise of judicial power. Admittedly, the lower court's ordered plan was intended only as a temporary and provisional measure and the District Court correctly indicated that the plan was invalid as a permanent apportionment. In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion. Since the District Court evinced its realization that its ordered reapportionment could not be sustained as the basis for conducting the 1966 election of Alabama legislators, and avowedly intends to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim, we affirm the judgment below and remand the cases for further proceedings consistent with the views stated in this opinion. It is so ordered.

Affirmed and remanded.

Mr. Justice CLARK, concurring in the affirmance. The Court goes much beyond the necessities of this case in laying down a new 'equal population' principle for state legislative apportionment. This principle seems to be an offshoot of Gray v. Sanders, i.e., 'one person, one vote,' modified by the 'nearly as is practicable' admonition of Wesberry v. Sanders, .* Whether 'nearly as is practicable' means 'one person, one vote' qualified by 'approximately equal' or 'some deviations' or by the impossibility of 'mathematical nicety' is not clear from the majority's use of these vague and meaningless phrases. But whatever the standard, the Court applies it to each house of the State Legislature.

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is 'a crazy quilt,' clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. See my concurring opinion in Baker v. Carr,

I, therefore, do not reach the question of the so-called 'federal analogy.' But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as

to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State.

All of the parties have agreed with the District Court's finding that legislative inaction for some 60 years in the face of growth and shifts in population has converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, for the reasons stated in my dissenting opinion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S., p. 744, 84 S.Ct., p. 1477. I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment.

Mr. Justice HARLAN, dissenting.

In these cases the Court holds that seats in the legislatures of six States 1 are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate These decisions, with Wesberry v. Sandersinvolving congressional districting by the States, and Gray v. Sandersrelating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. Once again,3 I must register my protest.

PRELIMINARY STATEMENT.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic 'population' principle. Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate (see the dissenting opinion of Frankfurter, J., in Baker v. Carr, 301,)—I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

The Court's constitutional discussion, found in its opinion in the Ala ama cases (Nos. 23, 27, 41, ante, p. 533) and more particularly at pages 561—568 thereof, is remarkable (as, indeed, is that found in the separate opinions of my Brothers STEWART and CLARK, ante, pp. 588, 587,) for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously 'debased' or 'diluted' by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is

tied to the Equal Protection Clause only by the constitutionally frail tautology that 'equal' means 'equal.'

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choos- ing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before Baker v. Carrmade an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of 'developing' constitutionalism. It is meaningless to speak of constitutional 'development' when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, § 4), 4 the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of action, because what has been alleged or proved shows no violation of any constitutional right.

Before proceeding to my argument it should be observed that nothing done in Baker v. Carror in the two cases that followed in its wake, Gray v. Sanders and Wesberry v. Sandersfrom which the Court quotes at some length, forecloses the conclusion which I reach.

Baker decided only that claims such as those made here are within the competence of the federal courts to adjudicate. Although the Court stated as its conclusion that the allegations of a denial of equal protection presented 'a justiciable constitutional cause of action', it is evident from the Court's opinion that it was concerned all but exclusively with justiciability and gave no serious attention to the question whether the Equal Protection Clause touches state legislative apportionments Neither the opinion of the Court nor any of the concurring opinions considered the relevant text of the Fourteenth Amendm nt or any of the historical materials bearing on that question. None of the materials was briefed or otherwise brought to the Court's attention.

In the Gray case the Court expressly laid aside the applicability to state legislative apportionments of the 'one person, one vote' theory there found to require the striking down of the Georgia county unit system. See 372 U.S., and the

concurring opinion of STEWART, J., joined by CLARK, J., U.S.—382, In Wesberry, involving congressional districting, the decision rested on Art. I, § 2, of the Constitution. The Court expressly did not reach the arguments put forward concerning the Equal Protection Clause. See 376 U.S., note 10,

Thus it seems abundantly clear that the Court is entirely free to deal with the cases presently before it in light of materials now called to its attention for the first time. To these I now turn.

A. The Language of the Fourteenth Amendment.

The Court relies exclusively on that portion of § 1 of the Fourteenth Amendment which provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' and disregards entirely the significance of § 2, which reads:

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

The Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee,7 which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States,8 which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate Whatever one might take to be the application of these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny 'or in any way' abridge the right of their inhabitants to vote for 'the members of the (State) Legislature,' and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the sugg stion that the first section was intended to have the result reached by the Court today. If indeed the words of the Fourteenth Amendment speak for themselves, as the majority's disregard of history seems to imply, they speak as clearly as may be against the construction which the majority puts on them. But we are not limited to the language of the Amendment itself.

B. Proposal and Ratification of the Amendment.

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment

believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrate that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

1. Proposal of the amendment in Congress.—A resolution proposing what became the Fourteenth Amendment was reported to both houses of Congress by the Reconstruction Committee of Fifteen on April 30, 1866 The first two sections of the proposed amendment read: shall bear to the whole number of malecitizens not less than twenty-one years of age.'

In the House, Thaddeus Stevens introduced debate on the resolution on May 8. In his opening remarks, Stevens explained why he supported the resolution although it fell 'far short' of his wishes:

'I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify and proposition more stringent than this.'

In explanation of this belief, he asked the House to remember 'that three months since, and more, the committee reported and the House adopted a proposed amendment fixing the basis of representation in such way as would surely have secured the enfranchisement of every citizen at no distant period,' but that proposal had been rejected by the Senate.

He then ex lained the impact of the first section of the proposed Amendment, particularly the Equal Protection Clause.

'This amendment allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen.'

He turned next to the second section, which he said he considered 'the most important in the article.'15 Its effect, he said, was to fix 'the basis of representation in Congress.'16 In unmistakable terms, he recognized the power of a State to withhold the right to vote:

'If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the

same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.'

Closing his discussion of the second section, he noted his dislike for the fact that it allowed 'the States to discriminate (with respect to the right to vote) among the same class, and receive proportionate credit inrepresentation.'

Toward the end of the debate three days later, Mr. Bingham, the author of the first section in the Reconstruction Committee and its leading proponent,19 concluded his discussion of it with the following:

'Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.'20 (Emphasis added.)

He immediately continued:

'The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people.'21 (Emphasis added.)

He stated at another point in his remarks:

'To be sure we all agree, and the great body of the peopl of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.'22 (Emphasis added.)

In the three days of debate which separate the opening and closing remarks, both made by members of the Reconstruction Committee, every speaker on the resolution, with a single doubtful exception,23 assumed without question that, as Mr. Bingham said'the second section excludes the conclusion that by the first section suffrage is subjected to congressional law.' The assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders. Attached as Appendix A hereto are some of those statements. The resolution was adopted by the House without change on May 10.

Debate in the Senate began on May 23, and followed the same pattern. Speaking for the Senate Chairman of the Reconstruction Committee, who was ill, Senator Howard, also a member of the Committee, explained the meaning of the Equal Protection Clause as follows:

'The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law?

'But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism (sic).'25 (Emphasis added.)

Discussing the second section, he expressed his regret that it did 'not recognize the authority of the United States over the question of suffrage in the several States at all * * *.'26 He justified the limited purpose of the Amendment in this regard as follows:

'But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?

'The committee were of opinion that the States are not ye prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.

'The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.'27 (Emphasis added.)

There was not in the Senate, as there had been in the House, a closing speech in

explanation of the Amendment. But because the Senate considered, and finally adopted, several changes in the first and second sections, even more attention was given to the problem of voting rights there than had been given in the House. In the Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise. Attached as Appendix B hereto are representative statements from the debates to that effect. After having changed the proposed amendment to the form in which it was adopted, the Senate passed the resolution on June 8, 1866 As changed, it passed in the House on June 13.

1. Ratification by the 'loyal' States.—Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before 1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the spread of population.

Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas. 32 Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

Nor were these state constitutional provisions merely theoretical. In New Jersey, for example, Cape May County, with a population of 8,349, and Ocean County, with a population of 13,628, each elected one State Senator, as did Essex and Hudson Counties, with populations of 143,839 and 129,067, respectively In the House, each county was entitled to one representative, which left 39 seats to be apportioned according to population. 34 Since there were 12 counties besides the two already mentioned which had populations over 30,000,35 it is evident that there were serious disproportions in the House also. In

New York, each of the 60 counties except Hamilton County was entitled to one of the 128 seats in the Assembly This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292 With seven more counties having populations over 100,000 and 13 others having populations over 50,000,38 the disproportion in the Assembly was necessarily large. In Vermont, after each county had been allocated one Senator, there were 16 seats remaining to be distributed among the larger counties The smallest county had a population of 4,082; the largest had a population of 40,651 and there were 10 other counties with populations over 20,000.

1. Ratification by the 'reconstructed' States.—Each of the 10 'reconstructed' States was required to ratify the Fourteenth Amendment before it was readmitted to the Union The Constitution of each was scrutinized in Congress Debates over readmission were extensive In at least one instance, the problem of state legislative apportionment was expressly called to the

attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House: to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants.'

The response of Mr. Butler is particularly illuminating:

'All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House.'

The Constitutions of six of the 10 States Contained provisions departing substantially from the method of apportionment now held to be required by the Amendment And, as in the North, the departures were as real in fact as in theory. In North Carolina, 90 of the 120 representatives were apportioned among the counties without regard to population, leaving 30 seats to be distributed by numbers Since there were seven counties with populations under 5,000 and 26 counties with populations over 15,000, the disproportions must have been widespread and substantial In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,269 to Page

42,486, elected one Senator In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively.

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.

The facts recited above show beyond any possible doubt:

'(1) that Congress, with full awareness of and attention to the possibility that the States would not afford full equality in voting rights to all their citizens, nevertheless deliberately chose not to interfere with the States' plenary power in this regard when it proposed the Fourteenth Amendment;

1. that Congress did not include in the Fourteenth Amendment restrictions on the States' power to control voting rights because it believed that if such restrictions were included, the Amendment would not be adopted; and
2. that at least a substantial majority, if not all, of the States which ratified the Fourteenth Amendment did not consider that in so doing, they

were accepting limitations on their freedom, never before questioned, to regulate voting rights as they chose.

Even if one were to accept the majority's belief that it is proper entirely to disregard the unmistakable implica- tions of the second section of the Amendment in construing the first section, one is confounded by its disregard of all this history. There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which concern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.

C. After 1868.

The years following 1868, far from indicating a developing awareness of the applicability of the Fourteenth Amendment to problems of apportionment, demonstrate precisely the reverse: that the States retained and exercised the power independently to apportion their legislatures. In its Constitutions of 1875 and 1901, Alabama carried forward earlier provisions guaranteeing each county at least one representative and fixing an upper limit to the number of seats in the House Florida's Constitution of 1885 continued the guarantee of one representative for each county and reduced the maximum number of representatives per county from four to three Georgia, in 1877, continued to favor the smaller counties Louisiana, in 1879, guaranteed each parish at least one representative in the House In 1890, Mississippi guaranteed each county one representative, established a maximum number of representatives, and provided that specified groups of counties should each have approximately one-third of the seats in the House, what- ever the spread of population Missouri's

Constitution of 1875 gave each county one representative and otherwise favored less populous areas Montana's original Constitution of 1889 apportioned the State Senate by counties In 1877, New Hampshire amended its Constitution's provisions for apportionment, but continued to favor sparsely settled areas in the House and to apportion seats in the Senate according to direct taxes paid the same was true of New Hampshire's Constitution of 1902.

In 1894, New York adopted a Constitution the peculiar apportionment provisions of which were obviously intended to prevent representation according to population: no county was allowed to have more than one-third of all the Senators, no two countries which were adjoining or 'separated only by public waters' could have more than one-half of all the Senators, and whenever any county became entitled to mo e than three Senators, the total number of Senators was increased, thus preserving to the small counties their original number of seats In addition, each county except Hamilton was guaranteed a seat in the Assembly The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House Oklahoma's Constitution at the time of its admission to the Union (1907) favored small counties by the use of partial ratios and a maximum number of seats

in the House; in addition, no county was permitted to 'take part' in the election of more than seven representatives Pennsylvania, in 1873, continued to guarantee each county one representative in the House The same was true of South Carolina's Constitution of 1895, which provided also that each county should elect one and only one Senator Utah's original Constitution of 1895 assured each county of one representative in the House Wyoming, when it entered the Union in 1889, guaranteed each county at least one Senator and one representative.

D. Today.

Since the Court now invalidates the legislative apportionments in six States, and has so far upheld the apportionment in none, it is scarcely necessary to comment on the situation in the States today, which is of course, as fully contrary to the Court's decision as is the record of every prior period in this Nation's history. As of 1961, the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices, ranging from straight area representation or guaranteed minimum area representation to complicated schemes of the kind exemplified by the provisions of New York's Constitution of 1894, still in effect until struck down by the Court today in No. 20, 377 U.S., p. 633, 84 S.Ct., p. 633 Since

Tennessee, which was the subject of Baker v. Carr, and Virginia, scrutinized and disapproved today in No. 69, 377 U.S., p. 678, 84 S.Ct., p. 1441, are among the 11 States whose own Constitutions are sound from the standpoint of the Federal Constitution as construed today, it is evident that the actual practice of the States is even more uniformly than their theory opposed to the Court's view of what is constitutionally permissible.

E. Other Factors.

In this summary of what the majority ignores, note should be taken of the Fifteenth and Nineteenth Amendments. The former prohibited the States from denying or abridging the right to vote 'on account of race, color, or previous condition of servitude.' The latter, certified as part of the Constitution in 1920, added sex to the prohibited classifications. In Minor v. Happersett, 21 Wall. 162, this Court considered the claim that the right of women to vote was protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Court's discussion there of the significance of the Fifteenth Amendment is fully applicable here with respect to the Nineteenth Amendment as well.

'And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The ight of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffirage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing

is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?' Wall..

In the present case, we can go still further. If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for federal officers, how can it be that the far less obvious right to a particular kind of apportionment of state legislatures a right to which is opposed a far more plausible conflicting interest of the State than the interest which opposes the general right to vote—can be conferred by judicial construction of the Fourteenth Amendment? 70 Yet, unless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself suprotected, the conclusion is inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.

Mention should be made finally of the decisions of this Court which are disregarded or, more accurately, silently overruled today. Minor v. Happersettin which the Court held that the Fourteenth Amendment did not confer the right to vote on anyone, has already been noted. Other cases are more directly in point. In Colegrove v. Barrettthis Court dismissed 'for want of a substantial federal question' an appeal from the dismissal of a complaint alleging that the Illinois legislative apportionment resulted in 'gross inequality in voting power' and 'gross and arbitrary and atrocious discrimination in voting' which denied the plaintiffs equal protection of the laws In Remmey v. Smith, 102 F.Supp. 708 (D.C.E.D.Pa.), a three-judge District Court dismissed a complaint alleging that the apportionment of the Pennsylvania Legislature deprived the plaintiffs of 'constitutional rights guaranteed to them by the Fourteenth Amendment'. F.Supp.. The District Court stated that it was aware that the plaintiffs' allegations were 'notoriously true' and that '(t)he practical disenfranchisement of qualified electors in certain of the election districts in Philadelphia County is a matter of common knowledge.' F.Supp.. This Court dismissed the appeal 'for the want of a substantial federal question.'

In Kidd v. McCanless, 200 Tenn. 273, 292 S.W d 40, the Supreme Court of Tennessee dismissed an action for a declaratory judgment that the Tennessee Apportionment Act of 1901 was unconstitutional. The complaint alleged that 'a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives.' 292 S.W d. Without dissent, this Court granted the motion to dismiss the appeal. 352 U.S. 920, In Radford v. Gary, 145 F.Supp. 541 (D.C.W.D.Okla.), a three-judge District Court was convened to consider 'the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma

Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.' F.Supp.. The plaintiff alleged that he was a resident and voter in the most populous county of the State, which had about 15% of the total population of the State but only about 2% of the seats in the State Senate and less than 4% of the seats in the House. The complaint recited the unwillingness or inability of the branches of the state government to provide relief and alleged that there was no state remedy available. The District Court granted a motion to dismiss. This Court affirmed without dissent.

Each of these recent cases is distinguished on some ground or other in Baker v. Carr. See 369 U.S.S.Ct. 720. Their summary dispositions prevent consideration whether these after-the-fact distinctions are real or imaginary. The fact remains, however, that between 1947 and 1957, four cases raising issues precisely the same as those decided today were presented to the Court. Three were dismissed because the issues presented were thought insubstantial and in the fourth the lower court's dismissal was affirmed.

I have tried to make the catalogue complete, yet to keep it within the manageable limits of a judicial opinion. In my judgment, today's decisions are refuted by the language of the Amendment which they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history and by consistent theory and practice from the time of the adop ion of the Fourteenth Amendment until today.

The Court's elaboration of its new 'constitutional' doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

In the Alabama cases (Nos. 23, 27, 41), the District Court held invalid not only existing provisions of the State Constitution—which this Court lightly dismisses with a wave of the Supremacy Clause and the remark that 'it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions,' ante, p. 584 but also a proposed amendment to the Alabama Constitution which had never been submitted to the voters of Alabama for ratification, and 'standby' legislation which was not to become effective unless the amendment was rejected (or declared unconstitutional) and in no event before 1966. Sims v. Frink, D.C., 208 F.Supp. 431. See ante, pp. 543—551. Both of these measures had been adopted only nine days before,73 at an Extraordinary Session of the Alabama Legislature, convened pursuant to what was very nearly a directive of the District Court, see Sims v. Frink, D.C., 205 F.Supp. 245, 248. The District Court formulated its own plan for the apportionment of the Alabama Legislature, by picking and choosing among the provisions of

the legislative measures. 208 F.Supp.—442. See ante, p. 552. Beyond that, the court warned the legislature that there would be still further judicial reapportionment unless the legislature, like it or not, undertook the task for itself. 208 F.Supp.. This Court now states that the District Court acted in 'a most proper and commendable manner,' ante, p. 586, and approves the District Court's avowed intention of taking 'some further action' unless the State Legislature acts by 1966, ante, p. 587.

In the Maryland case (No. 29S.Ct. 1429), the State Legislature was called into Special Session and enacted a temporary reapportionment of the House of Delegates, under pressure from the state courts Thereafter, the

Maryland Court of Appeals held that the Maryland Senate was constitutionally apportioned. Maryland Committee for Fair Representation v. Tawes, 229 Md. 406, 184 A d 715. This Court now holds that neither branch of the State Legislature meets constitutional requirements. 377 U.S., p. 674, 84 S.Ct., p. 1439. The Court presumes that since 'the Maryland constitutional provisions relating to legislative apportionment (are) hereby held unconstitutional, the Maryland Legislature

has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions' which satisfy the Federal Constitution, U.S., On this premise, the Court concludes that the Maryland courts need not 'feel obliged to take further affirmative action' now, but that 'under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan.' U.S., In the Virginia case (No. 69, 377 U.S., p. 678, 84 S.Ct., p. 1441), the State Legislature in 1962 complied with the state constitutional requirement of regular reapportionment Two days later, a complaint was filed in the District Court Eight months later, the legislative reapportionment was declared unconstitutional. declared unconstitutional. Mann v. Davis, D.C., 213 F.Supp. 577. The District Court gave the State Legislature two months within which to reapportion itself in special session, under penalty of being reapportioned by the court Only a stay granted by a member of this Court slowed the process it is plain that no stay will be forthcoming in the future. The Virginia Legislature is to be given 'an adequate opportunity to enact a valid plan'; but if it fails 'to act promptly in remedying the constitutional defects in the State's legislative apportionment plan,' the District Court is to 'take further action.' 377 U.S. p. 693, 84 S.Ct. p. 1449.

In Delaware (No. 307S.Ct. 1449), the District Court entered an order on July 25, 1962, which stayed proceedings until August 7, 1962, 'in the hope and expectation' that the General Assembly would take 'some appropriate action' in the intervening 13 days. Sincock v. Terry, 207 F.Supp. 205, 207. By way of prodding, presumably, the court noted that if no legislative action were taken and the court sustained the plaintiffs' claim, 'the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2 (the challenged provisions of the Delaware Constitution),

might be held not to be a de jure legislature and its legislative acts might be held invalid and unconstitutional.' F.Supp.—206. Five days later, on July 30, 1962, the General Assembly approved a proposed amendment to the State Constitution. On August 7, 1962, the District Court entered an order denying the defendants' motion to dismiss. The court said that it did not wish to substitute its judgment 'for the collective wisdom of the General Assembly of Delaware', but that 'in the light of all the circumstances', it had to proceed promptly. 210 F.Supp. 395, 396. On October 16, 1962, the court declined to enjoin the conduct of elections in November. 210 F.Supp. 396. The court went on to express its regret that the General Assembly had not adopted the court's suggestion, see 207 F.Supp.—207, that the Delaware Constitution be amended to make apportionment a statutory rather than a constitutional matter, so as to facilitate further changes in apportionment which might be required. 210 F.Supp.. In January 1963, the General Assembly again approved the proposed amendment of the apportionment provisions of the Delaware Constitution, which thereby became effe tive on January 17, 1963 Three months later, on April 17, 1963, the District Court reached 'the reluctant conclusion' that Art. II, § 2, of the Delaware Constitution was unconstitutional, with or without the 1963 amendment. Sincock v. Duffy, D.C., 215 F.Supp. 169, 189. Observing that '(t)he State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time,' F.Supp., the court gave that General Assembly until October 1, 1963, to adopt acceptable provisions for apportionment. On May 20, 1963, the District Court enjoined the defendants from conducting any elections, including the general election scheduled for November 1964, pursuant to the old or the new constitutional provisions This Court now approves all these proceedings, noting particularly that in allowing the 1962 elections to go forward, 'the District Court acted in a wise and temperate manner.'

Records such as these in the cases decided today are sure to be duplicated in most of the other States if they have not been already. They present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference. So far as I can tell, the Court's only response to this unseemingly state of affairs is ponderous insistence that 'a denial of constitutionally protected rights demands judicial protection,' ante, p. 566. By thus refusing to recognize the bearing which a potential for conflict of this kind may have on the question whether the claimed rights are in fact constitutionally entitled to judicial protection, the Court assumes, rather than supports, its conclusion.

It should by now be obvious that these cases do not mark the end of reapportionment problems in the courts. Predictions once made that the courts would never have to face the problem of actually working out an apportionment have proved false. This Court, however, ontinues to avoid the consequences of its decisions, simply assuring us that the lower courts 'can and will work out more concrete and specific standards,' ante, p. 578. Deeming it 'expedient' not to

spell out 'precise constitutional tests,' the Court contents itself with stating 'only a few rather general considerations.'

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible solutions, with varying political consequences, than reapportionment broadside.

The Court ignores all this, saying only that 'what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case,' ante, p. 578. It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States.

Although the Court—necessarily, as I believe—provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that 'indiscriminate districting' is an invitation to 'partisan gerrymandering,' ante, pp. 578-579, the Court nevertheless excludes virtually every basis for the formation of electoral districts other than 'indiscriminate districting.' In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

1. history;
2. "economic or other sorts of group interests";]
3. area;
4. geographical considerations;
5. a desire "to insure effective representation for sparsely settled areas"
6. "availability of access of citizens to their representatives";
7. theories of bicameralism (except those approved by the Court);

8. occupation;
9. "an attempt to balance urban and rural power."
10. the preference of a majority of voters in the state.

So far as presently appears, the only factor which a State may consider, apart from numbers, is political subdivisions. But even 'a clearly rational state policy' recognizing this factor is unconstitutional if 'population is submerged as the controlling consideration * * *.'

I now of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that 'legislators represent people, not trees or acres,' ante, p. 1382; that 'citizens, not history or economic interests, cast votes,' ante, p. 580; that 'people, not land or trees or pastures, vote,' ibid All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speak- ing for their interests—economic, social, political—many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

With these cases the Court approaches the end of the third round set in motion by the complaint filed in Baker v. Carr. What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, Wesberry v. Sanders U.S., I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, the though of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that

in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

I dissent in each of these cases, believing that in none of them have the plaintiffs stated a cause of action. To the extent that Baker v. Carr, expressly or by implication, went beyond a discussion of jurisdictional doctrines independent of the substantive issues involved here, it hould be limited to what it in fact was: an experiment in venturesome constitutionalism. I would reverse the judgments of the District Courts in Nos. 23, 27, and 41 (Alabama), No. 69 (Virginia), and No. 307 (Delaware), and remand with directions to dismiss the complaints. I would affirm the judgments of the District Courts in No. 20 (New York), and No. 508 (Colorado), and of the Court of Appeals of Maryland in No. 29.

APPENDIX A TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the House of Representatives during the debate on the resolution proposing the Fourteenth Amendment.

'As the nearest approach to justice which we are likely to be able to make, I approve of the second section that bases representation upon voters.' 2463 (Mr. Garfield).

'Would it not be a most unprecedented thing that when this (former slave) population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here; that when they will not count them in apportioning their own legislative districts, we are to count them as five fifths (no longer as three fifths, for that is out of the question) as soon as you make a new apportionment?' 2464—2465 (Mr. Thayer).

'The second section of the amendment is ostensibly intended to remedy a supposed inequality in the basis of representation. The real object is to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage.' 2467 (Mr. Boyer).

'Shall the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?' 2468 (Mr. Kelley).

'I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country.' 2469 (Mr. Kelley).

'But I will ask, why should not the representation of the States be limited as the States themselves limit suffrage?

If the negroes of the South are not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union?' 2498 (Mr. Broomall).

'It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union.' 2502 (Mr. Raymond).

'We admit equality of representation based upon the exercise of the elective franchise by the people. The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation.' 2508 (Mr. Boutwell).

'Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age.' 2510 (Mr. Miller).

'Manifestly no State should have its basis of nat onal representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, unlitimately recognized and admitted.' 2511 (Mr. Eliot).

'I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think

they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion. The situation of opinion in these States compels us to look to other means to protect the Government against the enemy.' 2532 (Mr. Banks).

'If you deny to any portion of the loyal citizens of your State the right to vote for Representatives you shall not assume to represent them, and, as you have done for so long a time, misrepresent and oppress them. This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best.' 2539 2540 (Mr. Farnsworth).

APPENDIX B TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the Senate during the debate on the resolution proposing the Fourteenth Amendment.*

'The second section of the constitutional amendment proposed by the committee can be justified upon no other theory than that the negroes ought to vote; and negro suffrage must be vindicated before the people in sustaining that section, for it does not exclude the non-voting population of the North, because it is admitted that there is no wrong in excluding from suffrage aliens, females, and minors. But we say, if the negro is excluded from suffrage he shall also be excluded from the basis of representation. Why this inequality? Why this injustice? For injustice it would be unless there be some good reason for this discrimination against the South in excluding her non-voting population from the basis of representation. The only defense that we can make to this apparent injustice is that the South commits an outrage upon human rights when she denies the ballot to the blacks, and we will not allow her to take advantage of her own wrong or profit by this outrage. Does any one suppose it possible to avoid this plain issue before the people? For if they will sustain you in reducing the representation of the South because she does not allow the negro to vote, they will do so because they think it is wrong to disfranchise him.' 2800 (Senator Stewart).

'It (the second section of the proposed amendment) relieves him (the Negro) from misrepresentation in Congress by denying him any represe tation whatever.' 2801 (Senator Stewart).

'But I will again venture the opinion that it (the second section) means as if it read thus: no State shall be allowed a representation on a colored population unless the right of voting is given to the negroes—presenting to the States the alternative of loss of representation or the enfranchisement of the negroes, and their political equality.' 2939 (Senator Hendricks).

'I should be much better satisfied if the right of suffrage had been given at once

to the more intelligent of them (the Negroes) and such as had served in our Army. But it is believed by wiser ones than myself that this amendment will very soon produce some grant of suffrage to them, and that the craving for political power will ere long give them universal suffrage.

Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further.' 2963—2964 (Senator Poland). 'What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less.' 2987 (Senator Cowan).

'Now, sir, in all the States—certainly in mine, and no doubt in all—there are local as contradistinguished from State elections. There are city elections, county elections, and district or borough elections; and those city and county and district elections are held under some law of the State in which the city or county or district or borough may be; and in those elections, according to the laws of the States, certain qualifications are prescribed, residence within the limits of the locality and a property qualification in some. Now, is it proposed to say that if every man in a State is not at liberty to vote at a city or a country or a borough election that is to affect the basis of representation?' 2991 (Senator Johnson).

'Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States not only the right, but the exclusive right, to regulate the franchise.

It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Govern- ment of the United States will be impotent to redress.' 3027 (Senator Johnson).

'The amendment fixes representation upon numbers, precisely as the Constitution new does, but when a State denies or abridges the elective franchise to any of its male inhabitants who are citizens of the United States and not less than twenty-one years of age, except for participation in rebellion or other crime, then such State will lose its representation in Congress in the proportion which the male citizen so excluded bears to the whole number of male citizens not less than twenty-one years of age in the State.' 3033 (Senator Henderson).

From Due Process to Equal Protection

The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?

"The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery" is a speech by Frederick Douglass delivered in Glasgow in 1860. The text below is copied from Philip Foner, ed., Frederick Douglass: Selected Speeches and Writings (Lawrence Hill Books 1999).

I proceed to the discussion. And first a word about the question. Much will be gained at the outset if we fully and clearly understand the real question under discussion. Indeed, nothing is or can be understood till this is understood. Things are often confounded and treated as the same, for no better reason than that they resemble each other, even while they are in their nature and character totally distinct and even directly opposed to each other. This jumbling up things is a sort of dust-throwing which is often indulged in by small men who argue for victory rather than for truth. Thus, for instance, the American Government and the American Constitution are spoken of in a manner which would naturally lead the hearer to believe that the one is identical with the other; when the truth is, they are as distinct in character as is a ship and a compass. The one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another. The Constitution may be right, the Government wrong. If the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked. What, then, is the question? I will state it. But first let me state what is not the question. It is not whether slavery existed in the United States at the time of the adoption of the Constitution; it is not whether slaveholders took part in framing the Constitution; it is not whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery; it is not whether the American Government has been wielded during seventy-two years in favour of the propagation and permanence of slavery; it is not whether a pro-slavery interpretation has been put upon the Constitution by the American Courts – all these points may be true or they may be false, they may be accepted or they may be rejected, without in any wise affecting the real question in debate. The real and exact question between myself and the class of persons represented by the speech at the City Hall may be fairly stated thus: – 1st, Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country? 2nd, Is the dissolution of the union between the slave and free States required by fidelity to the slaves, or by the just demands of conscience? Or, in other words, is the refusal to exercise the elective franchise, and to hold office in America, the surest, wisest, and best way to abolish slavery in America?

To these questions the Garrisonians say Yes. They hold the Constitution to be a slaveholding instrument, and will not cast a vote or hold office, and denounce

all who vote or hold office, no matter how faithfully such persons labour to promote the abolition of slavery. I, on the other hand, deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as will use their powers for the abolition of slavery. This is the issue plainly stated, and you shall judge between us. Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain what the Constitution itself is. Before looking for what it means, let us see what it is. Here, too, there is much dust to be cleared away. What, then, is the Constitution? I will tell you. It is no vague, indefinite, floating, unsubstantial, ideal something, coloured according to any man's fancy, now a weasel, now a whale, and now nothing. On the contrary, it is a plainly written document, not in Hebrew or Greek, but in English, beginning with a preamble, filled out with articles, sections, provisions, and clauses, defining the rights, powers, and duties to be secured, claimed, and exercised under its authority. It is not even like the British Constitution, which is made up of enactments of Parliament, decisions of Courts, and the established usages of the Government. The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people. I am careful to make this statement here; in America it would not be necessary. It would not be necessary here if my assailant had showed the same desire to set before you the simple truth, which he manifested to make out a good case for himself and friends. Again, it should be borne in mind that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States. It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are to be respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say. Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with closed doors, and that this was done purposely, that nothing but the result of their labours should be seen, and that that result should be judged of by the people free from any of the bias shown in the debates. It should also be borne in mind, and the fact is still more important, that the debates in the convention that framed the Constitution, and by means of which a pro-slavery interpretation is now attempted to be forced upon that instrument, were not published till more than a quarter of a century after the presentation and the adoption of the Constitution.

These debates were purposely kept out of view, in order that the people should

adopt, not the secret motives or unexpressed intentions of any body, but the simple text of the paper itself. Those debates form no part of the original agreement. I repeat, the paper itself, and only the paper itself, with its own plainly-written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects. Again, where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages. Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves – which Wesley says is the sum of all villainies – to shelter itself under a fair-seeming and virtuous language. We owe it to ourselves to compel the devil to wear his own garments, and to make wicked laws speak out their wicked intentions. Common sense, and common justice, and sound rules of interpretation all drive us to the words of the law for the meaning of the law. The practice of the Government is dwelt upon with much fervour and eloquence as conclusive as to the slaveholding character of the Constitution. This is really the strong point, and the only strong point, made in the speech in the City Hall. But good as this argument is, it is not conclusive. A wise man has said that few people have been found better than their laws, but many have been found worse. To this last rule America is no exception. Her laws are one thing, her practice is another thing. We read that the Jews made void the law by their tradition, that Moses permitted men to put away their wives because of the hardness of their hearts, but that this was not so at the beginning. While good laws will always be found where good practice prevails, the reverse does not always hold true. Far from it. The very opposite is often the case. What then? Shall we condemn the righteous law because wicked men twist it to the support of wickedness? Is that the way to deal with good and evil? Shall we blot out all distinction between them, and hand over to slavery all that slavery may claim on the score of long practice? Such is the course commended to us in the City Hall speech. After all, the fact that men go out of the Constitution to prove it pro-slavery, whether that going out is to the practice of the Government, or to the secret intentions of the writers of the paper, the fact that they do go out is very significant. It is a powerful argument on my side. It is an admission that the thing for which they are looking is not to be found where only it ought to be found, and that is in the Constitution itself. If it is not there, it is nothing to the purpose, be it wheresoever else it may be. But I shall have more to say on this point hereafter.

The very eloquent lecturer at the City Hall doubtless felt some embarrassment from the fact that he had literally to give the Constitution a pro-slavery interpretation; because upon its face it of itself conveys no such meaning, but a very

opposite meaning. He thus sums up what he calls the slaveholding provisions of the Constitution. I quote his own words: – "Article I, section 9, provides for the continuance of the African slave trade for 20 years, after the adoption of the Constitution. Art˙ 4, section 9, provides for the recovery from other States of fugitive slaves. Art˙ I, section 2, gives the slave States a representation of three-fifths of all the slave population; and Art˙ I, section 8, requires the President to use the military, naval, ordnance, and militia resources of the entire country for the suppression of slave insurrection, in the same manner as he would employ them to repel invasion." Now any man reading this statement, or hearing it made with such a show of exactness, would unquestionably suppose that the speaker or writer had given the plain written text of the Constitution itself. I can hardly believe that he intended to make any such impression. It would be a scandalous imputation to say he did. And yet what are we to make of it? How can we regard it? How can he be screened from the charge of having perpetrated a deliberate and point-blank misrepresentation? That individual has seen fit to place himself before the public as my opponent, and yet I would gladly find some excuse for him. I do not wish to think as badly of him as this trick of his would naturally lead me to think. Why did he not read the Constitution? Why did he read that which was not the Constitution? He pretended to be giving chapter and verse, section and clause, paragraph and provision. The words of the Constitution were before him. Why then did he not give you the plain words of the Constitution? Oh, sir, I fear that that gentleman knows too well why he did not. It so happens that no such words as "African slave trade," no such words as "slave representation," no such words as "fugitive slaves," no such words as "slave insurrections," are anywhere used in that instrument. These are the words of that orator, and not the words of the Constitution of the United States. Now you shall see a slight difference between my manner of treating this subject and that which my opponent has seen fit, for reasons satisfactory to himself, to pursue. What he withheld, that I will spread before you: what he suppressed, I will bring to light: and what he passed over in silence, I will proclaim: that you may have the whole case before you, and not be left to depend upon either his, or upon my inferences or testimony. Here then are the several provisions of the Constitution to which reference has been made. I read them word for word just as they stand in the paper, called the United States Constitution, Art˙ I, sec˙ 2. "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons; Art˙ I, sec˙ 9. The migration or importation of such persons as any of the States now existing shall think fit to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person; Art˙ 4, sec˙ 2. No person held to service or labour in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labour; but shall be delivered up on claim of the party to whom

such service or labour may be due; Art˙ I, sec˙ 8. To provide for calling for the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Here, then, are those provisions of the Constitution, which the most extravagant defenders of slavery can claim to guarantee a right of property in man. These are the provisions which have been pressed into the service of the human fleshmongers of America. Let us look at them just as they stand, one by one. Let us grant, for sake of the argument, that the first of these provisions, referring to the basis of representation and taxation, does refer to slaves. We are not compelled to make that admission, for it might fairly apply to aliens – persons living in the country, but not naturalized. But giving the provisions the very worst construction, what does it amount to? I answer – It is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation. A black man in a free State is worth just two-fifths more than a black man in a slave State, as a basis of political power under the Constitution. Therefore, instead of encouraging slavery, the Constitution encourages freedom by giving an increase of "two-fifths" of political power to free over slave States. So much for the three-fifths clause; taking it at its worst, it still leans to freedom, not to slavery; for, be it remembered that the Constitution nowhere forbids a coloured man to vote. I come to the next, that which it is said guaranteed the continuance of the African slave trade for twenty years. I will also take that for just what my opponent alleges it to have been, although the Constitution does not warrant any such conclusion. But, to be liberal, let us suppose it did, and what follows? why, this – that this part of the Constitution, so far as the slave trade is concerned, became a dead letter more than 50 years ago, and now binds no man's conscience for the continuance of any slave trade whatever. Mr˙ Thompson is just 52 years too late in dissolving the Union on account of this clause. He might as well dissolve the British Government, because Queen Elizabeth granted to Sir John Hawkins to import Africans into the West Indies 300 years ago! But there is still more to be said about this abolition of the slave trade. Men, at that time, both in England and in America, looked upon the slave trade as the life of slavery. The abolition of the slave trade was supposed to be the certain death of slavery. Cut off the stream, and the pond will dry up, was the common notion at that time.

Wilberforce and Clarkson, clear-sighted as they were, took this view; and the American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of slavery. This view is quite consistent with the history of the times. All regarded slavery as an expiring and doomed system, destined to speedily disappear from the country. But, again, it should be remembered that this very provision, if made to refer to the African slave trade at all, makes the Constitution anti-slavery rather than for slavery, for it says to the slave States, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union. Secondly, if it does apply, it expired by its own limitation more than fifty years ago. Thirdly, it is anti-slavery, because it looked to the abolition of

slavery rather than to its perpetuity. Fourthly, it showed that the intentions of the framers of the Constitution were good, not bad. I think this is quite enough for this point. I go to the "slave insurrection" clause, though, in truth, there is no such clause. The one which is called so has nothing whatever to do with slaves or slaveholders any more than your laws for the suppression of popular outbreaks has to do with making slaves of you and your children. It is only a law for suppression of riots or insurrections. But I will be generous here, as well as elsewhere, and grant that it applies to slave insurrections. Let us suppose that an anti-slavery man is President of the United States (and the day that shall see this the case is not distant) and this very power of suppressing slave insurrection would put an end to slavery. The right to put down an insurrection carries with it the right to determine the means by which it shall be put down. If it should turn out that slavery is a source of insurrection, that there is no security from insurrection while slavery lasts, why, the Constitution would be best obeyed by putting an end to slavery, and an anti-slavery Congress would do that very thing. Thus, you see, the so-called slave-holding provisions of the American Constitution, which a little while ago looked so formidable, are, after all, no defence or guarantee for slavery whatever. But there is one other provision. This is called the "Fugitive Slave Provision." It is called so by those who wish to make it subserve the interest of slavery in America, and the same by those who wish to uphold the views of a party in this country. It is put thus in the speech at the City Hall: – "Let us go back to 1787, and enter Liberty Hall, Philadelphia, where sat in convention the illustrious men who framed the Constitution – with George Washington in the chair. On the 27th of September, Mr˙ Butler and Mr˙ Pinckney, two delegates from the State of South Carolina, moved that the Constitution should require that fugitive slaves and servants should be delivered up like criminals, and after a discussion on the subject, the clause, as it stands in the Constitution, was adopted. After this, in the conventions held in the several States to ratify the Constitution, the same meaning was attached to the words. For example, Mr˙ Madison (afterwards President), when recommending the Constitution to his constituents, told them that the clause would secure them their property in slaves." I must ask you to look well to this statement. Upon its face, it would seem a full and fair statement of the history of the transaction it professes to describe and yet I declare unto you, knowing as I do the facts in the case, my utter amazement at the downright untruth conveyed under the fair seeming words now quoted. The man who could make such a statement may have all the craftiness of a lawyer, but who can accord to him the candour of an honest debater? What could more completely destroy all confidence in his statements? Mark you, the orator had not allowed his audience to hear read the provision of the Constitution to which he referred. He merely characterized it as one to "deliver up fugitive slaves and servants like criminals," and tells you that that provision was adopted as it stands in the Constitution. He tells you that this was done "after discussion." But he took good care not to tell you what was the nature of that discussion. He would have spoiled the whole effect of his statement had he told you the whole truth. Now, what are the facts connected with this provision of the Constitution? You shall have them.

It seems to take two men to tell the truth. It is quite true that Mr˙ Butler and Mr˙ Pinckney introduced a provision expressly with a view to the recapture of fugitive slaves: it is quite true also that there was some discussion on the subject – and just here the truth shall come out. These illustrious kidnappers were told promptly in that discussion that no such idea as property in man should be admitted into the Constitution. The speaker in question might have told you, and he would have told you but the simple truth, if he had told you that the proposition of Mr˙ Butler and Mr˙ Pinckney – which he leads you to infer was adopted by the convention that framed the Constitution – was, in fact, promptly and indignantly rejected by that convention. He might have told you, had it suited his purpose to do so, that the words employed in the first draft of the fugitive clause were such as applied to the condition of slaves, and expressly declared that persons held to "servitude" should be given up; but that the word "servitude" was struck from the provision, for the very reason that it applied to slaves. He might have told you that that same Mr˙ Madison declared that that word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution. The fact that Mr˙ Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed. But it may be asked – if this clause does not apply to slaves, to whom does it apply?

I answer, that when adopted, it applies to a very large class of persons – namely, redemptioners – persons who had come to America from Holland, from Ireland, and other quarters of the globe – like the Coolies to the West Indies – and had, for a consideration duly paid, become bound to "serve and labour" for the parties to whom their service and labour was due. It applies to indentured apprentices and others who had become bound for a consideration, under contract duly made, to serve and labour. To such persons this provision applies, and only to such persons. The plain reading of this provision shows that it applies, and that it can only properly and legally apply, to persons "bound to service." Its object plainly is, to secure the fulfilment of contracts for "service and labour." It applies to indentured apprentices, and any other persons from whom service and labour may be due. The legal condition of the slave puts him beyond the operation of this provision. He is not described in it. He is a simple article of property. He does not owe and cannot owe service. He cannot even make a contract. It is impossible for him to do so. He can no more make such a contract than a horse or an ox can make one. This provision, then, only respects persons who owe service, and they only can owe service who can receive an equivalent and make a bargain. The slave cannot do that, and is therefore exempted from the operation of this fugitive provision. In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing. It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood. The very nature of law is opposed to all such wickedness, and makes it difficult to accomplish such objects under the forms of law. Law is not merely an arbitrary enactment with regard to justice, reason, or

humanity. Blackstone defines it to be a rule prescribed by the supreme power of the State commanding what is right and forbidding what is wrong. The speaker at the City Hall laid down some rules of legal interpretation. These rules send us to the history of the law for its meaning. I have no objection to such a course in ordinary cases of doubt. But where human liberty and justice are at stake, the case falls under an entirely different class of rules. There must be something more than history – something more than tradition. The Supreme Court of the United States lays down this rule, and it meets the case exactly – "Where rights are infringed – where the fundamental principles of the law are overthrown – where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness." The same court says that the language of the law must be construed strictly in favour of justice and liberty. Again, there is another rule of law. It is – Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose. Again, the details of a law are to be interpreted in the light of the declared objects sought by the law. I set these rules down against those employed at the City Hall. To me they seem just and rational. I only ask you to look at the American Constitution in the light of them, and you will see with me that no man is guaranteed a right of property in man, under the provisions of that instrument. If there are two ideas more distinct in their character and essence than another, those ideas are "persons" and "property," "men" and "things." Now, when it is proposed to transform persons into "property" and men into beasts of burden, I demand that the law that contemplates such a purpose shall be expressed with irresistible clearness. The thing must not be left to inference, but must be done in plain English. I know how this view of the subject is treated by the class represented at the City Hall. They are in the habit of treating the Negro as an exception to general rules. When their own liberty is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man's rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reverse the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise. Let us look at the objects for which the Constitution was framed and adopted, and see if slavery is one of them. Here are its own objects as set forth by itself: – "We, the people of these United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." The objects here set forth are six in number: union, defence, welfare, tranquillity, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all. But it has been said that Negroes are not included within the benefits sought under this declaration. This is said by the slaveholders in America – it is said by the City Hall orator – but it is not said by the Constitution itself. Its language is "we the people;" not we the white people,

not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established. But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution? Why should such friends invent new arguments to increase the hopelessness of his bondage? This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming everything for slavery; by denying everything for freedom; by assuming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in the light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery. They go everywhere else for proof that the Constitution is pro-slavery but to the Constitution itself. The Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus – that great writ that put an end to slavery and slave-hunting in England – it secures to every State a republican form of government. Any one of these provisions, in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America. The Constitution forbids the passing of a bill of attainder: that is, a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave. But to all this it is said that the practice of the American people is against my view. I admit it. They have given the Constitution a slaveholding interpretation. I admit it. They have committed innumerable wrongs against the Negro in the name of the Constitution. Yes, I admit it all; and I go with him who goes farthest in denouncing these wrongs. But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation. To be consistent in his logic, the City Hall speaker must follow the example of some of his brothers in America – he must not only fling away the Constitution, but the Bible. The Bible must follow the Constitution, for that, too, has been interpreted for slavery by American divines. Nay, more, he must not stop with the Constitution of America, but make war upon the British Constitution, for, if I mistake not, that gentleman is opposed to the union of Church and State. In America he called himself a Republican. Yet he does not go for breaking down the British Constitution, although you have a Queen on the throne, and bishops in the House of Lords.

My argument against the dissolution of the American Union is this: It would place the slave system more exclusively under the control of the slaveholding

States, and withdraw it from the power in the Northern States which is opposed to slavery. Slavery is essentially barbarous in its character. It, above all things else, dreads the presence of an advanced civilisation. It flourishes best where it meets no reproving frowns, and hears no condemning voices. While in the Union it will meet with both. Its hope of life, in the last resort, is to get out of the Union. I am, therefore, for drawing the bond of the Union more closely, and bringing the Slave States more completely under the power of the Free States. What they most dread, that I most desire. I have much confidence in the instincts of the slaveholders. They see that the Constitution will afford slavery no protection when it shall cease to be administered by slaveholders. They see, moreover, that if there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result. They see that the Constitution has not saved slavery in Rhode Island, in Connecticut, in New York, or Pennsylvania; that the Free States have increased from one up to eighteen in number, while the Slave States have only added three to their original number. There were twelve Slave States at the beginning of the Government: there are fifteen now. There was one Free State at the beginning of the Government: there are eighteen now. The dissolution of the Union would not give the North a single advantage over slavery, but would take from it many. Within the Union we have a firm basis of opposition to slavery. It is opposed to all the great objects of the Constitution. The dissolution of the Union is not only an unwise but a cowardly measure – 15 millions running away from three hundred and fifty thousand slaveholders. Mr˙ Garrison and his friends tell us that while in the Union we are responsible for slavery. He and they sing out "No Union with slaveholders," and refuse to vote. I admit our responsibility for slavery while in the Union, but I deny that going out of the Union would free us from that responsibility. There now clearly is no freedom from responsibility for slavery to any American citizen short of the abolition of slavery. The American people have gone quite too far in this slaveholding business now to sum up their whole business of slavery by singing out the cant phrase, "No union with slaveholders." To desert the family hearth may place the recreant husband out of the presence of his starving children, but this does not free him from responsibility. If a man were on board of a pirate ship, and in company with others had robbed and plundered, his whole duty would not be performed simply by taking the longboat and singing out "No union with pirates." His duty would be to restore the stolen property. The American people in the Northern States have helped to enslave the black people. Their duty will not have been done till they give them back their plundered rights. Reference was made at the City Hall to my having once held other opinions, and very different opinions to those I have now expressed. An old speech of mine delivered fourteen years ago was read to show – I know not what. Perhaps it was to show that I am not infallible. If so, I have to say in defence, that I never pretended to be. Although I cannot accuse myself of being remarkably unstable, I do not pretend that I have never altered my opinion both in respect to men and things. Indeed, I have been very much modified both in feeling and opinion within the last fourteen years. When I escaped from slavery, and was introduced to the Garrisonians, I adopted

very many of their opinions, and defended them just as long as I deemed them true. I was young, had read but little, and naturally took some things on trust. Subsequent experience and reading have led me to examine for myself. This has brought me to other conclusions. When I was a child, I thought and spoke as a child. But the question is not as to what were my opinions fourteen years ago, but what they are now. If I am right now, it really does not matter what I was fourteen years ago. My position now is one of reform, not of revolution. I would act for the abolition of slavery through the Government – not over its ruins. If slaveholders have ruled the American Government for the last fifty years, let the anti-slavery men rule the nation for the next fifty years. If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice. If 350,000 slaveholders have, by devoting their energies to that single end, been able to make slavery the vital and animating spirit of the American Confederacy for the last 72 years, now let the freemen of the North, who have the power in their own hands, and who can make the American Government just what they think fit, resolve to blot out for ever the foul and haggard crime, which is the blight and mildew, the curse and the disgrace of the whole United States.

Dred Scott v. Sandford

60 U.S. 393 (1856)

Chief Justice TANEY delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdic-

tion; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Govern-

ments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased

the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was

formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, (ch. 13, s. 5,) passed a law declaring 'that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid.'

The other colonial law to which we refer was passed by Massachusetts in 1705, (chap. 6.) It is entitled 'An act for the better preventing of a spurious and mixed issue,' &c.; and it provides, that 'if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted.'

And 'that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds;

one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information.'

We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, 'when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation.'

It then proceeds to say: '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 them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.'

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and

adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By

the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the Government went into operation.

We need not refer, on this point, particularly to the laws of the present slave-

holding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.

And as long ago as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States; and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meigs's Tenn. Reports, 331.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation

of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the States might improperly naturalize. The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet,

when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, will all the privileges and immunities which belong to citizens of the

State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what

the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word 'citizen' and the word 'people.'

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

Equal Protection

Foundations, and Race

Plessy v. Ferguson

163 U.S. 537 (1896)

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.'

By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.'

1. By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguish d from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Gallagher, 93 N. Y. 438, 448:

'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights

before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.'

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

Mr. Justice HARLAN dissenting.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' and that '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.' These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that 'the right of citizens of the United States to vote shall

not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.'

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure 'to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy.' They declared, in legal effect, this court has further said, 'that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.' We also said: 'The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy; and discriminations which are steps towards reducing them to the condition of a subject race.' It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race, however well qualified in other respects to discharge the duties of jurymen, was repugnant to the fourteenth amendment. Strauder v. West Virginia, 307; Virginia v. Rives, ; Ex parte Virginia, ; Neal v. Delaware; Bush v. Com., 1 Sup. Ct. 625. At the present term, referring to the previous adjudications, this court declared that 'underlying all of those decisions is the principle 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 the states against any citizen because of his race. All citizens are equal before the law.' Gibson v. StateSup. Ct. 904.

The decisions referred to show the scope of the recent amendments of the constitution. They also show that it is not within the power of a state to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, there-

fore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Comm. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the la Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, 'the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.' Sedg. St. & Const. Law, 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each much keep within the limits defined by the constitution. And the courts best discharge their duty by executing the will of the law-making

power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly, sometimes literally, in order to carry out the legislative will. But, however construed, the intent of the legislature is to be respected if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

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 liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word 'citizens' in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at time of the adoption of the constitution, they were 'considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' 17 How. 393, 404. The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people

of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

Brown v. Board of Education

347 U.S. 483 (1954)

Mr. Chief Justice WARREN delivered the opinion of the Court. These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under

laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in Plessy v. Ferguso-nUnder that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of Plessy v. Fergusoninvolving not education but transportation American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education In Cumming v. Board of Education of Richmond Countyand Gong Lum v. Ricethe validity of the doctrine itself was not challenged. 8 In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. State of Missouri ex rel. Gaines v. Canada; Sipuel v. Board of Regents of University of Oklahoma; Sweatt v. Painters.Ct. 848, ; McLaurin v. Oklahoma State RegentsIn none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painterthe Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. 9 Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of

equal educational opportunities? We believe that it does.

In Sweatt v. Painter(339 U.S. 629,), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents(339 U.S. 637,), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '

his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the

Court for the reargument this Term The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

From the Footnotes:

K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44—48; Frazier, The Negro in the United States (1949), 674—681. And see generally Myrdal, An American Dilemma (1944).

Loving v. Virginia

388 U.S. 1 (1967)

Mr. Chief Justice WARREN delivered the opinion of the Court. This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the convictions.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20—58 of the Virginia Code:

'Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20—59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.'

Section 20—59, which defines the penalty for miscegenation, provides: 'Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.'

Other central provisions in the Virginia statutory scheme are § 20—57, which automatically voids all marriages between 'a white person and a colored person' without any judicial proceeding,3 and §§ 20—54 and 1—14 which, respectively, define 'white persons' and 'colored persons and Indians' for purposes of the statutory prohibitions The Lovings have never disputed in the course of this litigation that Mrs. Loving is a 'colored person' or that Mr. Loving is a 'white person' within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. 6 The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of

the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a 'white person' marrying other than another 'white person,' a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct,8 certificates of 'racial composition' to be kept by both local and state registrars,9 and the carrying forward of earlier prohibitions against racial intermarriage.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 197 Va. 80, 87 S.E d 749, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy. 87 S.E d. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, Maynard v. Hillthe State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of Meyer v. State of Nebraskaand Skinner v. State of OklahomaInstead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial

discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, Railway Express Agency, Inc. v. People of State of New York§ .Ct. 463, or an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse, Allied Stores of Ohio, Inc. v. BowersIn these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that the pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources 'cast some light' they are not sufficient to resolve the problem; '(a)t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.' Brown v. Board of Education of Topeka, See also Strauder v. State of West Virginia, We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.

The State finds support for its 'equal application' theory in the decision of the Court in Pace v. State of AlabamaIn that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated 'Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.' McLaughlin v.

Florida U.S., As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' Hirabayashi v. United States, At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' Korematsu v. United States, and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose which makes the color of a person's skin the test of whether his conduct is a criminal offense.'

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. State of Oklahoma, See also Maynard v. HillTo deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered. Reversed.

From the footnotes:

Section 20—57 of the Virginia Code provides: 'Marriages void without decree.—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.' Va.Code Ann. § 20—57 (1960 Repl.Vol.).

Section 20—54 of the Virginia Code provides: 'Intermarriage prohibited; meaning of term 'white persons.' It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chaper.' Va.Code Ann. § 20—54 (1960 Repl.Vol.).

The exception for persons with less than one-sixteenth 'of the blood of the American Indian' is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by 'the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas * * *.' Plecker, The New Family and Race Improvement, 17 Va.Health Bull., Extra No. 12—26 (New Family Series No. 5, 1925), cited in Wadlington, The Loving Case; Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va.L.Rev. 1189, 1202, n. 93 (1966).

Section 1—14 of the Virginia Code provides:

Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.' Va.Code Ann. § 1—14 (1960 Repl.Vol.).

Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, 'An Act to Preserve Racial Integrity,' extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve 'racial integrity.' We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races.

Johnson v. California

543 U.S. 499 (2005)

Justice O'Connor delivered the opinion of the Court.

The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are " '[p]retty close' " to zero percent. App. to Pet. for Cert. 3a. The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and northern California Hispanics are separated from southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. Brief for Respondents 1-6. It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. The CDC also notes that prison-gang culture is violent and murderous. An associate warden testified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. App. 215a. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. See, e. g., a-306a. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others. See Brief for Respondents 29.

With the exception of the double cells in reception areas, the rest of the state prison facilities — dining areas, yards, and cells — are fully integrated. After the initial 60-day periodˆ prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them.

We have held that "all racial classifications [imposed by government] . must be analyzed by a reviewing court under strict scrutiny." Adarand Constructors, Inc. v. Peña (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, see Grutter v. Bollinger, race-based

preferences in government contracts, see Adarand, and race-based districting intended to improve minority representation, see Shaw v. Reno.

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[ajbsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining … what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Richmond v. J. A. Croson Co. (plurality opinion). We therefore apply strict scrutiny to all racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

The CDC claims that its policy should be exempt from our categorical rule because it is "neutral" — that is, it "neither benefits nor burdens one group or individual more than any other group or individual." Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." Shaw. Indeed, we rejected the notion that separate can ever be equal — or "neutral" — 50 years ago in Brown v. Board of Education, and we refuse to resurrect it today. See also Powers v. Ohio (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In Lee v. Washington (per curiam), we upheld a three-judge court's decision striking down Alabama's policy of segregation in its prisons. -334. Alabama had argued that desegregation would undermine prison security and discipline, but we rejected that contention. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion" — "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Ibid, (emphasis added). The concurring Justices emphasized that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination."

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." Shaw (citing J. A. Croson Co. (plurality opinion); emphasis added). Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce

racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." Shaw; see also Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated"). See also Brief for Former State Corrections Officials as Amici Curiae 19 (opinion of former corrections officials from six States that "racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence" and that "a blanket policy of racial segregation of inmates is contrary to sound prison management").

The CBC's policy is unwritten. Although California claimed at oral argument that two other States follow a similar policy, see Tr. of Oral Arg. 30-31, this assertion was unsubstantiated, and we are unable to confirm or deny its accuracy Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. See Brief for United States as Amicus Curiae 24. Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. 28 CFR § 551 (2004) ("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs"). The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." Brief for United States as Amicus Curiae 25. Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible.

Because the CDC's policy is an express racial classification, it is "immediately suspect." Shaw; see also Washington v. Seattle School Dist. No. 1. We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in Turner v. Safley, because its segregation policy applies only in the prison context. We decline the invitation. In Turner, we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners' fundamental rights

was "reasonably related" to "legitimate penological interests."

We have never applied Turner to racial classifications. Turner itself did not involve any racial classification, and it cast no doubt on Lee. We think this unsurprising, as we have applied Turner's reasonable-relationship test only to rights that are "inconsistent with proper incarceration." Overton v. Bazzetta; see also Pell v. Procunier ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). This is because certain privileges and rights must necessarily be limited in the prison context. See O'Lone v. Estate of Shabazz (" '[Ljawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system' " (quoting Price v. Johnston)). Thus, for example, we have relied on Turner in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, Overton; limits on inmate correspondence, Shaw v. Murphy; restrictions on inmates' access to courts, Lewis v. Casey; restrictions on receipt of subscription publications, Thornburgh v. Abbott; and work rules limiting prisoners' attendance at religious services, Shabazz. We have also applied Turner to some due process claims, such as involuntary medication of mentally ill prisoners, Washington v. Harper; and restrictions on the right to marry, Turner.

The right not to be discriminated against based on one's race is not susceptible to the logic of Turner. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is "especially pernicious in the administration of justice." Rose v. Mitchell. And public respect for our system of justice is undermined when the system discriminates based on race. Cf. Batson v. Kentucky ("[Pjublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race"). When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used Turner to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the "deliberate indifference" standard, rather than Turner's "reasonably related" standard. See Hope v. Pelzer (asking whether prison officials displayed " 'deliberate indifference' to the inmates' health or safety" where an inmate claimed that they violated his rights under the Eighth Amendment (quoting Hudson v. McMillian)). This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment. See Spain v. Procunier, -194 (CA9 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. . Mechanical deference to the findings of state prison officials in the

context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." McCleskey v. Kemp (internal quotation marks omitted).

We did not relax the standard of review for racial classifications in prison in Lee, and we refuse to do so today. Rather, we explicitly reaffirm what we implicitly held in Lee: The "necessities of prison security and discipline," 390 U. S., are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. See Grutter (Thomas, J., concurring in part and dissenting in part) (citing Lee for the principle that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); J. A. Croson Co. (Scalia, J., concurring in judgment) (citing Lee for the proposition that "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 — 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' " (quoting Plessy v. Ferguson (Harlan, J., dissenting))); see also Pell ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves").

The CDC protests that strict scrutiny will handcuff prison administrators and render them unable to address legitimate problems of race-based violence in prisons. See also post, 546-547 (Thomas, J., dissenting). Not so. Strict scrutiny is not "strict in theory, but fatal in fact." Adarand (internal quotation marks omitted); Grutter ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end. See ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied").

The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." Adarand. At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into

account.

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance. See Consolidated Rail Corporation v. Gottshall (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance); Lucas v. South Carolina Coastal Council (1992) (same). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Yick Wo v. Hopkins

118 U.S. 356 (1886)

The ordinances for the violation of which he had been found guilty were set out as follows: Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be- located.

" The people of the city and county of San Francisco do ordain as follows: " Sec. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

It was alleged in the petition, that " your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting, eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly .situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others."

It was also admitted " that petitioner and 200 of his countrymen similarly situated petitipne'd the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions -were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

Mr. Justice Matthews delivered the opinion of the court.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden

buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public ˆinterest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: " If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says : " 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." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality ; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Kevised Statutes, that " 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." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights .of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the

court.

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are sup.posed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely'political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class1 of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, wfth a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied

and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York; Chy Lung v. Freeman; Ex parte Virginia; Neal v. Delaware; and Soon Hing v. Crowley.

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Girouit Court of the United States for the District of Odlifornia ini the case of Wo Lee, are severally reversed, and the cases remanded, each to the pi'oper court, with directions to discharge the petitioners from custody cmd imprisonment.

Washington v. Davis

426 U.S. 229 (1976)

Mr. Justice WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission An amended complaint, filed December 10, alleged that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. The respondents Harley and Sellers were permitted to intervene, their amended complaint assert- ing that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. § 1981 and under D.C.Code § 1-320." Defendants answered, and discovery and various other proceedings followed Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that re-

spondents were entitled to relief on neither constitutional nor statutory grounds The District Court granted petitioners' and denied respondents' motions. 348 F.Supp. 15 (DC1972).

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," and which was "designed to test verbal ability, vocabulary, reading and comprehension."

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% Of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates (Sic) to discriminate against otherwise qualified blacks' It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance"The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process." The District Court ultimately concluded that "(t)he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence."

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their sum-

mary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by Griggs v. Duke Power Co.a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one.

The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks four times as many failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison (not) material to this appeal." n. 24, 512 F d n. 24. The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorarifiled by the District of Columbia officials.

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal,8 our Rule 40(1)(d)(2) provides that we "may notice a plain error not presented"; 9 and this is an appropriate occasion to invoke the Rule.

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. SharpeBut our cases

have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.

Almost 100 years ago, Strauder v. West VirginiaL.Ed. 664 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." Akins v. Texas, 1696 (1945). A defendant in a criminal case is entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." Alexander v. Louisiana.

The rule is the same in other contexts. Wright v. Rockefellerupheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." 58, 11 L.Ed d. The dissenters were in agreement that the issue was whether the "boundaries . were purposefully drawn on racial lines."

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of De jure segregation is "a current condition of segregation resulting from intentional state action. Keyes v. School Dist. No. 1, The differentiating factor between De jure segregation and so-called De facto segregation . is Purpose or Intent to segregate." 37 L.Ed d. See also 211, 213, 2698, 2699, 37 L.Ed d, 564, 566. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "(t)he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." Jefferson v. Hackney, 297 (1972).

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as

invidiously to discriminate on the basis of race. Yick Wo v. HopkinsIt is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . as to show intentional discrimination." Akins v. Texas L.Ed.. Smith v. Texas; Pierre v. Louisiana; Neal v. DelawareL.Ed. 567 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 1562 (1942), or with racially non-neutral selection procedures, Alexander v. Louisiana; Avery v. Georgia; Whitus v. GeorgiaWith a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In Palmer v. Thompsonthe city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated. Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance to preserve peace and avoid deficits

were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinary having neutral purposes but disproportionate racial consequences.

Wright v. Council of City of Emporia also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." There was thus no need to find "an independent constitutional violation." Citing Palmer v. Thompson, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither Palmer Nor Wright was understood to have changed the prevailing rule is apparent from Keyes v. School Dist. No. 1where the principal issue in litigation was whether to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, Alexander v. Louisianaand Jefferson v. Hackneyindicate that either Palmer or Wright had worked a fundamental change in equal protection law.

Both before and after Palmer v. Thompson, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than

to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F.Supp..

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disprortionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applica-

ble by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

We also hold that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds.

The submission of the defendants in the District Court was that Test 21 complied with all applicable statutory as well as constitutional requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied The District Court also assumed that Title VII standards were to control the case identified the determinative issue as whether Test 21 was sufficiently job related and proceeded to uphold use of the test because it was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy." 348 F.Supp.. The Court of Appeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement of a direct relationship between performance on Test 21 and performance on the policeman's job.

We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties to the case Nor is the conclusion closed by either Griggs or Albemarle Paper Co. v. Moody; and it seems to us the much more sensible construction of the job-relatedness requirement.

The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record; 17 and we are not convinced that this conclusion was erroneous.

The federal parties, whose views have somewhat changed since the decision of

the Court of Appeals and who still insist that training-program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training-program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that Title.

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

Mr. Justice STEVENS, concurring.

The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps

not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in Gomillion v. Lightfootor Yick Wo v. Hopkinsit really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.*

My agreement rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second, the same test is used throughout the federal service. The applicants for employment in the District of Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purposes" that term is used in constitutional adjudication.

Milliken v. Bradley

418 U.S. 717 (1974)

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

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.

The action was commenced in August 1970 by the respondents, the Detroit

Branch of the National Association for the Advancement of Colored People2 and individual parents and students, on behalf of a class later defined by order of the United States District Court for the Eastern District of Michigan, dated February 16, 1971, to included 'all school children in the City of Detroit, Michigan, and all Detroit resident parents who have children of school age.' The named defendants in the District Court included the Governor of Michigan, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction, the Board of Education of the city of Detroit, its members, the city's and its former superintendent of schools. The State of Michigan as such is not a party to this litigation and references to the State must be read as references to the public officials, state and local, through whom the State is alleged to have acted. In their complaint respondents attacked the constitutionality of a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970, Plan, which had been adopted by the Detroit Board of Education to be effective beginning with the fall 1970 semester. The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate 'the racial identity of every school in the (Detroit) system and . maintain now and hereafter a unitary, nonracial school system.'

Initially the matter was tried on respondents' motion for a preliminary injunction to restrain in enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, the District Court ruled that respondents were not entitled to a preliminary injunction since at that stage there was no proof that Detroit had a dual segregated school system. On appeal, the Court of Appeals found that the 'implementation of the April 7 plan was (unconstitutionally) thwarted by State action in the form of the Act of the Legislature of Michigan,' CA6 1970), and that such action could not be interposed to delay, obstruct, or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment. The case was remanded to the District Court for an expedited trial on the merits.

On remand, the respondents moved for immediate implementation of the April 7 Plan in order to remedy the deprivation of the claimed constitutional rights. In response, the School Board suggested two other plans, along with the April 7 Plan, and urged that top priority be assigned to the so-called 'Magnet Plan' which was 'designed to attract children to a school because of its superior curriculum.' The District Court approved the Board's Magnet Plan, and respondents again appealed to the Court of Appeals, moving for summary reversal. The Court of Appeals refused to pass on the merits of the Magnet Plan and ruled that the District Court had not abused its discretion in refusing to adopt the April 7 Plan without an evidentiary hearing. The case was again remanded with instructions to proceed immediately to a trial on the merits of respondents'

substantive allegations concerning the Detroit school system. CA6 1971).

The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days. On September 27, 1971, the District Court issued its findings and conclusions on the issue of segregation, finding that 'Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.' 338 F.Supp. 582, 587 (ED Mich). While still addressing a Detroit-only violation, the District Court reasoned:

'While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.'

The District Court found that the Detroit Board of Education created and maintained optional attendance zones3 within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the 'natural, probable, foreseeable and actual effect' of allowing white pupils to escape identifiably Negro schools. Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit.

The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro schools which were beyond or away from closer white schools with available space This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation:

'With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black.'

With respect to the Detroit Board of Education's practices in school construc-

tion, the District Court found that Detroit school construction generally tended to have a segregative effect with the great majority of schools being built in either overwhelmingly all-Negro or all-white neighborhoods so that the new schools opened as predominantly one-race schools. Thus, of the 14 schools which opened for use in 1970opened over 90% Negro and one opened less than 10% Negro.

The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education The State, for example, was found to have failed, until the 1971 Session of the Michigan Legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly white, suburban districts the full range of state-supported transportation.

The District Court found that the State, through Act 48, acted to 'impede, delay and minimize racial integration in Detroit schools.' The first sentence of § 12 of Act 48 was designed to delay the April 7, 1970, desegregation plan originally adopted by the Detroit Board. The remainder of § 12 sought to prescribe for each school in the eight districts criteria of 'free choice' and 'neighborhood schools,' which, the District Court found, 'had as their purpose and effect the maintenance of segregation.' 338 F.Supp..

The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan, thus creating a vicarious liability on the part of the State. Under Michigan law, Mich.Comp.Laws § 388 (1970), for example, school building construction plans had to be approved by the State Board of Education, and, prior to 1962, the State Board had specific statutory authority to supervise school-site selection. The proofs concerning the effect of Detroit's school construction program were, therefore, found to be largely applicable to show state responsibility for the segregative results.

Turning to the question of an appropriate remedy for these several constitutional violations, the District Court deferred a pending motion8 by intervening parent de- fendants to join as additional parties defendant the 85 outlying school districts in the three-county Detroit metropolitan area on the ground that effective relief could not be achieved without their presence. 9 The District Court concluded that this motion to join was 'premature,' since it 'has to do with relief' and no reasonably specific desegregation plan was before the court. 338 F.Supp.. Accordingly, the District Court proceeded to order the Detroit Board of Education to submit desegregation plans limited to the segregation problems found to be existing within the city of Detroit. At the same time, however, the state defendants were directed to submit desegregation plans encompassing the three-county metropolitan area 10 despite the fact that the 85 outlying school districts of these three counties were not parties to the action and despite the fact that there had been no claim that these outlying districts had committed

constitutional violations An effort to appeal these orders to the Court of Appeals was dismissed on the ground that the orders were not appealable. CA6), cert. deniedThe sequence of the ensuing actions and orders of the District Court are significant factors and will therefore be catalogued in some detail.

Following the District Court's abrupt announcement that it planned to consider the implementation of a multidistrict, metropolitan area remedy to the segregation problems identified within the city of Detroit, the District Court was again requested to grant the outlying school districts intervention as of right on the ground that the District Court's new request for multidistrict plans 'may, as a practical matter, impair or impede (the intervenors') ability to protect' the welfare of their students. The District Court took the motions to intervene under advisement pending submission of the requested desegregation plans by Detroit and the state officials. On March 7, 1972, the District Court notified all parties and the petitioner school districts seeking intervention, that March 14, 1972, was the deadline for submission of recommendations for conditions of intervention and the date of the commencement of hearings on Detroit-only desegregation plans. On the second day of the scheduled hearings, March 15, 1972, the District Court granted the motions of the intervenor school districts12 subject, inter alia, to the following conditions:

'1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

'2. No intervenor shall reopen any question or issue which has previously been decided by the court.

'7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court.' 1 Joint Appendix 206 (hereinafter App.).

Upon granting the motion to intervene, on March 15, 1972, the District Court advised the petitioning intervenors that the court had previously set March 22, 1972, as the date for the filing of briefs on the legal propriety of a 'metropolitan' plan of desegregation and, accordingly, that the intervening school districts would have one week to muster their legal arguments on the issue.

Thereafter, and following the completion of hearings on the Detroit-only desegregation plans, the District Court issued the four rulings that were the principal issues in the Court of Appeals.

1. On March 24, 1972, two days after the intervenors' briefs were due, the District Court issued its ruling on the question of whether it could 'consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger Detroit metropolitan area.' It rejected the state defendants' arguments that no state action caused the segregation

of the Detroit schools, and the intervening suburban districts' contention that interdistrict relief was inappropriate unless the suburban districts themselves had committed violations. The court concluded:

'(I)t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.' Pet.App. 51a.

1. On March 28, 1972, the District Court issued its findings and conclusions on the three Detroit-only plans submitted by the city Board and the respondents. It found that the best of the three plans 'would make the Detroit school system more identifiably Black . thereby increasing the flight of Whites from the city and the system.' a. From this the court concluded that the plan 'would not accomplish desegregation . within the corporate geographical limits of the city.' a. Accordingly, the District Court held that it 'must look beyond the limits of the Detroit school district for a solution to the problem,' and that '(s)chool district lines are simply matters of political convenience and may not be used to deny constitutional rights.' a.

2. During the period from March 28 to April 14, 1972, the District Court conducted hearings on a metropolitan plan. Counsel for the petitioning intervenors was allowed to participate in these hearings, but he was ordered to confine his argument to 'the size and expanse of the metropolitan plan' without addressing the intervenors' opposition to such a remedy or the claim that a finding of a constitutional violation by the intervenor districts was an essential predicate to any remedy involving them. Thereafter, on June 14, 1972, the District Court issued its ruling on the 'desegregation area' and related findings and conclusions. The court acknowledged at the outset that it had 'taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties (in the Detroit area), nor on the issue of whether, with the exclusion of the city of Detroit school districts, such school districts have committed acts of de jure segregation.' Nevertheless, the court designated 53 of the 85 suburban school districts plus Detroit as the 'desegregation area' and appointed a panel to prepare and submit 'an effective desegregation plan' for the Detroit schools that would encompass the entire desegregation area The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts, and was to 'achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom (would be) substantially disproportionate to the overall pupil racial composition.' 345 F.Supp. 914, 918 (ED Mich).

3. On July 11, 1972, and in accordance with a recommendation by the court-appointed desegregation panel, the District Court ordered the Detroit

Board of Education to purchase or lease 'at least' 295 school buses for the purpose of providing transportation under an interim plan to be developed for the 1972 1973 school year. The costs of this acquisition were to be borne by the state defendants. Pet.App. 106a—107a.

On June 12, 1973, a divided Court of Appeals, sitting en banc, affirmed in part, vacated in part, and remanded for further proceedings. CA6) The Court of Appeals held, first, that the record supported the District Court's findings and conclusions on the constitutional violations committed by the Detroit Board, —238, and by the state defendants, —241 It stated that the acts of racial discrimination shown in the record are 'causally related to the substantial amount of segregation found in the Detroit school system,' and that 'the District Court was therefore authorized and required to take effective measures to desegregate the Detroit Public School System.'

The Court of Appeals also agreed with the District Court that 'any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.' The court went on to state that it could '(not) see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district.'

Accordingly, the Court of Appeals concluded that 'the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan.' It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. Without further elaboration, and without any discussion of the claims that no constitutional violation by the outlying districts had been shown and that no evidence on that point had been allowed, the Court of Appeals held:

'(T)he State has committed de jure acts of segregation and . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts.'

An interdistrict remedy was thus held to be 'within the equity powers of the District Court.'

The Court of Appeals expressed no views on the propriety of the District Court's composition of the metropolitan 'desegregation area.' It held that all suburban school districts that might be affected by any metropolitanwide remedy should, under Fed.Rule Civ.Proc. 19, be made parties to the case on remand and be given an opportunity to be heard with respect to the scope and implementation of such a remedy. 484 F d—252. Under the terms of the remand, however, the District Court was not 'required' to receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy, or on the question of whether the affected districts had committed any violation

of the constitutional rights of Detroit pupils or others. Finally, the Court of Appeals vacated the District Court's order directing the acquisition of school buses, subject to the right of the District Court to consider reimposing the order 'at the appropriate time.'

Ever since Brown v. Board of Educationjudicial consideration of school desegregation cases has begun with the standard:

'(I)n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.'

This has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.

The target of the Brown holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution in the cases subsequent to 1954, including particularly Green v. County School Board of New Kent County; Raney v. Board of Education; Monroe v. Board of Comm'rs; Swann v. Charlotte-Mecklenburg Board of Education; Wright v. Council of the City of Emporia; United States v. Scotland Neck City Board of Education.

The Swann case, of course, dealt 'with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once.'

In Brown v. Board of Education (Brown II), the Court's first encounter with the problem of remedies in school desegregation cases, the Court noted:

'In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Tra- ditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'

In further refining the remedial process, Swann held, the task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '(a)s with any equity case, the nature of the violation determines the scope of the remedy.'

Proceeding from these basic principles, we first note that in the District Court the complainants sought a remedy aimed at the condition alleged to offend the Constitution—the segregation within the Detroit City School District. 18 The court acted on this theory of the case and in its initial ruling on the 'Desegregation Area' stated:

'The task before this court, therefore, is now, and . has always been, now to desegregate the Detroit public schools.' 345 F.Supp..

Thereafter, however, the District Court abruptly rejected the proposed Detroit-only plans on the ground that 'while (they) would provide a racial mix more in keeping with the Black-White proportions of the student population (they) would accentuate the racial identifiability of the (Detroit) district as a Black school system, and would not accomplish desegregation.' Pet.App., 56a. '(T)he racial composition of the student body is such,' said the court, 'that the plan's implementation would clearly make the entire Detroit public school system racially identifiable' (Id.a), 'leav(ing) many of its schools 75 to 90 per cent Black.' a. Consequently, the court reasoned, it was imperative to 'look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools . .' since '(s)chool district lines are simply matters of political convenience and may not be used to deny constitutional rights.' a. Accordingly, the District Court proceeded to redefine the relevant area to include areas of predominantly white pupil population in order to ensure that 'upon implementation, no school, grade or classroom (would be) substantially disproportionate to the overall pupil racial composition' of the entire metropolitan area.

While specifically acknowledging that the District Court's findings of a condition of segregation were limited to Detroit, the Court of Appeals approved the use of a metropolitan remedy largely on the grounds that it is

'impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only segregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black.' 484 F d.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the pri- mary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. The metropolitan area was then defined as Detroit plus 53 of the outlying school districts. That this was the approach the District Court expressly and frankly employed is shown by the order which expressed the court's view of the constitutional standard:

'Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom (will be) substantially disproportionate to the overall pupil racial composition.' 345 F.Supp., st 918 (emphasis added).

In Swann, which arose in the context of a single independent school district, the Court held:

'If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.'

The clear import of this language from Swann is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'19 See Spencer v. Kugler

Here the District Court's approach to what constituted 'actual desegregation' raises the fundamental question, not presented in Swann, as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district. The court's analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn 'for political convenience.' Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the nation that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, Thus, in San Antonio Independent School District v. Rodriguez, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'

The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control,20 and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public edu- cation in Michigan. The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district. See n. 10. Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts constituting the consolidated metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term

bonds be jeopardized unless approved by all of the component districts as well as the State? What body would determine that portion of the curricula now left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils? See n. 10.

It may be suggested that all of these vital operational problems are yet to be resolved by the District Court, and that this is the purpose of the Court of Appeals' proposed remand. But it is obvious from the scope of the interdistrict remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto Page

'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.

Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies. See, e.g., Wright v. Council of the City of Emporia; United States v. Scotland Neck City Board of Education (state or local officials prevented from carving out a new school district from an existing district that was in process of dismantling a dual school system); cf. Haney v. County Board of Education of Sevier County, CA8 1970) (State contributed to separation of races by drawing of school district lines); United States v. Texas, 321 F.Supp. 1043 (ED Tex), aff'd, CA5 1971), cert. denied sub nom. Edgar v. United States (one or more school districts created and maintained for one race). But our prior holdings have been confined to violations and remedies within a single school district. We therefore turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district.

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional vi-

olation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. See—726. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and or any holding of this Court.

In dissent, Mr. Justice WHITE and Mr. Justice MARSHALL undertake to demonstrate that agencies having statewide authority participated in maintaining the dual school system found to exist in Detroit. They are apparently of the view that once such participation is shown, the District Court should have a relatively free hand to reconstruct school districts outside of Detroit in fashioning relief. Our assumption, arguendo, see infra, p. 748, that state agencies did participate in the maintenance of the Detroit system, should make it clear that it is not on this point that we part company. 21 The difference between us arises instead from established doctrine laid down by our cases. Brown; Green; Swann; Scotland Neck; and Emporiaeach addressed the issue of constitutional wrong in terms of an established geographic and administrative school system populated by both Negro and white children. In such a context, terms such as 'unitary' and 'dual' systems, and 'racially identifiable schools,' have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. 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.

The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion. or arranged for white students residing in the Detroit district to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.

We recognize that the six-volume record presently under consideration contains

language and some specific incidental findings thought by the District Court to afford a basis for interdistrict relief. However, these comparatively isolated findings and brief comments concern only one possible interdistrict violation and are found in the context of a proceeding that, as the District Court conceded, included no proof of segregation practiced by any of the 85 suburban school districts surrounding Detroit. The Court of Appeals, for example, relied on five factors which, it held, amounted to unconstitutional state action with respect to the violations found in the Detroit system:

1. It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State. Accepting, arguendo, the correctness of this finding of state responsibility for the segregated conditions within the city of Detroit, it does not follow that an interdistrict remedy is constitutionally justified or required. With a single exception, discussed later, there has been no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect. The boundaries of the Detroit School District, which are coterminous with the boundaries of the city of Detroit, were established over a century ago by neutral legislation when the city was incorporated; there is no evidence in the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining, or perpetuating segregation of races. There is no claim and there is no evidence hinting that petitioner outlying schools districts and their processors, or the 30-odd other school districts in the tricounty area—but outside the District Court's 'desegregation area'—have ever maintained or operated anything but unitary school systems. Unitary school systems have been required for more than a century by the Michigan Constitution as implemented by state law White the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts.

2. There was evidence introduced at trial that, during the late 1950's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit. At the time, Carver was an independent school district that had no high school because, according to the trial evidence, 'Carver District . did not have a place for adequate high school facilities.' 484 F d.. Accordingly, arrangements were made with Northern High School in the abutting Detroit School District so that the Carver high school students could obtain a secondary school education. In 1960 the Oak Park School District, a predominantly white suburban district, annexed the predominantly Negro Carver School District, through the initiative of local officials.

There is, of course, no claim that the 1960 annexation had a segregative purpose

or result or that Oak Park now maintains a dual system.

According to the Court of Appeals, the arrangement during the late 1950's which allowed Carver students to be educated within the Detroit District was dependent upon the 'tacit or express' approval of the State Board of Education and was the result of the refusal of the white suburban districts to accept the Carver students. Although there is nothing in the record supporting the Court of Appeals' supposition that suburban white schools refused to accept the Carver students, it appears that this situation, whether with or without the State's consent, may have had a segregative effect on the school populations of the two districts involved. However, since 'the nature of the violation determines the scope of the remedy,' Swann, this isolated instance effecting two of the school districts would not justify the broad metropolitanwide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students.

1. The Court of Appeals cited the enactment of state legislation (Act 48) which had the effect of rescinding Detroit's voluntary desegregation plan (the April 7 Plan). That plan, however, affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tricounty area.

2. The court relied on the State's authority to supervise schoolsite selection and to approve building construction as a basis for holding the State responsible for the segregative results of the school construction program in Detroit. Specifically, the Court of Appeals asserted that during the period between 1949 and 1962 the State Board of Education exercised general authority as overseer of site acquisitions by local boards for new school construction, and suggested that this state-approved school construction 'fostered segregation throughout the Detroit Metropolitan area.' 484 F d. This brief comment, however, is not supported by the evidence taken at trial since that evidence was specifically limited to proof that schoolsite acquisition and school construction within the city of Detroit produced de jure segregation within the city itself. —238. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

3. The Court of Appeals also relied upon the District Court's finding:

'This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated

systematic educational inequalities.'

However, neither the Court of Appeals nor the District Court offered any indication in the record or in their opinions as to how, if at all, the availability of state-financed aid for some Michigan students outside Detroit, but not for those within Detroit, might have affected the racial character of any of the State's school districts. Furthermore, as the respondents recognize, the application of our recent ruling in San Antonio School District v. Rodriguezto this state education financing system is questionable, and this issue was not addressed by either the Court of Appeals or the District Court. This, again, underscores the crucial fact that the theory upon which the the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge was concerned with a foundation for interdistrict relief.

Petitioners have urged that they were denied due process by the manner in which the District Court limited their participation after intervention was allowed, thus precluding adequate opportunity to present evidence that they had committed no acts having a segregative effect in Detroit. In light of our holding that, absent an interdistrict violation, there is no basis for an interdistrict remedy, we need not reach these claims. It is clear, however, that the District Court, with the approval of the Court of Appeals, has provided an interdistrict remedy in the face of a record which shows no constitutional violations that would call for equitable relief except within the city of Detroit. In these circumstances there was no occasion for the parties to address, or for the District Court to consider whether there were racially discriminatory acts for which any of the 53 outlying districts were responsible and which had direct and significant segregative effect on schools of more than one district.

We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of De- troit. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.

Reversed and remanded.

From the footnotes:

1. The Court of Appeals found record evidence that in at least one instance during the period 1957—1958, Detroit served a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban white high schools, and past Detroit high schools which were predominantly white, to all-Negro or predominantly Negro Detroit schools. 484 F d.

2. School districts in the State of Michigan are instrumentalities of the State

and subordinate to its State Board of Education and legislature. The Constitution of the State of Michigan, Art. 8, § 2, provides in relevant part: 'The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.' Similarly, the Michigan Supreme Court has stated: 'The school district is a State agency. Moreover, it is of legislative creation. . .' Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902): "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the Legislature may choose to make it such. The Constitution has turned the whole subject over to the Legislature. . ." Attorney General ex rel. Zacharias v. Detroit Board of Education, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908).

3. The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which, in turn, produced the predominantly white and predominantly Negro neighborhoods that characterize Detroit: 'It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, i.e., racially and economically harmonious. The conditions created continue.' 338 F.Supp. 582, 587 (ED Mich).

Thus, the District Court concluded:

'The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation.' The Court of Appeals, however, expressly noted that: 'In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.' 484 F d..

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations. 8. On March 22, 1971, a group of Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as parties defendant. On June 24, 1971, the District Judge alluded to the 'possibility' of a metropolitan school system stating: '(A)s I have said to several witnesses in this case: 'How do you desegrate a black city, or a black school system." Petitioners' Appendix 243a (hereinafter

Pat.App.). Subsequently, on July 16, 1971, various parents filed a motion to require joinder of all of the 85 outlying independent school districts within the tri-county area. 9. The respondents, as plaintiffs below, opposed the motion to join the additional school districts, arguing that the presence of the state defendants was sufficient and all that was required, even if, in shaping a remedy, the affairs of these other districts was to be affected. 338 F.Supp.. 10. At the time of the 1970 census, the population of Michigan was 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. Oakland and Macomb Counties abut Wayne County to the north, and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles, Michigan Statistical Abstract (9th ed. 1972), and the area is approximately the size of the State of Delaware (2,057 square miles), more than half again the size of the State of Rhode Island (1,214 square miles) and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of the United States (93d ed. 1972). The populations of Wayne, Oakland, and Macomb Counties were 2,666,751; 907,871; and 625,309, respectively, in 1970. Detroit, the State's largest city, is located in Wayne County.

In the 1970—1971 school year, there were 2,157,449 children enrolled in school districts in Michigan. There are 86 independent, legally distinct school districts within the tri-county area, having a total enrollment of approximately 1,000,000 children. In 1970, the Detroit Board of Education operated 319 schools with approximately 276,000 students. 11. In its formal opinion, subsequently announced, the District Court candidly recognized:

> 1. The suggestion in the dissent of Mr. Justice MARSHALL that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases. In Green v. County School Board of New Kent Countyfor example, this Court approved a desegregation plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% White. In Wright v. Council of the City of Emporiathe optimal desegregation plan would have resulted in the schools' being 66% Negro and 34% white, substantially the same percentages as could be obtained under one of the plans involved in this case. And in United States v. Scotland Neck City Board of Educationn. 5, a desegregation plan was implicitly approved for a school district which had a racial composition of 77% Negro and 22% white. In none of these cases was it even intimated that 'actual desegregation' could not be accomplished as long as the number of Negro students was greater than the number of white students. The dissents also seem to attach importance to the metropolitan character of Detroit and neighboring school districts. But the constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county, or school district as compared with neighboring areas.

Mr. Justice STEWART, concurring.

In joining the opinion of the Court, I think it appropriate, in view of some of the extravagant language of the dissenting opinions, to state briefly my understanding of what it is that the Court decides today.

The respondents commenced this suit in 1970, claiming only that a constitutionally impermissible allocation of educational facilities along racial lines had occurred in public schools within a single school district whose lines were coterminous with those of the city of Detroit. In the course of the subsequent proceedings, the District Court found that public school officials had contributed to racial segregation within that district by means of improper use of zoning and attendance patterns, optional-attendance areas, and building and site selection. This finding of a violation of the Equal Protection Clause was upheld by the Court of Appeals, and is accepted by this Court today. See n. 18. In the present posture of the case, therefore, the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.

No evidence was adduced and no findings were made in the District Court concerning the activities of school officials in districts outside the city of Detroit, and no school officials from the outside districts even participated in the suit until after the District Court had made the initial determination that is the focus of today's decision. In spite of the limited scope of the inquiry and the findings, the District Court concluded that the only effective remedy for the constitutional violations found to have existed within the city of Detroit was a desegregation plan calling for busing pupils to and from school districts outside the city. The District Court found that any desegregation plan operating wholly "within the corporate geographical limits of the city" would be deficient since it "would clearly make the entire Detroit public school system racially identifiable as Black." 243. The Court of Appeals, in affirming the decision that an interdistrict remedy was necessary, noted that a plan limited to the city of Detroit 'would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.'

The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found. Within a single school district whose officials have been shown to have engaged in unconstitutional racial segregation, a remedial decree that affects every individual school may be dictated by 'common sense,' see Keyes v. School District No. 1, Denver, Colorado, and indeed may provide the only effective means to eliminate segregation 'root and branch,' Green v. County School Board of New Kent County, and to 'effectuate a transition to a racially nondiscriminatory school system.' Brown v. Board of Education, See KeyesS.Ct.—2696. But in this case the Court of Appeals approved the concept of a remedial decree that would go beyond the boundaries of the district where the constitutional violation was found, and include schools and schoolchildren in many other school

districts that have presumptively been administered in complete accord with the Constitution.

The opinion of the Court convincingly demonstrates, —743, that traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an interdistrict response to a constitutional violation found to have occurred only within a single school district.

This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, see Haney v. County Board of Education of Sevier County, ; cf. Wright v. Council of the City of Emporia; United States v. Scotland Neck City Board of Education; by transfer of school units between districts, United States v. Texas, 321 F.Supp. 1043, aff'd, ; Turner v. Warren County Board of Education, 313 F.Supp. 380; or by purposeful racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

In this case, however, no such interdistrict violation was shown. Indeed, no evidence at all concerning the administration of schools outside the city of Detroit was presented other than the fact that these schools contained a higher proportion of white pupils than did the schools within the city. Since the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that no interdistrict violation was shown in this case The formulation of an inter-distrit remedy was thus simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.

In reversing the decision of the Court of Appeals this Court is in no way turning its back on the proscription of state-imposed segregation first voiced in Brown v. Board of Educationor on the delineation of remedial powers and duties most recently expressed in Swann v. Charlotte-Mecklenburg Board of EducationIn Swann the Court addressed itself to the range of equitable remedies available to the courts to effectuate the desegregation mandated by Brown and its progeny, noting that the task in choosing appropriate relief is 'to correct . the condition that offends the Constitution,' and that 'the nature of the violation determines the scope of the remedy . .' The disposition of this case thus falls squarely under these principles. The only 'condition that offends the Constitution' found by the District Court in this case is the existence of officially supported segregation in and among public schools in Detroit itself. There were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegregation plan pupils from school districts outside Detroit

was not predicated upon any constitutional violation involving those school districts. By approving a remedy that would reach beyond the limits of the city of Detroit to correct a constitutional violation found to have occurred solely within that city the Court of Appeals thus went beyond the governing equitable principles established in this Court's decisions.

From the footnotes:

1. My Brother MARSHALL seems to ignore this fundamental fact when he states, post, that 'the most essential finding (made by the District Court) was that Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools.' This conclusion is simply not substantiated by the record presented in this case. The record here does support the claim made by the respondents that white and Negro students within Detroit who otherwise would have attended school together were separated by acts of the State or its subdivision. However, segregative acts within the city alone cannot be presumed to have produced—and no factual showing was made that they did produce—an increase in the number of Negro students in the city as a whole. It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the 'growing core of Negro schools,' a 'core' that has grown to include virtually the entire city. The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity, and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.

Mr. Justice DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than three years. The Court of Appeals affirmed the District

Court on the issue of segregation and on the 'Detroit-only' plans of desegregation. The Court of Appeals also approved in principle the use of a metropolitan area plan, vacating and remanding only to allow the other affected school districts to be brought in as parties, and in other minor respects.

We have before us today no plan for integration. The only orders entered so far are interlocutory. No new principles of law are presented here. Metropolitan treatment of metropolitan problems is commonplace. If this were a sewage problem or a water problem, or an energy problem, there can be no doubt that

Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy. In Bradley v. School Board of City of Richmond, 4 Cir., aff'd by an equally divided Courtwe had a case involving the Virginia school system where local school boards had 'exclusive jurisdiction' of the problem, not 'the State Board of Education,' 462 F d. Here the Michigan educational system is unitary, maintained and supported by the legislature and under the general supervision of the State Board of Education The State controls the boundaries of school districts The State supervises schoolsite selection The construction is done through municipal bonds approved by several state agencies Education in Michigan is a state project with very little completely local control,5 except that the schools are financed locally, not on a statewide basis. Indeed the proposal to put school funding in Michigan on a statewide basis was defeated at the polls in November 1972. 6 Yet the school districts by state law are agencies of the State State action is indeed challenged as violating the Equal Protection Clause. Whatever the reach of that claim may be, it certainly is aimed at discrimination based on race.

Therefore as the Court of Appeals held there can be no doubt that as a matter of Michigan law the State itself has the final say as to where and how school district lines should be drawn.

When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of Plessy v. FergusonThe reason is simple.

The inner core of Detroit is now rather solidly black and the blacks, we know, in many instances are likely to be poorer,10 just as were the Chicanos in San Antonio School District v. RodriguezBy that decision the poorer school districts11 must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.

Today's decision, given Rodriguez, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'

So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment.

As I indicated in Keyes v. School District No. 1, Denver, Colorado, there is so far as the school cases go no constitutional difference between de facto and de jure segregation. Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students. The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenants maintained by state action or inaction build black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a com-

munity is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system, just as surely as did those States involved in Brown v. Board of Educationwhen they maintained dual school systems.

All these conditions and more were found by the District Court to exist. The issue is not whether there should be racial balance but whether the State's use of various devices that end up with black schools and white schools brought the Equal Protection Clause into effect. Given the State's control over the educational system in Michigan, the fact that the black schools are in one district and the white schools are in another is not controlling—either constitutionally or equitably No specific plan has yet been adopted. We are still at an interlocutory stage of a long drawn-out judicial effort at school desegregation. It is conceivable that ghettos develop on their own without any hint of state action. But since Michigan by one device or another has over the years created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, the State washes its hands of its own creations.

Mr. Justice WHITE, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL join, dissenting.

The District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices calculated to effect the segregation of the Detroit school system. The Court does not question these findings, nor could it reasonably do so. Neither does it question the obligation of the federal courts to devise a feasible and effective remedy. But it promptly cripples the ability of the judiciary to perform this task, which is of fundamental importance to our constitutional system, by fashioning a strict rule that remedies in school cases must stop at the school district line unless certain other conditions are met. As applied here, the remedy for unquestioned violations of the protection rights of Detroit's Negroes by the Detroit School Board and the State of Michigan must be totally confined to the limits of the school district and may not reach into adjoining or surrounding districts unless and until it is proved there has been some sort of 'interdistrict violation'—unless unconstitutional actions of the Detroit School Board have had a segregative impact on other districts, or unless the segregated condition of the Detroit schools has itself been influenced by segregative practices in those surrounding districts into which it is proposed to extend the remedy.

Regretfully, and for several reasons, I can join neither the Court's judgment nor its opinion. The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment

is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.

There are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases. The Court has made it clear that the achievement of any particular degree of racial balance in the school system is not required by the Constitution; nor may it be the primary focus of a court in devising an acceptable remedy for de jure segregation. A variety of procedures and techniques are available to a district court engrossed in fashioning remedies in a case such as this; but the courts must keep in mind that they are dealing with the process of educating the young, including the very young. The task is not to devise a system of pains and penalties to punish constituttional violations brought to light. Rather, it is to desegregate an educational system in which the races have been kept apart, without, at the same time, losing sight of the central educational function of the schools.

Viewed in this light, remedies calling for school zoning, pairing, and pupil assignments, become more and more suspect as they require that schoolchildren spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems. Manifestly, these considerations are of immediate and urgent concern when the issue is the desegregation of a city school system where residential patterns are predominantly segregated and the respective areas occupied by blacks and whites are heavily populated and geographically extensive. Thus, if one postulates a metropolitan school system covering a sufficiently large area, with the population evenly divided between whites and Negroes and with the races occupying identifiable residential areas, there will be very real practical limits on the extent to which racially identifiable schools can be eliminated within the school district. It is also apparent that the larger the proportion of Negroes in the area, the more difficult it would be to avoid having a substantial number of all-black or nearly all-black schools.

The Detroit school district is both large and heavily populated. It covers 139 square miles, encircles two entirely separate cities and school districts, and surrounds a third city on three sides. Also, whites and Negroes live in identifiable areas in the city. The 1970 public school enrollment in the city school district totaled 289,763 and was 63 % Negro and 34 % white. 1 If 'racial balance' were achieved in every school in the district, each school would be approximately 64% Negro. A remedy confined to the district could achieve no more desegregation. Furthermore, the proposed intracity remedies were beset with practical problems. None of the plans limited to the school district was satisfactory to the District Court. The most promising proposal, submitted by respondents, who were the plaintiffs in the District Court, would 'leave many of its schools 75 to 90 per cent Black.' CA6 1973) Transportation on a 'vast scale' would be required; 900 buses would have to be purchased for the transportation of pupils

who are not now bused. The District Court also found that the plan 'would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.' For the District Court, '(t)he conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the

City of Detroit cannot be accomplished within the corporate geographical limits of the city.'

The District Court therefore considered extending its remedy of the suburbs. After hearings, it concluded that a much more effective desegregation plan could be implemented if the suburban districts were included. In proceeding to design its plan on the basis that student bus rides to and from school should not exceed 40 minutes each way as a general matter, the court's express finding was that '(f)or all the reasons stated heretofore including time, distance, and transportation factors—desegregation within the area described is physically easier and more practicable and feasible, than desegregation efforts limited to the corporate geographic limits of the city of Detroit.' 345 F.Supp. 914, 930 (ED Mich).

The Court of Appeals agreed with the District Court that the remedy must extend beyond the city limits of Detroit. It concluded that '(i)n the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan.' 484 F d. (Emphasis added.) It also agreed that 'any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black.' There was 'more than ample support for the District Judge's findings of unconstitutional segregation by race resulting in major part from action and inaction of public authorities, both local and State. . Under this record a remedial order of a court of equity which left the Detroit school system overwhelmingly black (for the fore- seeable future) surrounded by suburban school systems overwhelmingly white cannot correct the constitutional violations herein found.' To conclude otherwise, the Court of Appeals announced, would call up 'haunting memories of the now long overruled and discredited 'separate but equal doctrine' of Plessy v. Ferguson) . (1896),' and 'would be opening a way to nullify Brown v. Board of Education which overruled Plessy. . .' 484 F d.

This Court now reverses the Court of Appeals. It does not question the District Court's findings that any feasible Detroit-only plan would leave many schools 75 to 90 percent black and that the district would become progressively more black as whites left the city. Neither does the Court suggest that including the suburbs in a desegregation plan would be impractical or infeasible because of educational considerations, because of the number of children requiring transportation, or

because of the length of their rides. Indeed, the Court leaves unchallenged the District Court's conclusion that a plan including the suburbs would be physically easier and more practical and feasible than a Detroit-only plan. Whereas the most promising Detroit-only plan, for example, would have entailed the purchase of 900 buses, the metropolitan plan would involve the acquisition of no more than 350 new vehicles.

Despite the fact that a metropolitan remedy, if the findings of the District Court accepted by the Court of Appeals are to be credited, would more effectively desegregate the Detroit schools, would prevent resegregation,3 and would be easier and more feasible from many standpoints, the Court fashions out of whole cloth an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line. Apparently, no matter how much less burdensome or more effective and efficient in many respects, such as transportation, the metropolitan plan might be, the school district line may not be crossed. Otherwise, it seems, there would be too much disruption of the Michigan scheme for managing its educational system, too much confusion, and too much administrative burden.

The District Court, on the scene and familiar with local conditions, had a wholly different view. The Court of Appeals also addressed itself at length to matters of local law and to the problems that interdistrict remedies might present to the State of Michigan. Its conclusion, flatly contrary to that of this Court, was that 'the constitutional right to equality before the law (is not) hemmed in by the boundaries of a school district' and that an interdistrict remedy

'is supported by the status of school districts under Michigan law and by the historical control exercised over local school districts by the legislature of Michigan and by State agencies and officials . .. (I)t is well established under the Constitution and laws of Michigan that the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience.' 484 F d—246.

I am surprised that the Court, sitting at this distance from the State of Michigan, claims better insight than the Court of Appeals and the District Court as to whether an interdistrict remedy for equal protection violations practiced by the State of Michigan would involve undue difficulties for the State in the management of its public schools. In the area of what constitutes an acceptable desegregation plan, 'we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.' Swann v. Charlotte-Mecklenburg Board of Education, Obviously, whatever difficulties there might be, they are surmountable; for the Court itself concedes that, had there been sufficient evidence of an interdistrict violation, the District Court could have fashioned a single remedy for the districts implicated rather than a different remedy for each district in which the violation had occurred or had an impact.

I am even more mystified as to how the Court can ignore the legal reality that

the constitutional violations, even if occurring locally, were committed by governmental entities for which the State is responsible and that it is the State that must respond to the command of the Fourteenth Amendment. An interdistrict remedy for the infringements that occurred in this case is well within the confines and powers of the State, which is the governmental entity ultimately responsible for desegregating its schools. The Michigan Supreme Court has observed that '(t)he school district is a State agency,' Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902), and that "(e)ducation in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature. . ." Attorney General ex rel. Lacharias v. Detroit Board of Education, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908).

It is unnecessary to catalogue at length the various public misdeeds found by the District Court and the Court of Appeals to have contributed to the present segregation of the Detroit public schools. The legislature contributed directly by enacting a statute overriding a partial high school desegregation plan voluntarily adopted by the Detroit Board of Education. Indirectly, the trial court found the State was accountable for the thinly disguised, pervasive acts of segregation committed by the Detroit Board,5 for Detroit's school construction plans that would promote segregation, and for the Detroit school district's not having funds for pupil transportation within the district. The State was also chargeable with responsibility for the transportation of Negro high school students in the late 1950's from the suburban Ferndale School District, past closer suburban and Detroit high schools with predominantly white student bodies, to a predominantly Negro high school within Detroit. Swann v. Charlotte-Mecklenburg Board of Education—21, and Keyes v. School District No. 1, Denver, Coloradomake abundantly clear that the tactics employed by the Detroit Board of Education, a local instrumentality of the State, violated the constitutional rights of the Negro students in Detroit's public schools and required equitable relief sufficient to accomplish the maximum, practical desegregation within the power of the political body against which the Fourteenth Amendment directs its proscriptions. No 'State' may deny any individual the equal protection of the laws; and if the Constitution and the Supremacy Clause are to have any substance at all, the courts must be free to devise workable remedies against the political entity with the effective power to determine local choice. It is also the case here that the State's legislative interdiction of Detroit's voluntary effort to desegregate its school system was unconstitutional.

The Court draws the remedial line at the Detroit school district boundary, even though the Fourteenth Amendment is addressed to the State and even though the State denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate. The State's default is 'the condition that offends the Constitution,' Swann v. Charlotte-Mecklenburg Board of Educationand state officials may therefore be ordered to take the necessary measures to completely eliminate from the Detroit public schools 'all vestiges of state-

imposed segregation.' I cannot understand, nor does the majority satisfactorily explain, why a federal court may not order an appropriate interdistrict remedy, if this is necessary or more effective to accomplish this constitutionally mandated task. As the Court unanimously observed in Swann: 'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' In this case, both the right and the State's Fourteenth Amendment violation have concededly been fully established, and there is no acceptable reason for permitting the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power.

The unwavering decisions of this Court over the past 20 years support the assumption of the Court of Appeals that the District Court's remedial power does not cease at the school district line. The Court's first formulation of the remedial principles to be followed in disestablishing racially discriminatory school systems recognized the variety of problems arising from different local school conditions and the necessity for that 'practical flexibility' traditionally associated with courts of equity. Brown v. Board of Education, (1955) (Brown II). Indeed, the district courts to which the Brown cases were remanded for the formulation of remedial decrees were specifically instructed that they might consider, inter alia, 'revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . ..' —301, The malady addressed in Brown was the statewide policy of requiring or permitting school segregation on the basis of race, while the record here concerns segregated schools only in the city of Detroit. The obligation to rectify the unlawful condition nevertheless rests on the State. The permissible revision of school districts contemplated in Brown rested on the State's responsibility for desegregating its unlawfully segregated schools, not on any segregative effect which the condition of segregation in one school district might have had on the schools of a neighboring district. The same situation obtains here and the same remedial power is available to the District Court.

Later cases reinforced the clearly essential rules that state officials are fully answerable for unlawfully caused conditions of school segregation which can effectively be controlled only by steps beyond the authority of local school districts to take, and that the equity power of the district courts includes the ability to order such measures implemented. When the highest officials of the State of Arkansas impeded a federal court order to desegregate the public schools under the immediate jurisdiction of the Little Rock School Board, this Court refused to accept the local board's assertion of its good faith as a legal excuse for delay in implementing the desegregation order. The Court emphasized that 'from the point of view of the Fourteenth Amendment, they (the local school board members) stand in this litigation as the agents of the State.' Cooper v. Aaron, Per- haps more importantly for present purposes, the Court went on to state:

'The record before us clearly establishes that the growth of the Board's difficul-

ties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties . can also be brought under control by state action.'

In the context of dual school systems, the Court subsequently made clear the 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch' and to come forward with a desegregation plan that 'promises realistically to work now.' Green v. County School Board of New Kent County, 'Freedom of choice' plans were rejected as acceptable desegregation measures where 'reasonably available other ways . promising speedier and more effective conversion to a unitary, nonracial school system . .' exist. Imperative insistence on immediate full desegregation of dual school systems 'to operate now and hereafter only unitary schools' was reiterated in Alexander v. Holmes County Board of Education, and Carter v. West Feliciana Parish School Board.

The breadth of the equitable authority of the district courts to accomplish these comprehensive tasks was reaffirmed in much greater detail in Swann v. Charlotte-Mecklenburg Board of Educationand the companion case of Davis v. School Comm'rs of Mobile Countywhere there was unanimous assent to the following propositions:

'Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. . The measure of any desegregation plan is its effectiveness.'

No suggestion was made that interdistrict relief was not an available technique. In Swann v. Charlotte-Mecklenburg Board of Education itself, the Court, without dissent, recognized that the District Judge, in fulfilling his obligation to 'make every effort to achieve the greatest possible degree of actual desegregation(,) will thus necessarily be concerned with the elimination of one-race schools.' 402 U.S., Nor was there any dispute that to break up the dual school system, it was within the District Court's 'broad remedial powers' to employ a 'frank—and sometimes drastic—gerrymandering of school districts and attendance zones,' as well as 'pairing, 'clustering,' or 'grouping' of schools,' to desegregate the 'formerly all-Negro schools,' despite the fact that these zones might not be compact or contiguous and might be 'on opposite ends of the city.' The school board in that case had jurisdiction over a 550-square-mile area encompassing the city of Charlotte and surrounding Mecklenburg County, North Carolina. The Mobile County, Alabama, board in Davis embraced a 1,248-squaremile area, including the city of Mobile. Yet the Court approved the District Court's authority to award countywide relief in each case in order to accomplish desegregation of the dual school system.

Even more recently, the Court specifically rejected the claim that a new school district, which admittedly would operate a unitary school system within its

borders, was beyond the reach of a court-ordered desegregation plan for other school districts, where the effectiveness of the plan as to the other districts depended upon the availability of the facilities and student population of the new district. In Wright v. Council of City of Emporia, we held 'that a new school district may not be created where its effect would be to impede the process of dismantling a dual system.' Mr. Justice Stewart's opinion for the Court made clear that if a proposal to erect new district boundary lines 'would impede the dismantling of the (pre-existing) dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.' In United States v. Scotland Neck Board of Educationthis same standard was applied to forbid North Carolina from creating a new city school district within a larger district which was in the process of dismantling a dual school system. The Court noted that if establishment of the new district were permitted, the 'traditional racial identities of the schools in the area would be maintained.'

Until today, the permissible contours of the equitable authority of the district courts to remedy the unlawful establishment of a dual school system have been extensive, adaptable, and fully responsive to the ultimate goal of achieving 'the greatest possible degree of actual desegregation.' There are indeed limitations on the equity powers of the federal judiciary, but until now the Court had not accepted the proposition that effective enforcement of the Fourteenth Amendment could be limited by political or administrative boundary lines demarcated by the very State responsible for the constitutional violation and for the disestablishment of the dual system. Until now the Court has instead looked to practical considerations in effectuating a desegregation decree, such as excessive distance, transportation time, and hazards to the safety of the schoolchildren involved in a proposed plan. That these broad principles have developed in the context of dual school systems compelled or authorized by state statute at the time of Brown v. Board of Education (Brown I), does not lessen their current applicability to dual systems found to exist in other contexts, like that in Detroit, where intentional school segregation does not stem from the compulsion of state law, but from deliberate individual actions of local and state school authorities directed at a particular school system. The majority properly does not suggest that the duty to eradicate completely the resulting dual system in the latter context is any less than in the former. But its reason for incapacitating the remedial authority of the federal judiciary in the presence of school district perimeters in the latter context is not readily apparent.

The result reached by the Court certainly cannot be supported by the theory that the configuration of local governmental units is immune from alteration when necessary to redress constitutional violations. In addition to the well-established principles already noted, the Court has elsewhere required the public bodies of a State to restructure the State's political subdivisions to remedy infringements of the constitutional rights of certain members of its populace, notably in the reapportionment cases. In Reynolds v. Simsfor example, which held that equal protection of the laws demands that the seats in both houses of a bicameral state legislature be apportioned on a population basis, thus neces-

sitating wholesale revision of Alabama's voting districts, the Court remarked:

'Political subdivisions of States—counties, cities, or whatever—never were and never have been con- sidered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.' And even more pointedly, the Court declared in Gomillion v. Lightfoot—345, that '(l) egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.

Nor does the Court's conclusion follow from the talismanic invocation of the desirability of local control over education. Local autonomy over school affairs, in the sense of the community's participation in the decisions affecting the education of its children, is, of course, an important interest. But presently constituted school district lines do not delimit fixed and unchangeable areas of a local educational community. If restructuring is required to meet constitutional requirements, local authority may simply be redefined in terms of whatever configuration is adopted, with the parents of the children attending schools in the newly demarcated district or attendance zone continuing their participation in the policy management of the schools with which they are concerned most directly. The majority's suggestion that judges should not attempt to grapple with the administrative problems attendant on a reorganization of school attendance patterns is wholly without foundation. It is precisely this sort of task which the district courts have been properly exercising to vindicate the constitutional rights of Negro students since Brown I and which the Court has never suggested they lack the capacity to perform. Intradistrict revisions of attendance zones, and pairing and grouping of schools, are techniques unanimously approved in Swann v. Charlotte-Mecklenburg Board of Education which entail the same sensitivity to the interet of parents in the education their children receive as would an interditrict plan which is likely to employ the very same methods. There is no reason to suppose that the District Court, which has not yet adopted a final plan of desegregation, would not be as capable of giving or as likely to give sufficient weight to the interest in community participation in schools in an interdistrict setting, consistent with the dictates of the Fourteenth Amendment. The majority's assumption that the District Court would act otherwise is a radical departure from the practical flexibility previously left to the equity powers of the federal judiciary.

Finally, I remain wholly unpersuaded by the Court's assertion that 'the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Ante, p. 746. In the first place, under this premise the Court's judgment is itself infirm; for had the Detroit school system not followed an official policy of segregation throughout the 1950's and 1960's, Negroes and whites would have been going to school together. There would have been no, or at least not as many, recognizable Negro schools and no, or at least not as many, white schools, but 'just schools,' and neither Negroes nor whites would have suf-

fered from the effects of segregated education, will all its shortcomings. Surely the Court's remedy will not restore to the Negro community, stigmatized as it was by the dual school system, what it would have enjoyed over all or most of this period if the remedy is confined to present-day Detroit; for the maximum remedy available within that area will leave many of the schools almost totally black, and the system itself will be predominantly black and will become increasingly so. Moreover, when a State has engaged in acts of official segregation over a lengthy period of time, as in the case before us, it is unrealistic to suppose that the children who were victims of the State's unconstitutional conduct could now be provided the benefits of which they were wrongfully deprived. Nor can the benefits which accrue to school systems in which schoolchildren have not been officially segregated, and to the communities supporting such school systems, be fully and immediately restored after a substantial period of unlawful segregation. The education of children of different races in a desegregated environment has unhappily been lost, along with the social, economic, and political advantages which accompany a desegregated school system as compared with an unconstitutionally segregated system. It is for these reasons that the Court has consistently followed the course of requiring the effects of past official segregation to be eliminated 'root and branch' by imposing, in the present, the duty to provide a remedy which will achieve 'the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.' It is also for these reasons that once a constitutional violation has been found, the district judge obligated to provide such a remedy 'will thus necessarily be concerned with the elimination of one-race schools.' These concerns were properly taken into account by the District Judge in this case. Confining the remedy to the boundaries of the Detroit district is quite unrelated either to the goal of achieving maximum desegregation or to those intensely practical considerations, such as the extent and expense of transportation, that have imposed limits on remedies in cases such as this. The Court's remedy, in the end, is essentially arbitrary and will leave serious violations of the Constitution substantially unremedied.

I agree with my Brother DOUGLAS that the Court of Appeals has acted responsibly in these cases. Regre- tably, the majority's arbitrary limitation on the equitable power of federal district courts, based on the invisible borders of local school districts, is unrelated to the State's responsibility for remedying the constitutional wrongs visited upon the Negro schoolchildren of Detroit. It is oblivious to the potential benefits of metropolitan relief, to the noneducational communities of interest among neighborhoods located in and sometimes bridging different school districts, and to the considerable interdistrict cooperation already existing in various educational areas. Ultimately, it is unresponsive to the goal of attaining the utmost actual desegregation consistent with restraints of practicability and thus augurs the frequent frustration of the remedial powers of the federal courts.

Here the District Court will be forced to impose an intracity desegregation plan more expensive to the district, more burdensome for many of Detroit's Negro

students, and surely more conductive to white flight than a metropolitan plan would be—all of this merely to avoid what the Detroit School Board, the District Court, and the en banc Court of Appeals considered to be the very manageable and quite surmountable difficulties that would be involved in extending the desegregation remedy to the suburban school districts.

I am therefore constrained to record my disagreement and dissent.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

In Brown v. Board of Education this Court held that segregation of children in public schools on the basis of race deprives minority group childen of equal educational opportunities and therefore denies them the equal protection of the laws under the Fourteenth Amendment. This Court recognized then that remedying decades of segregation in public education would not be an easy task. Subsequent events, unfortunately, have seen that prediction bear bitter fruit. But however imbedded old ways, however ingrained old prejudices, this Court has not been diverted from its appointed task of making 'a living truth' of our constitutional ideal of equal justice under law. Cooper v. Aaron,

After 20 years of small, often difficult steps toward that great end, the Court today takes a giant step backwards. Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.

I cannot subscribe to this emasculation of our constitutional guarantee of equal protection of the laws and must respectfully dissent. Our precedents, in my view, firmly establish that where, as here, state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of racial discrimination and to achieve the greatest possible degree of actual desegregation. I agree with both the District Court and the Court of Appeals that, under the facts of this case, this duty cannot be fulfilled unless the State of Michigan involves outlying metropolitan area school districts in its desegregation remedy. Furthermore, I perceive no basis either in law or in the practicalities of the situation justifying the State's interposition of school district boundaries as absolute barriers to the implementation of an effective desegregation remedy. Under established and frequently used Michigan procedures, school district lines are both flexible and permeable for a wide variety of purposes, and there is no reason why they must now stand in the way of

meaningful desegregation relief.

The rights at issue in this case are too fundamental to be abridged on grounds as superficial as those relied on by the majority today. We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.

The great irony of the Court's opinion and, in my view, its most serious analytical flaw may be gleaned from its concluding sentence, in which the Court remands for 'prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.' The majority, however, seems to have forgotten the District Court's explicit finding that a Detroit-only decree, the only remedy permitted under today's decision, 'would not accomplish desegregation.'

Nowhere in the Court's opinion does the majority confront, let alone respond to, the District Court's conclusion that a remedy limited to the city of Detroit would not effectively desegregate the Detroit city schools. I, for one, find the District Court's conclusion well supported by the record and its analysis compelled by our prior cases. Before turning to these questions, however, it is best to begin by laying to rest some mischaracterizations in the Court's opinion with respect to the basis for the District Court's decision to impose a metropolitan remedy.

The Court maintains that while the initial focus of this lawsuit was the condition of segregation within the Detroit city schools, the District Court abruptly shifted focus in mid-course and altered its theory of the case. This new theory, in the majority's words, was 'equating racial imbalance with a constitutional violation calling for a remedy.' n. 19. As the following review of the District Court's handling of the case demonstrates, however, the majority's characterization is totally inaccurate. Nowhere did the District Court indicate that racial imbalance between school districts in the Detroit metropolitan area or within the Detroit School District constituted constitutional violation calling for interdistrict relief. The focus of this case was from the beginning, and has remained, the segregated system of education in the Detroit city schools and the steps necessary to cure that condition which offends the Fourteenth Amendment.

The District Court's consideration of this case began with its finding, which the majority accepts, that the State of Michigan, through its instrumentality, the Detroit Board of Education, engaged in widespread purposeful acts of racial segregation in the Detroit School District. Without belaboring the details, it is sufficient to note that the various techniques used in Detroit were typical of methods employed to segregate students by race in areas where no statutory dual system of education has existed. See, e.g., Keyes v. School District No. 1,

Denver, ColoradoExacerbating the effects of extensive residential segregation between Negroes and whites, the school board consciously drew attendance zones along lines which maximized the segregation of the races in schools as well. Optional attendance zones were created for neighborhoods undergoing racial transition so as to allow whites in these areas to escape integration. Negro students in areas with overcrowded schools were transported past or away from closer white schools with available space to more distant Negro schools. Grade structures and feeder-school patterns were created and maintained in a manner which had the foreseeable and actual effect of keeping Negro and white pupils in separate schools. Schools were also constructed in locations and in sizes which ensured that they would open with predominantly one-race student bodies. In sum, the evidence adduced below showed that Negro children had been intentionally confined to an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools.

Contrary to the suggestions in the Court's opinion, the basis for affording a desegregation remedy in this case was not some perceived racial imbalance either between schools within a single school district or between independent school districts. What we confront here is 'a systematic program of segregation affecting a substantial portion of the students, schools . and facilities within the school system . ..' U.S., The constitutional violation found here was not some de facto racial imbalance, but rather the purposeful, intentional, massive, de jure segregation of the Detroit city schools, which under our decision in Keyes, forms 'a predicate for a finding of the existence of a dual school system,' , and justifies 'all-out desegregation.'

Having found a de jure segregated public school system in operation in the city of Detroit, the District Court turned next to consider which officials and agencies should be assigned the affirmative obligation to cure the constitutional violation. The court concluded that responsibility for the segregation in the Detroit city schools rested not only with the Detroit Board of Education, but belonged to the State of Michigan itself and the state defendants in this case that is, the Governor of Michigan, the Attorney General, the State Board of Education, and the State Superintendent of Public Instruction. While the validity of this conclusion will merit more extensive analysis below, suffice it for now to say that it was based on three considerations. First, the evidence at trial showed that the State itself had taken actions contributing to the segregation within the Detroit schools. Second, since the Detroit Board of Education was an agency of the State of Michigan, its acts of racial discrimination were acts of the State for purposes of the Fourteenth Amendment. Finally, the District Court found that under Michigan law and practice, the system of education was in fact a state school system, characterized by relatively little local control and a large degree of centralized state regulation, with respect to both educational policy and the structure and operation of school districts.

Having concluded, then, that the school system in the city of Detroit was a de jure segregated system and that the State of Michigan had the affirmative

duty to remedy that condition of segregation, the District Court then turned to the difficult task of devising an effective remedy. It bears repeating that the District Court's focus at this stage of the litigation remained what it had been at the beginning—the condition of segregation within the Detroit city schools. As the District Court stated: 'From the initial ruling (on segregation) to this day, the basis of the proceedings has been and remains the violation: de jure school segregation. . The task before this court, therefore, is now, and . has always been, how to desegregate the Detroit public schools.'

The District Court first considered three desegregation plans limited to the geographical boundaries of the city of Detroit. All were rejected as ineffective to desegregate the Detroit city schools. Specifically, the District Court determined that the racial composition of the Detroit student body is such that implementation of any Detroit-only plan 'would clearly make the entire Detroit public school system racially identifiable as Black' and would 'leave many of its schools 75 to 90 per cent Black.' The District Court also found that a Detroit-only plan 'would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.' Based on these findings, the District Court reasoned that 'relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city' because a Detroit-only decree 'would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.' The District Court therefore concluded that it 'must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools . ..'

In seeking to define the appropriate scope of that expanded desegregation area, however, the District Court continued to maintain as its sole focus the condition shown to violate the Constitution in this case—the segregation of the Detroit school system. As it stated, the primary question 'remains the determination of the area necessary and practicable effectively to eliminate 'root and branch' the effects of state-imposed and supported segregation and to desegregate the Detroit public schools.'

There is simply no foundation in the record, then, for the majority's accusation that the only basis for the District Court's order was some desire to achieve a racial balance in the Detroit metropolitan area In fact, just the contrary is the case. In considering proposed desegregation areas, the District Court had occasion to criticize one of the State's proposals specifically because it had no basis other than its 'particular racial ratio' and did not focus on 'relevant factors, like eliminating racially identifiable schools (and) accomplishing maximum actual desegregation of the Detroit public schools.' Similarly, in rejecting the Detroit School Board's proposed desegregation area, even though it included more all-white districts and therefore achieved a higher white-Negro ratio, the District Court commented:

'There is nothing in the record which suggests that these districts need be in-

cluded in the desegregation area in order to disestablish the racial identifiability of the Detroit public schools. From the evidence, the primary reason for the Detroit School Board's interest in the inclusion of these school districts is not racial desegregation but to increase the average socio-economic balance of all the schools in the abutting regions and clusters.'

The Court also misstates the basis for the District Court's order by suggesting that since the only segregation proved at trial was within the Detroit school system, any relief which extended beyond the jurisdiction of the Detroit Board of Education would be inappropriate because it would impose a remedy on outlying districts 'not shown to have committed any constitutional violation.' The essential foundation of interdistrict relief in this case was not to correct conditions within outlying districts which themselves engaged in purposeful segregation. Instead, interdistrict relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the city of Detroit.

Rather than consider the propriety of interdistrict relief on this basis, however, the Court has conjured up a largely fictional account of what the District Court was attempting to accomplish. With all due respect, the Court, in my view, does a great disservice to the District Judge who labored long and hard with this complex litigation by accusing him of changing horses in midstream and shifting the focus of this case from the pursuit of a remedy for the condition of segregation within the Detroit school system to some unprincipled attempt to impose his own philosophy of racial balance on the entire Detroit metropolitan area. See —739. The focus of this case has always been the segregated system of education in the city of Detroit. The District Court determined that interdistrict relief was necessary and appropriate only because it found that the condition of segregation within the Detroit school system could not be cured with a Detroit-only remedy. It is on this theory that the interdistrict relief must stand or fall. Unlike the Court, I perceive my task to be to review the District Court's order for what it is, rather than to criticize it for what it manifestly is not.

As the foregoing demonstrates, the District Court's decision to expand its desegregation decree beyond the geographical limits of the city of Detroit rested in large part on its conclusions (A) that the State of Michigan was ultimately responsible for curing the condition of segregation within the Detroit city schools, and (B) that a Detroit-only remedy would not accomplish this task. In my view, both of these conclusions are well supported by the facts of this case and by this Court's precedents.

To begin with, the record amply supports the District Court's findings that the State of Michigan, through state officers and state agencies, had engaged in purposeful acts which created or aggravated segregation in the Detroit schools. The State Board of Education, for example, prior to 1962, exercised its authority to supervise local schoolsite selection in a manner which contributed to segregation. CA6 1973). Furthermore, the State's continuing authority, after 1962, to approve school building construction plans3 had intertwined the State with

site-selection decisions of the Detroit Board of Education which had the purpose and effect of maintaining segregation.

The State had also stood in the way of past efforts to desegregate the Detroit city schools. In 1970, for example, the Detroit School Board had begun implementation of its own desegregation plan for its high schools, despite considerable public and official resistance. The State Legislature intervened by enacting Act 48 of the Public Acts of 1970, specifically prohibiting implementation of the desegregation plan and thereby continuing the growing segregation of the Detroit school system. Adequate desegregation of the Detroit system was also hampered by discriminatory restrictions placed by the State on the use of transportation within Detroit. While state aid for transportation was provided by statute for suburban districts, many of which were highly urbanized, aid for intracity transportation was excepted. One of the effects of this restriction was to encourage the construction of small walk-in neighborhood schools in Detroit, thereby lending aid to the intentional policy of creating a school system which reflected, to the greatest extent feasible, extensive residential segregation. Indeed, that one of the purposes of the transportation restriction was to impede desegregation was evidenced when the Michigan Legislature amended the State Transportation Aid Act to cover intracity transportation but expressly prohibited the allocation of funds for cross-busing of students within a school district to achieve racial balance.

Also significant was the State's involvement during the 1950's in the transportation of Negro high school students from the Carver School-District past a closer white high school in the Oak Park District to a more distant Negro high school in the Detroit system. Certainly the District Court's finding that the State Board of Education had knowledge of this action and had given its tacit or express approval was not clearly erroneous. Given the comprehensive statutory powers of the State Board of Education over contractual arrangements between school districts in the enrollment of students on a nonresident tuition basis, including certification of the number of pupils involved in the transfer and the amount of tuition charged, over the review of transportation routes and distances, and over the disbursement of transportation funds,5 the State Board inevitably knew and understood the significance of this discriminatory act.

Aside from the acts of purposeful segregation committed by the State Legislature and the State Board of Education, the District Court also concluded that the State was responsible for the many intentional acts of segregation committed by the Detroit Board of Education, an agency of the State. The majority is only willing to accept this finding arguendo. See I have no doubt, however, as to its validity under the Fourteenth Amendment.

'The command of the Fourteenth Amendment,' it should be recalled, 'is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws.' Cooper v. Aaron, While a State can act only through 'the officers or agents by whom its powers are exerted,' Ex parte Virginia, actions by an agent or officer of the State are encompassed by the Fourteenth Amendment for, 'as

he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' See also Cooper v. Aaron; Virginia v. Rives, ; Shelley v. Kraemer, Under Michigan law a 'school district is an agency of the City of State government.' School District of Lansing v. State Board of Education, 367 Mich. 591, 600, 116 N.W d 866, 870 (1962). It is 'a legal division of territory, created by the State for educational purposes, to which the State has granted such powers as are deemed necessary to permit the district to function as a State agency.' Detroit Board of Education v. Superintendent of Public Instruction, 319 Mich. 436, 450, 29 N.W d 902, 908 (1947). Racial discrimination by the school district, an agency of the State, is therefore racial discrimination by the State itself, forbidden by the Fourteenth Amendment.

We recognized only last Term in Keyes that it was the State itself which was ultimately responsible for de jure acts of segregation committed by a local school board. A deliberate policy of segregation by the local board, we held, amounted to 'state-imposed segregation.' 413 U.S., Wherever a dual school system exists, whether compelled by state statute or created by a local board's systematic program of segregation, 'the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system' (and) to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation."

Vesting responsibility with the State of Michigan for Detroit's segregated schools is particularly appropriate as

Michigan, unlike some other States, operates a single statewide system of education rather than several separate and independent local school systems. The majority's emphasis on local governmental control and local autonomy of school districts in Michigan will come as a surprise to those with any familiarity with that State's system of education. School districts are not separate and distinct sovereign entities under Michigan law, but rather are "auxiliaries of the State," subject to its 'absolute power.' Attorney General of Michigan ex rel. Kies v. Lowrey, The courts of the State have repeatedly emphasized that education in Michigan is not a local governmental concern, but a state function.

'Unlike the delegation of other powers by the legislature to local governments, education is not inherently a part of the local self-government of a municipality . .. Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution. The policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given (them) by the legislature.' School District of the City of Lansing v. State Board of Education, 116 N.W d.

The Supreme Court of Michigan has noted the deep roots of this policy:

'It has been settled by the Ordinance of 1787, the several Constitutions adopted in this state, by its uniform course of legislation, and by the decisions of this court, that education in Michigan is a matter of state concern, that it is no part

of the local self-government of a particular township or munic- ipality . .. The legislature has always dictated the educational policy of the state.' In re School District No. 6, 284 Mich. 132, 145N.W. 792, 797 (1938).

The State's control over education is reflected in the fact that, contrary to the Court's implication, there is little or no relationship between school districts and local political units. To take the 85 outlying local school districts in the Detroit metropolitan area as examples, 17 districts lie in two counties, two in three counties. One district serves five municipalities; other suburban municipalities are fragmented into as many as six school districts. Nor is there any apparent state policy with regard to the size of school districts, as they now range from 2,000 to 285,000 students.

Centralized state control manifests itself in practice as well as in theory. The State controls the financing of education in several ways. The legislature contributes a substantial portion of most school districts' operating budgets with funds appropriated from the State's General Fund revenues raised through statewide taxation The State's power over the purse can be and is in fact used to enforce the State's powers over local districts In addition, although local districts obtain funds through local property taxation, the State has assumed the responsibility to ensure equalized property valuations throughout the State The State also establishes standards for teacher certification and teacher tenure determines part of the required curriculum; sets the minimum school term approves bus routes, equipment, and drivers approves textbooks and establishes procedures for student discipline The State Superintendent of Public Instruction and the State Board of Education have the power to remove local school board members from office for neglect of their duties.

Most significantly for present purposes, the State has wide-ranging powers to consolidate and merge school districts, even without the consent of the districts themselves or of the local citizenry See, e.g., Attorney General ex rel. Kies, v. Lowrey, 131 Mich. 639, 92 N.W. 289 (1902), aff'dIndeed, recent years have witnessed an accelerated program of school district consolidations, mergers, and annexations, many of which were state imposed. Whereas the State had 7,362 local districts in 1912, the number had been reduced to 1,438 in 1964 and to 738 in 1968 By June 1972, only 608 school districts remained. Furthermore, the State has broad powers to transfer property from one district to another, again without the consent of the local school districts affected by the transfer.

Whatever may be the history of public education in other parts of our Nation, it simply files in the face of reality to say, as does the majority, that in Michigan, '(n)o single tradition in public education is more deeply rooted than local control over the operation of schools . ..' Ante, as 741. As the State's Supreme Court has said: 'We have repeatedly held that education in this state is not a matter of local concern, but belongs to the state at large.' Indeed, a study prepared for the 1961 Michigan Constitutional Convention noted that the Michigan Constitution's articles on education had resulted in 'the establishment of a state system of education in contrast to a series of local school systems.'

In sum, several factors in this case coalesce to support the District Court's ruling that it was the State of Michigan itself, not simply the Detroit Board of Education, which bore the obligation of curing the condition of segregation within the Detroit city schools. The actions of the State itself directly contributed to Detroit's segregation. Under the Fourteenth Amendment, the State is ultimately responsible for the actions of its local agencies. And, finally, given the structure of Michigan's educational system, Detroit's segregation cannot be viewed as the problem of an independent and separate entity. Michigan operates a single statewide system of education, a substantial part of which was shown to be segregated in this case.

What action, then, could the District Court require the State to take in order to cure Detroit's condition of segregation? Our prior cases have not minced words as to what steps responsible officials and agencies must take in order to remedy segregation in the public schools. Not only must distinctions on the basis of race be terminated for the future, but school officials are also 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' Green v. County School Board of New Kent County—438, See also Lee v. Macon County Board of Education, 267 F.Supp. 458 (MD Ala.), aff'd sub nom. Wallace v. United StatesNegro students are not only entitled to neutral nondiscriminatory treatment in the future. They must receive 'what Brown promised them: a school system in which all vestiges of enforced racial segregation have been eliminated.' Wright v. Council of the City of Emporia, See also Swann v. Charlotte-Mecklenburg Board of Education, These remedial standards are fully applicable not only to school districts where a dual system was compelled by statute, but also where, as here, a dual system was the product of purposeful and intentional state action.

After examining three plans limited to the city of Detroit, the District Court correctly concluded that none would eliminate root and branch the vestiges of unconstitutional segregation. The plans' effectiveness, of course, had to be evaluated in the context of the District Court's findings as to the extent of segregation in the Detroit city schools. As indicated earlier, the most essential finding was that Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools Thus, in 1960, of Detroit's 251 regular attendance schools, 100 were 90% or more white and 71 were 90% or more Negro. In 1970, of Detroit's 282 regular attendance schools, 69 were 90% or more white and 133 were 90% or more Negro. While in 1960, 68% of all schools were 90% or more one race, by 1970, 71 % of the schools fell into that category. The growing core of all-Negro schools was further evidenced in total school district population figures. In 1960 the Detroit system had 46% Negro students and 54% white students, but by 1970, 64% of the students were Negro and only 36% were white. This increase in the proportion of Negro students was the highest of any major Northern city.

It was with these figures in the background that the District Court evaluated

the adequacy of the three Detroit-only plans submitted by the parties. Plan A, proposed by the Detroit Board of Education, desegregated the high schools and about a fifth of the middle-level schools. It was deemed inadequate, however, because it did not desegregate elementary schools and left the middle-level schools not included in the plan more segregated than ever. Plan C, also proposed by the Detroit Board, was deemed inadequate because it too covered only some grade levels and would leave elementary schools segregated. Plan B, the plaintiffs' plan, though requiring the transportation of 82,000 pupils and the acquisition of 900 school buses, would make little headway in rooting out the vestiges of segregation. To begin with, because of practical limitations, the District Court found that the plan would leave many of the Detroit city schools 75 to 90% Negro. More significantly, the District Court recognized that in the context of a community which historically had a school system marked by rigid de jure segregation, the likely effect of a Detroit-only plan would be to 'change a school system which is now Black and White to one that would be perceived as Black . ..' The result of this changed perception, the District Court found, would be to increase the flight of whites from the city to the outlying suburbs, compounding the effects of the present rate of increase in the proportion of Negro students in the Detroit system. Thus, even if a plan were adopted which, at its outset, provided in every school a 65% Negro-35% white racial mix in keeping with the Negro-white proportions of the total student population, such a system would, in short order, devolve into an all-Negro system. The net result would be a continuation of the all-Negro schools which were the hallmarks of Detroit's former dual system of one-race schools.

Under our decisions, it was clearly proper for the District Court to take into account the so-called 'white flight' from the city schools which would be forthcoming from any Detroit-only decree. The court's prediction of white flight was well supported by expert testimony based on past experience in other cities undergoing desegregation relief. We ourselves took the possibility of white flight into account in evaluating the effectiveness of a desegregation plan in Wrightwhere we relied on the District Court's finding that if the city of Emporia were allowed to withdraw from the existing system, leaving a system with a higher proportion of Negroes, it 'may be anticipated that the pro- portion of whites in county schools may drop as those who can register in private academies' . ..' 407 U.S., One cannot ignore the white-flight problem, for where legally imposed segregation has been established, the District Court has the responsibility to see to it not only that the dual system is terminated at once but also that future events do not serve to perpetuate or re-establish segregation.

We held in Swannthat where de jure segregation is shown, school authorities must make 'every effort to achieve the greatest possible degree of actual desegregation.' 402 U.S., This is the operative standard re-emphasized in Davis v. School Comm'rs of Mobile County, If these words have any meaning at all, surely it is that school authorities must, to the extent possible, take all practicable steps to ensure that Negro and white children in fact go to school together. This is, in the final analysis, what desegregation of the public schools is all

about.

Because of the already high and rapidly increasing percentage of Negro students in the Detroit system, as well as the prospect of white flight, a Detroit-only plan simply has no hope of achieving actual desegregation. Under such a plan white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that Brown I was aimed at will not be cured, but will be perpetuated for the future.

Racially identifiable schools are one of the primary vestiges of state-imposed segregation which an effective desegregation decree must attempt to eliminate. In Swannfor example, we held that '(t)he district judge or school authorities . will thus necessarily be concerned with the elimination of one-race schools.' There is 'a presumption,' we stated, 'against schools that are substantially disproportionate in their racial composition.' And in evaluating the effectiveness of desegregation plans in prior cases, we ourselves have considered the extent to which they discontinued racially identifiable schools. See, e.g., Green v. County School Board of New Kent County; Wright v. Council of the City of Emporia. For a principal end of any desegregation remedy is to ensure that it is no longer 'possible to identify a 'white school' or a 'Negro school." Swann U.S., 18, The evil to be remedied in the dismantling of a dual system is the'(r) acial identification of the system's schools.' GreenThe goal is a system without white schools or Negro schools—a system with 'just schools.' A school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness in achieving this end.

We cautioned in Swann, of course, that the dismantling of a segregated school system does not mandate any particular racial balance. 402 U.S., We also concluded that a remedy under which there would remain a small number of racially identifiable schools was only presumptively inadequate and might be justified. But this is a totally different case. The flaw of a Detroit-only decree is not that it does not reach some ideal degree of racial balance or mixing. It simply does not promise to achieve actual desegregation at all. It is one thing to have a system where a small number of students remain in racially identifiable schools. It is something else entirely to have a system where all students continue to attend such schools.

The continued racial identifiability of the Detroit schools under a Detroit-only remedy is not simply a reflection of their high percentage of Negro students.

What is or is not a racially identifiable vestige of de jure segregation must necessarily depend on several factors. Cf. Keyes, Foremost among these should be the relationship between the schools in question and the neighboring community. For these purposes the city of Detroit and its surrounding suburbs must be viewed as a single community. Detroit is closely connected to its suburbs in many ways, and the metropolitan area is viewed as a single cohesive unit by its residents. About 40% of the residents of the two suburban counties included in the desegregation plan work in Wayne County, in which Detroit is situated.

Many residents of the city work in the suburbs. The three counties participate in a wide variety of cooperative governmental ventures on a metropolitan-wide basis, including a metropolitan transit system, park authority, water and sewer system, and council of governments. The Federal Government has classified the tri-county area as a Standard Metropolitan Statistical Area, indicating that it is an area of 'economic and social integration.' United States v. Connecticut National Bank,

Under a Detroit-only decree, Detroit's schools will clearly remain racially identifiable in comparison with neighboring schools in the metropolitan community. Schools with 65% and more Negro students will stand in sharp and obvious contrast to schools in neighboring districts with less than 2% Negro enrollment. Negro students will continue to perceive their schools as segregated educational facilities and this perception will only be increased when whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration. School district lines, however innocently drawn, will surely be perceived as fences to separate the races when, under a Detroit-only decree, white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools. The message of this action will not escape the Negro children in the city of Detroit. See Wright, It will be of scant significance to Negro children who have for years been confined by de jure acts of segregation to a growing core of all-Negro schools surrounded by a ring of all-white schools that the new dividing line between the races is the school district boundary.

Nor can it be said that the State is free from any responsibility for the disparity between the racial makeup of Detroit and its surrounding suburbs. The State's creation, through de jure acts of segregation, of a growing core of all-Negro schools inevitably acted as a magnet to attract Negroes to the areas served by such schools and to deter them from settling either in other areas of the city or in the suburbs. By the same token, the growing core of all-Negro schools inevitably helped drive whites to other areas of the city or to the suburbs. As we recognized in Swann:

'People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . (Action taken) to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning' . does more than simply influence the short-run composition of the student body . .. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.' The rippling effects on residential patterns caused by purposeful acts of segregation do not automatically subside at the school district border. With rare exceptions, these effects naturally spread through all the residential neighborhoods within a metropolitan area.

The State must also bear part of the blame for the white flight to the suburbs which would be forthcoming from a Detroit-only decree and would render such a remedy ineffective. Having created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, the State is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs. Indeed, by limiting the District Court to a Detroit-only remedy and allowing that flight to the suburbs to succeed, the Court today allows the State to profit from its own wrong and to perpetuate for years to come the separation of the races it achieved in the past by purposeful state action.

The majority asserts, however, that involvement of outlying districts would do violence to the accepted principle that 'the nature of the violation determines the scope of the remedy.' SwannSee Not only is the majority's attempt to find in this single phrase the answer to the complex and difficult questions presented in this case hopelessly simplistic, but more important, the Court reads these words in a manner which perverts their obvious meaning. The nature of a violation determines the scope of the remedy simply because the function of any remedy is to cure the violation to which it is addressed. In school segregation cases, as in other equitable causes, a remedy which effectively cures the violation is what is required. See Green, 88 S.Ct.; Davis, No more is necessary, but we can tolerate no less. To read this principle as barring a district court from imposing the only effective remedy for past segregation and remitting the court to a patently ineffective alternative is, in my view, to turn a simple commonsense rule into a cruel and meaningless paradox. Ironically, by ruling out an interdistrict remedy, the only relief which promises to cure segregation in the Detroit public schools, the majority flouts the very principle on which it purports to rely.

Nor should it be of any significance that the suburban school districts were not shown to have themselves taken any direct action to promote segregation of the races. Given the State's broad powers over local school districts, it was well within the State's powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy. The State's duty should be no different here than in cases where it is shown that certain of a State's voting districts are malapportioned in violation of the Fourteenth Amendment. Overrepresented electoral districts are required to participate in reapportionment although their only 'participation' in the violation was to do nothing about it. Similarly, electoral districts which themselves meet representation standards must frequently be redrawn as part of a remedy for other over-and under-inclusive districts. No finding of fault on the part of each electoral district and no finding of a discriminatory effect on each district is a prerequisite to its involvement in the constitutionally required remedy. By the same logic, no finding of fault on the part of the suburban school districts in this case and no finding of a discriminatory effect on each district should be a prerequisite to their involvement in the constitutionally required remedy.

It is the State, after all, which bears the responsibility under Brown of affording

a nondiscriminatory system of education. The State, of course, is ordinarily free to choose any decentralized framework for education it wishes, so long as it fulfills that Fourteenth Amendment obligation. But the State should no more be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children than it could hide behind its political subdivisions to avoid its obligations to its voters.

It is a hollow remedy indeed where 'after supposed 'desegregation' the schools remained segregated in fact.' We must do better than "substitute . one segregated school system for another segregated school system." Wright, To suggest, as does the majority, that a Detroitonly plan somehow remedies the effects of de jure segregation of the races is, in my view, to make a solemn mockery of Brown I's holding that separate educational facilities are inherently unequal and of Swann's unequivocal mandate that the answer to de jure segregation is the greatest possible degree of actual desegregation.

One final set of problems remains to be considered. We recognized in Brown II, and have re-emphasized ever since, that in fashioning relief in desegregation cases, 'the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' Brown II, See also Swann.

Though not resting its holding on this point, the majority suggests that various equitable considerations militate against interdistrict relief. The Court, for example, refers to financing and administrative problems, the logistical problems attending large-scale transportation of students, and the prospect of the District Court's becoming a 'de facto 'legislative authority" and "school superintendent' for the entire area.' The entangling web of problems woven by the Court, however, appears on further consideration to be constructed of the flimsiest of threads.

I deal first with the last of the problems posed by the Court the specter of the District Court qua 'school superintendent' and 'legislative authority'—for analysis of this problem helps put the other issues in proper perspective. Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default. See Swann, 91 S.Ct.; Green, Contrary to the majority's suggestions, the District Judge in this case consistently adhered to these procedures and there is every indication that he would have continued to do so. After finding de jure segregation the court ordered the parties to submit proposed Detroit-only plans. The state defendants were also ordered to submit a proposed metropolitan plan extending beyond Detroit's boundaries. As the District Court stated, 'the State defendants . bear the initial burden of coming forward with a proposal that promises to work.' The state defendants defaulted in this obligation, however.

Rather than submit a complete plan, the State Board of Education submitted six proposals, none of which was in fact a desegregation plan. It was only upon this default that the District Court began to take steps to develop its own plan. Even then the District Court maximized school authority participation by appointing a panel representing both plaintiffs and defendants to develop a plan. Pet.App. 99a—100a. Furthermore, the District Court still left the state defendants the initial responsibility for developing both interim and final financial and administrative arrangements to implement interdistrict relief. A—105a. The Court of Appeals further protected the interests of local school authorities by ensuring that the outlying suburban districts could fully participate in the proceedings to develop a metropolitan remedy.

These processes have not been allowed to run their course. No final desegregation plan has been proposed by the panel of experts, let alone approved by the District Court. We do not know in any detail how many students will be transported to effect a metropolitan remedy, and we do not know how long or how far they will have to travel. No recommendations have yet been submitted by the state defendants on financial and administrative arrangements. In sum, the practicality of a final metropolitan plan is simply not before us at the present time. Since the State and the panel of experts have not yet had an opportunity a come up with a workable remedy, there is no foundation for the majority's suggestion of the impracticality of interdistrict relief. Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent.

Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound, and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area.

Since the Court chooses, however, to speculate on the feasibility of a metropolitan plan, I feel constrained to comment on the problem areas it has targeted. To begin with, the majority's question concerning the practicality of consolidation of school districts need not give us pause. The State clearly has the power, under existing law, to effect a consolidation if it is ultimately determined that this offers the best prospect for a workable and stable desegregation plan. See—797. And given the 1,000 or so consolidations of school districts which have taken place in the past, it is hard to believe that the State has not already devised means of solving most, if not all, of the practical problems which the Court suggests consolidation would entail.

Furthermore, the majority ignores long-established Michigan procedures under which school districts may enter into contractual agreements to educate their pupils in other districts using state or local funds to finance nonresident education Such agreements could form an easily administrable framework for interdistrict relief short of outright consolidation of the school districts. The District Court found that interdistrict procedures like these were frequently used

to provide special educational services for handicapped children, and extensive statutory provision is also made for their use in vocational education Surely if school districts are willing to engage in interdistrict programs to help those unfortunate children crippled by physical or mental handicaps, school districts can be required to participate in an inter-district program to help those children in the city of Detroit whose educations and very futures have been crippled by purposeful state segregation.

Although the majority gives this last matter only fleeting reference, it is plain that one of the basic emotional and legal issues underlying these cases concerns the propriety of transportation of students to achieve desegregation. While others may have retreated from its standards, see, e.g., Keyes, 93 S.Ct. (Powell, J., concurring in part and dissenting in part), I continue to adhere to the guidelines set forth in Swann on this issue. See 402 U.S.S.Ct.—1283. And though no final desegregation plan is presently before us, to the extent the outline of such a plan is now visible, it is clear that the transportation it would entail will be fully consistent with these guidelines.

First of all, the metropolitan plan would not involve the busing of substantially more students than already ridebuses. The District Court found that, statewide, 35%—40% of all students already arrive at school on a bus. In those school districts in the tri-county Detroit metropolitan area eligible for state reimbursement of transportation costs, 42%—52% of all students rode buses to school. In the tri-county areas as a whole, ap- proximately 300,000 pupils arrived at school on some type of bus, with about 60,000 of these apparently using regular public transit. In comparison, the desegregation plan, according to its present rough outline, would involve the transportation of 310,000 students, about 40% of the population within the desegregation area.

With respect to distance and amount of time traveled, 17 of the outlying school districts involved in the plan are contiguous to the Detroit district. The rest are all within 8 miles of the Detroit city limits. The trial court, in defining the desegregation area, placed a ceiling of 40 minutes one way on the amount of travel time, and many students will obviously travel for far shorter periods. As to distance, the average statewide bus trip is 8 1/2 miles one way, and in some parts of the tri-county area, students already travel for one and a quarter hours or more each way. In sum, with regard to both the number of students transported and the time and distances involved, the outlined desegregation plan 'compares favorably with the transportation plan previously operated . ..'

As far as economics are concerned, a metropolitan remedy would actually be more sensible than a Detroit-only remedy. Because of prior transportation aid restrictions, see, Detroit largely relied on public transport, at student expense, for those students who lived too far away to walk to school. Since no inventory of school buses existed, a Detroit-only plan was estimated to require the purchase of 900 buses to effectuate the necessary transportation. The tri-county area, in contrast, already has an inventory of 1,800 buses, many of which are now underutilized. Since increased utilization of the existing inventory can take up much

of the increase in transportation involved in the interdistrict remedy, the District Court found that only 350 additional buses would probably be needed, almost two-thirds fewer than a Detroit-only remedy. Other features of an interdistrict remedy bespeak its practicality, such as the possibility of pairing up Negro schools near Detroit's boundary with nearby white schools on the other side of the present school district line.

Some disruption, of course, is the inevitable product of any desegregation decree, whether it operates within one district or on an interdistrict basis. As we said in Swann, however:

'Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided . ..'

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.

From the footnotes:

1. Despite Mr. Justice STEWART's claim to the contrary, n. 2, of his concurring opinion, the record fully supports my statement that Negro students were intentionally confined to a core of Negro schools within the city of Detroit. See, e.g.. Indeed, Mr. Justice STEWART acknowledges that intentional acts of segregation by the State have separated white and Negro students within the city, and that the resulting core of all-Negro schools has grown to encompass most of the city. In suggesting that my approval of an interdistrict remedy rests on a further conclusion that the State or its political subdivisions have been responsible for the increasing percentage of Negro students in Detroit, my Brother STEWART misconceives the thrust of this dissent. In light of the high concentration of Negro students in Detroit, the District Judge's finding that a Detroit-only remedy cannot effectively cure the constitutional violation within the city should be

enough to support the choice of an interdistrict remedy. Whether state action is responsible for the growth of the core of all-Negro schools in Detroit is, in my view, quite irrelevant.

The difficulty with Mr. Justice STEWART's position is that he, like the Court, confuses the inquiry required to determine whether there has been a substantive constitutional violation with that necessary to formulate an appropriate remedy once a constitutional violation has been shown. While a finding of state action is of course a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy. Rather, once a constitutional violation has been shown, the District Court is duty-bound to formulate an effective remedy and, in so doing, the court is entitled—indeed, it is required—to consider all the factual circumstances relevant to the framing of an effective decree. Thus, in Swann v. Charlotte-Mecklenburg Board of Education we held that the District Court must take into account the existence of extensive residential segregation in determining whether a racially neutral 'neighborhood school' attendance plan was an adequate desegregation remedy, regardless of whether this residential segregation was caused by state action. So here, the District Court was required to consider the facts that the Detroit school system was already predominantly Negro and would likely become all-Negro upon issuance of a Detroit-only decree in framing an effective desegregation remedy, regardless of state responsibility for this situation.

San Antonio Independent School District v. Rodriguez

411 U.S. 1 (1973)

Mr. Justice POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and sec- ondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants2 were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The com- plaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December 1971 the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U.S. 966, For the reasons stated in this opinion, we reverse the decision of the District Court.

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools. 6 Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the 'erection . of school buildings' and for the 'further maintenance of public free schools.' Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds The Permanent School Fund, its predecessor established in 1854 with $2,000,000 realized from an annexation settlement,9 was thereafter endowed with millions of acres of public land set aside to assure a continued source of income for school support The Available School Fund, which received income from the Permanent School Fund as well as from a state ad valorem property tax and other designated taxes,11 served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State.

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities Prior to 1939, the Available School Fund contributed money to every school district at a rate of $17 per school-age child Although the amount was increased several times in the early 1940's,18 the Fund was providing only $46 per student by 1945.

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program20. Today, this Program accounts for approximately half of the total educational expenditures

in Texas.

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible—as a unit—for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children24 but that would not by itself exhaust any district's resources Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education—from state as well as local sources have increased steadily. Between 1949 and 1967, expenditures increased approximately 500% In the last decade alone the total public school budget rose from $750 million to.$2 billion27 and these increases have been reflected in consistently rising perpupil expenditures throughout the State Teacher salaries, by far the largest item in any school's budget, have increased dramatically—the state-supported minimum salary for teachers possessing college degrees has risen from $2,400 to $6,000 over the last 20 years.

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan are enrolled in its 25 elementary and secondary schools. The district is are enrolled

in its 25 elementary situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960—the lowest in the metropolitan area—and the median family income ($4,686) is also the lowest At an equalized tax rate of $1 per $100 of assessed property the highest in the metropolitan area—the district contributed $26 to the education of each child for the 1967—1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248 Federal funds added another $108 for a total of $356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly 'Anglo,' having only 18% Mexican-Amer- icans and less than 1% Negroes. The assessed property value per pupil exceeds $49,000,33 and the median family income is $8,001. In 1967—1968 the local tax rate of $ per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that Program, the district was able to supply $558 per student. Supplemented by a $36 per-pupil grant from federal sources, Alamo Heights spent $594 per pupil.

Although the 1967—1968 school year figures provide the only complete statistical breakdown for each category of aid,34 more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970—1971 school year, the Foundation School Program allotment for Edgewood was $356 per pupil, a 62% increase over the 1967—68 school year. Indeed, state aid alone in 1970—1971 equaled Edgewood's entire 1967—1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting $491 per pupil in 1970—1971 These recent

figures also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately $100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only $8 per pupil, which is about 2 % of its grant It appears then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.

Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State38 still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District

Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F.Supp.. Finding that wealth is a 'suspect' classification and that education is a 'fundamental' interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. —284. On this issue the court concluded that '(n)ot only are defendants unable to demonstrate compelling state interests . they fail even to establish a reasonable basis for these classifications.'

Texas virtually concedes that its historically rooted dual system of financing education could not withstanding the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights39 or that involve suspect classifications If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives,41 the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that '(n)o one familiar with the Texas system would contend that it has yet achieved perfection.'42 Apart from its concession that educational financing in Texas has 'defects'43 and 'imperfections,'44 the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a 'reasonable basis.'

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes,45 and on cases disapproving wealth restrictions on the right to vote Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education, 47 that there is a fundamental right to education and that, absent some compelling state justification, the Texas system

could not stand.

We are unable to agree that this case, which in significant aspects is sui generis, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification not the fundamental-interest analysis persuasive.

1.

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States,48 is quite unlike any of the forms of wealth dis- crimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against 'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent,'49 or (2) against those who are relatively poorer than others, 50 or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In Griffin v. Illinois,

Likewise, in Douglas v. California, a decision establishing an indigent defen-

dant's right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. Douglas provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

Williams v. Illinoisand Tate v. Short struck down criminal penalties that subjected indigents to incarceration simply be- cause of their inability to pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in Bullock v. Carter the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided 'no reasonable alternative means of access to the ballot' (id., 92 S.Ct.), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing

system—discrimination against a class of definably 'poor' persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the 'poor,' appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that '(i)t is clearly incorrect . to contend that the 'poor' live in 'poor' districts . .. Thus, the major factual assumption of Serrano—that the educational financing system discriminates against the 'poor'—is simply false in Connecticut.'53 Defining 'poor' families as those below the Bureau of the Census 'poverty level,'54 the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the

record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it,56 a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an 'adequate' education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to 'guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education."58 The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures 'every child in every school district an adequate education.'59 No proof was offered at trial persuasively discrediting or refuting the State's assertion.

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative-discrimination claim is an affidavit submitted by Professor Joele S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. 337 F.Supp. n. 3.

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees' comparative-discrimination theory would still face serious unanswered questions, including whether a bare positive correlation or some higher degree of correlation61 is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor, and whether a class of this size and diversity could ever claim the special protection accorded 'suspect' classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, previously set out in the margin, 63 show only that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts—96 districts composing almost 90% of the sample the correlation is inverted, i.e., the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest median family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.

This brings us, then, to the third way in which the classification scheme might be defined—district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education Alternatively, as suggested in Mr. Justice MARSHALL's dissenting opinion, post, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not 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.

We thus conclude that the Texas system does not operate to the peculiar disad-

vantage of any suspect class.

But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention They also assert that the State's system impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. Graham v. Richardson; Kramer v. Union Free School District; Shapiro v. ThompsonIt is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.

In Brown v. Board of Educationa unanimous Court recognized that 'education is perhaps the most important function of state and local governments.' What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

'Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after Brown was decided. Wisconsin v. Yoder; Abington School Dist. v. Schempp, (Brennan, J.); People of State of Illinois ex rel. McCollum v. Board of Education, (Frankfurter, J.); Pierce v. Society of Sisters; Meyer v. Nebraska; Interstate Consolidated Street R. Co. v. Massachusetts.

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that '(v)irtually every state statute affects important rights.' Shapiro v. Thompson. In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone 'far toward making this Court a 'super-legislature." We would, indeed,

then be assuming a legislative role and one for which the Court lacks both authority and competence. But Mr. Justice Stewart's response in Shapiro to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions:

'The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . ..' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.' (Emphasis in original.)

Mr. Justice Stewart's statement serves to underline what the opinion of the Court in Shapiro makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained:

'(I)n moving from State to State . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.' (Emphasis in original.)

The right to interstate travel had long been recognized as a right of constitutional significance,70 and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right.

Lindsey v. Normetdecided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under 'a more stringent standard than mere rationality.' The tenants argued that the statutory limitations implicated 'fundamental interests which are particularly important to the poor,' such as the "need for decent shelter" and the "right to retain peaceful possession of one's home." Mr. Justice White's analysis, in his opinion for the Court is instructive:

'We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . .. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.' (Emphasis supplied.)

Similarly, in Dandridge v. Williams the Court's explicit recognition of the fact that the 'administration of public welfare assistance . involves the most basic economic needs of impoverished human beings,' 72 provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the case of housing, the

central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also Jefferson v. Hackney; Richardson v. Belcher.

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information77 becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. 78 Exercise of the franchise, it is contended, cannot be divorced from the educational foun- dation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expendi tures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williamsand Lindsey v. Normer.

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty. See Skinner v. Oklahoma, ex rel. Williamson U.S., 62 S.Ct.; Shapiro v. Thompson U.S., 89 S.Ct.; Dunn v. Blumstein U.S.S.Ct.—1004. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Mr. Justice Brennan, writing for the Court in Katzenbach v. Morganexpresses well the salient point:

'This is not a complaint that Congress . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected (to others similarly situated). (The federal law in question) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . We need only decide whether the challenged limitation on the relief effected .. was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in

such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . that a legislature need not 'strike at all evils at the same time,' . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . .." (Emphasis in original.)

The Texas system of school financing is not unlike the federal legislation involved in Katzenbach in this regard. Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding the state aid—was implemented in an effort to extend public education and to improve its quality Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing lass than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:

'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . (T)he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax poli- cies. . It has . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination

against particular persons and classes. . .'

Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' Dandridge v. Williams, The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. Jefferson v. Hackney—547, On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education86—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous

judicial scrutiny. While '(t)he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,'88 it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheles bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly upon the demands of the Equal Protection Clause.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school district. On a statewide average, a roughly comparable amount of funds is derived from each source The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher—compensated at the statesupported minimum salary—for every 25 students Each school

district's other supportive personnel are provided for: one principal for every 30 teachers one 'special service' teacher—librarian, nurse, doctor, etc.—for every 20 teachers superintendents, vocational instructors, counselors, and educators for exceptional children are also provided Additional funds are earmarked for current operating expenses, for student transportation,94 and for free textbooks.

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation96 and for monitoring the statutory teacher-qualification standards As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years,98 the State's financial contribution to education is steadily increasing. None of Texas' school districts, how- ever, has been content to rely alone on funds from the Foundation Program.

By virtue of the obligation to fulfill its Local Fund Assignment, every district must impose an ad valorem tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to assure that each district would have some ability to provide a more enriched educational program Every district supplements its Foundation grant in this manner. In some districts, the local property tax contribution is insubstantial, as in Edgewood where the supplement was only $26 per pupil in 1967. In other districts, the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which

the market value for any category of property varies from its assessed value The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.

This, then, is the basic outline of the Texas school financing structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even 'to establish a reasonable basis' for a system that results in different levels of per-pupil expenditure. 337 F.Supp.. We disagree.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State The power to tax local property for educational purposes has been recognized in Texas at least since 1883 When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

The 'foundation grant' theory upon which Texas legislators and educators based the Gilmer-Aikin bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig. 104 Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis represented an accommodation between these two competing forces. As articulated by Professor Coleman:

'The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.'

The Texas system of school finance is responsive to these two forces. While assuring a basis education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of EmporiaMr. Justice Stewart stated there that '(d)irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' The Chief Justice, in his dissent, agreed that '(l)ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.'

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'106 No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in education expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others,107 the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. McGowan v. Maryland, It may not be condemned simply because it imperfectly effectuates the State's goals. Dandridge v. Williams, Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion 'less drastic' disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. Dunn v. Blumstein, 92 S.Ct.; Shelton v. Tucker, It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on 'happenstance.' They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the

boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school financing results in unequal expenditures between chil- dren who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, Lindsley v. Natural Carbonic Gas Co., it is important to remember that at every stage of its development it has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions. Metropolis Theatre Co. v. City of Chicago—70, One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.

McGinnis v. Royster, We hold that the Texas plan abundantly satisfies this standard.

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, Serrano v. Priest, 5 Cal d 584, 96 Cal.Rptr. 601, 487 P d 1241 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in over-burdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question 111—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, i.e., in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts Additionally, several research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers,114 a result that would exacerbate rather than ameliorate existing conditions in those areas.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its

methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democractic pressures of those who elect them.

Reversed.

From the footnotes to majority opinion:

1. Since the right to vote, per se, is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population.

2. Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be state-wide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See Simonn. 62. The authors of Private Wealth and Public Educationn. 13—242, suggest an alternative scheme, known as 'district power equalizing.' In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base. To finance the subsidies to 'poorer' districts, funds would be taken away from the 'wealthier' districts that, because of their higher property values, collect more than the stated amount at any given rate. This is not the place to weigh the arguments for an against 'district power equalizing,' beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case.

Mr. Justice STEWART, concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The unchartered directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. See, e.g., Rinaldi v. YeagerThis settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in McGowan v. Maryland—426, in the following words:

'Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv.L.Rev. 129 (1893).

Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently 'suspect.' Because of the historic purpose of the Fourteenth Amendment, the prime example of such a 'suspect' classification is one that is based upon race. See, e.g., Brown v. Board of Education; McLaughlin v. FloridaBut there are other classifications that, at least in some settings, are also 'suspect'—for example, those based upon national origin, alienage, indigency, or illegitimacy.

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, scuch a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle.

In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable

under the Equal Protection Clause Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally 'suspect' criteria. Third, the Texas system does not rest 'on grounds wholly irrelevant to the achievement of the State's objective.' Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in McGowan v. Marylandthat the judgment of the District Court must be reversed.

Mr. Justice BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution.' As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, '(a)s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the non- constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.'

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. This being so, any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid.

Mr. Justice WHITE, with whom Mr. Justice DOUGLAS and Mr. Justice BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per pupil The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed 'to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able . .. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much.' The majority advances this rationalization: 'While assuring

a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level.'

I cannot disagree with the proposition that local control and local decisionmaking play an important part in our democratic system of government. Cf. James v. ValtierraMuch may be left to local option, and this case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures and so to improve their children's education to the extent that increased funding would achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

Local school districts in Texas raise their portion of the Foundation School Program—the Local Fund Assignment—by levying ad valorem taxes on the property located within their boundaries. In addition, the districts are authorized, by the state constitution and by statute, to levy ad valorem property taxes in order to raise revenues to support educational spending over and above the expenditure of Foundation School Program funds.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is $49,078, in Edgewood $5,960. In a typical relevant year, Alamo Heights had a maintenance tax rate of $1 and a debt service (bond) tax rate of 20¢ per $100 assessed evaluation, while Edgewood had a maintenance rate of 52¢ and a bond rate of 67¢. These rates, when applied to the respective tax bases, yielded Alamo Heights $1,433,473 in maintenance dollars and $236,074 in bond dollars, and Edgewood $223,034 in maintenance dollars and $279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood's base, realized approximately six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond dollars by using a bond tax rate less than one-third of that used by Edgewood.

Nor is Edgewood's revenue-raising potential only deficient when compared with Alamo Heights. North East District has taxable property with a per-pupil market value of approximately $31,000, but total taxable property approximately four and one-half times that of Edgewood. Applying a maintenance rate of $1, North East yielded $2,818,148. Thus, because of its superior tax base, North East was able to apply a tax rate slightly less than twice that applied by Edgewood and yield more than 10 times the maintenance dollars. Similarly, North East, with a bond rate of 45¢, yielded $1,249,159—more than four times Edgewood's yield with two-thirds the rate.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and its impact on Edgewood is undeniably serious. It is evident from statistics in the record that show that, applying an equalized tax rate of 85¢ per $100 assessed valuation, Alamo Heights was able to provide approximately $330 per pupil in local revenues over and above the Local Fund Assignment. In Edgewood, on the other hand, with an equalized tax rate of $1 per $100 of assessed valuation, $26 per pupil was raised beyond the Local Fund Assignment As previously noted in Alamo Heights, total per-pupil revenues from local, state, and federal funds was $594 per pupil, in Edgewood $356.

In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax at the rate of 68 per $100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of $5 per $100. But state law places a $1 per $100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Taxas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally ralated to the end sought to be achieved. As the Court stated just lat Term in Weber v. Aetna Casualty & Surety Co.

'The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud; Williamson v. Lee Optical Co.; Gulf Colorado & Santa Fe Ry. v. Ellis; Yick Wo v. Hopkins.'

Neither Taxas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the

real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause.

This does not, of course, mean that local control may not be a legitimate goal of a school-financing system. Nor does it mean that the State must guarantee each district an equal per-pupil revenue from the state school-financing system. Nor does it mean, as the majority appears to believe, that, by affirming the decision below, this Court would be 'imposing on the States inflexible constitutionl restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.' On the contrary, it would merely mean that the State must fashion a financing scheme which provides a rational basis for the maximization of local control, if local control is to remain a goal of the system, and not a scheme with 'different treatment be(ing) accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' Reed v. Reed—76,

Perhaps the majority believes that the major disparity in revenues provided and permitted by the Texas system is inconsequential. I cannot agree, however, that the difference of the magnitude appearing in this case can sensibly be ignored, particularly since the State itself considers it so important to provide opportunities to exceed the minimum state educational expenditures.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause. I need go no further than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly underrepresented counties in the reapportionment cases. See, e.g., Baker v. Carr, ; Gray v. Sanders, ; Reynolds v. Sims, And in Bullock v. Carterwhere a challenge to the

Texas candidate filing fee on equal protection grounds was upheld, we noted that the victims of alleged discrimination wrought by the filing fee 'cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause,' but concluded that 'we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.' Similarly, in the present case we would blink reality to

ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme with respect to their capability to supplement the Minimum Foundation School Program. At the very least, the law discriminates against those children and their parents who live in districts where the per-pupil tax base is sufficiently low to make impossible the provision of comparable school revenues by resort to the real property tax which is the only device the State extends for this purpose.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hearts and minds in a way unlikely ever to be undone.' Brown v. Board of Education, 98 l.Ed. 873 (1954). I must therefore respectfully dissent. I

The Court acknowledges that 'substantial interdistrict disparities in school expenditures' exist in Texas, and that these disparities are 'largely attributable to differences in the amounts of money collected through local property taxation,' But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally

discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on substantial numbers of the schoolage children of the State of Texas.

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government It is enlightening to consider these in order.

Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole Yet the amount of revenue that any particular Texas district can raise is dependent on two factors—its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying voters of the district But, regardless of the enthusiasm of the local voters for public education, the second factor—the taxable property wealth of the district—necessarily restricts the district's ability to raise funds to support public education. 8 Thus, even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts9 for the 1967—1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than $100,000 in taxable property per pupil, raised through local effort an average of $610 per pupil, whereas the four poorest districts studied, each of which had less than $10,000 in taxable property per pupil, were able to raise only an average of $63 per pupil And, as the Court effectively recognizes, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.

It is clear, moreover, that the disparity of per-pupil revenues cannot be dismissed as the result of lack of local effort that is, lower tax rates—by property-poor districts. To the contrary, the data presented below indicate that the poorest

districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates Yet, despite the apparent extra effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce $585 per pupil with an equalized tax rate of 31¢ on $100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70¢ on $100 of equalized valuation, were able to produce only $60 per pupil. 13 Without more, this stateimposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate signiticantly the widely varying consequences for Texas school districts and schoolchildren of the local property tax element of the state financing scheme.

State funds provide the remaining some 50% of the monies spent on public education in Texas Technically, they are distributed under two programs. The first is the Available School Fund, for which provision is made in the Texas Constitution The Available

School Fund is composed of revenues obtained from a number of sources, including receipts from the state ad valorem property tax, one-fourth of all monies collected by the occupation tax, annual contributions by the legislature from general revenues, and the revenues derived from the Permanent School Fund For the 1970—1971 school year the Available School Fund contained $296,000,000. The Texas Constitution requires that this money be distributed annually on a per capita basis19 to the local school districts. Obviously, such a flat grant could not alone eradicate the funding differentials atrributable to the local property tax. Moreover, today the Available School Fund is in reality simply one facet of the second state financing program, the Minimum Foundation School Program,20 since each district's annual share of the Fund is deducted from the sum to which the district is entitled under the Foundation Program.

The Minimum Foundation School Program provides funds for three specific purposes: professional salaries, current operating expenses, and transportation expenses The State pays, on an overall basis, for approximately 80% of the cost of the Program; the remaining 20% is distributed among the local school districts under the

Local Fund Assignment Each district's share of the Local Fund Assignment is determined by a complex 'economic index' which is designed to allocate a larger share of the costs to property-rich districts than to property-poor districts Each district pays its share with revenues derived from local property taxation.

The stated purpose of the Minimum Foundation School Program is to provide certain basic funding for each local Texas school district At the same time, the Program was apparently intended to improve, to some degree, the financial position of property-poor districts relative to property-rich districts, since through the use of the economic index—an effort is made to charge a disproportionate share of the costs of the Program to rich districts. 26 It bears noting, however, that substantial criticism has been leveled at the practical effectiveness of the economic index system of local cost allocation In theory, the index is designed to ascertain the relative ability of each district to contribute to the Local Fund Assignment from local property taxes. Yet the index is not developed simply on the basis of each district's taxable wealth. It also takes into account the district's relative income from manufacturing, mining, and agriculture, its payrolls, and its scholastic population.

It is difficult to discern precisely how these latter factors are predictive of a district's relative ability to raise revenues through local property taxes. Thus, in 1966, one of the consultants who originally participated in the development of the Texas economic index adopted in 1949 told the Governor's Committee on Public School Education: 'The Economic Index approach to evaluating local ability offers a little better measure than sheer chance, but not much.'

Moreover, even putting aside these criticisms of the economic index as a device for achieving meaningful district wealth equalization through cost allocation, poor districts still do not necessarily receive more state aid than property-rich districts. For the standards which currently determine the amount received from the Foundation School Program by any particular district 30 favor property-rich districts Thus, focusing on the same

Edgewood Independent and Alamo Heights School Districts which the majority uses for purposes of illustration, we find that in 1967 1968 property-rich Alamo Heights,32 which raised $333 per pupil on an equalized tax rate of 85¢ per $100 valuation, received $225 per pupil from the Foundation School Program, while property-poor Edgewood,33 which raised only $26 per pupil with an equalized tax rate of $1 per $100 valuation, received only $222 per pupil from the Foundation School Program And, more recent data, which indicate that for the 1970—1971 school year Alamo Heights received $491 per pupil from the Program while Edgewood received only $356 per pupil, hardly suggest that the wealth gap between the districts is being narrowed by the State Program. To the contrary, whereas in 1967 1968 Alamo Heights received only $3 per pupil, or about 1%, more than Edgewood in state aid, by 1970—1971 the gap had widened to a difference of $135 per pupil, or about 38% It was data of this character that prompted the District Court to observe that 'the current (state aid) system tends to subsidize the rich at the expense of the poor, rather than the other way around.'36 337 F.Supp. 280, 282. And even the appellants go no further here than to venture that the Minimum Foundation School Program has 'a mildly equalizing effect.'

Despite these facts, the majority continually emphasized how much state aid has,

in recent years, been given to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing schement, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas school children as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. Authorities concerned with educational quality no doubt disagree as to the significance of variations in per-pupil spending Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning may nevertheless excel is to the credit of the child, not the State, cf. Missouri ex rel. Gaines v. Canada, Indeed, who can ever measure for such a child the opportuntiies lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

Hence, even before this Court recognized its duty to tear down the barriers of

state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in Sweatt v. Painter—634, stated:

'(W)e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the (whites only) Law School is superior. . It is difficult to believe that one who had a free choice between these law schools would consider the question close.'

See also McLaurin v. Oklahoma State Regents for Higher EducationLikewise, it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.

The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968% of the teachers in the property-rich Alamo Heights School District had college degrees By contrast, during the same school year only 80 % of the teachers had college degrees in the property poor Edgewood Independent School District Also, in 1968—1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was approximately 80% of Alamo Heights And, not surprisingly, the teacher-student ratio varies significantly between the two districts In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education. Cf. Gaston County v. United States,

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education must fall upon the appellants. Cf. Hobson v. Hansen, 327 F.Supp. 844, 860—861 (D.C.D.C). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this

Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state-created discrimination between the schoolchildren of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the

Texas financing scheme. Appellants assert that, despite its imperfections, the Program 'does guarantee an adequate education to every child.'48 The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program 'was designed to provide an adequate minimum educational offering in every school in the State,' and that the Program 'assur(es) a basic education for every child,' But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property-poor districts vis-a-vis property-rich districts—in terms of educational funds—to eliminate any claim of inter-district discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, e.g., Mayer v. City of Chicago, ; Draper v. Washington, ; Bain Peanut Co. v. Pinson, But, as has already been seen, we are hardly presented here with some de minimis claim of discrimination resulting from the play necessary in any functioning system; to the contrary, it is clear that the Foundation Program utterly fails to ameliorate the seriously discriminatory effects of the local property tax.

Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is 'enough.'50 The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

'The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' Tigner v. Texas.

But this Court has never suggested that because some 'adequate' level of ben-

efits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.' F. S. Royster Guano Co. v. Virginia,

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is 'enough' to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see —43, and n. 86 and n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity—much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Minimum

Foundation School Program cannot obscure the constitutional implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now muchtouted 'adequacy' of the education guaranteed by the Foundation Program.

In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.

Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws 'distinction betwen groups of citizens depending upon the wealth of the district in which they live' and thus creates a disadvantaged class composed of persons living in property-poor districts. See

337 F.Supp.. See also In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions.

But this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. See Gordon v. Lance, ; Reynolds v. Sims; Gray v. Sanders, Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution. 53 Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between school children on the basis of the amount of taxable property located within their local districts.

In my Brother STEWART's view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the 'kind of objectively identifiable classes' that he evidentlyperceives to be necessary for a claim to be 'cognizable under the Equal Protection Clause,' He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination—whatever the standard of equal protection analysis employed This is clear from our decision only last Term in Bullock v. Carterwhere the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily

identified. The Court recognized that the filing-fee system tended 'to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor.' The

Court also recognized that '(t)his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . ..' Nevertheless, it concluded that 'we would ignore reality were we not to recognize that this system falls with unequal weight on voters . according to their economic status.' The nature of the classification in Bullock was clear, although the precise membership of the disadvantaged class was not. This was enough in Bullock for purposes of equal protection analysis. It is enough here.

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor dis- tricts Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below,56 I have no need to join issue on these factual disputes.

I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, 'the quality of public education may not be a function of wealth, other than the wealth of the state as a whole.' 337 F.Supp.. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable prop-

erty per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an 'artificially defined level' of district wealth. But such is clearly not the case, for this is the definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the Equal Protection Clause is the question to which the must now turn.

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a 'compelling state interest' in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a 'fundamental interest,' namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a 'fundamental interest,' see, e.g., Dunn v. Blumstein, ; Shapiro v. Thompson, or is based on a distinction of a suspect character, see, e.g., Graham v. Richardson; McLaughlin v. Florida, must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. See, e.g., Dunn v. BlumsteinS.Ct.—1004; Shapiro v. ThompsonThe majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. See, e.g., McGowan v. MarylandS.Ct.—1105; Morey v. Doud; F. S. Royster Guano Co. v. Virginia, 40 S.Ct.; Lindsley v. Natural Carbonic Gas Co., By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case. A.

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See Dandridge v. Williams, (dissenting opinion); Richardson v. Belcher, (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat cate-

gories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protec- tion Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which 'concentration (is) placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.' Dandridge v. Williams (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See Police Dept. of City of Chicago v. MosleyFurther, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right 'was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.' United States v. Guest, See also Crandall v. Nevada, 6 Wall. 35, 48, Consequently, the Court has required that a state classification affecting theconstitutionally protected right to travel must be 'shown to be necessary to promote a compelling governmental interest.' Shapiro v. Thompson, But it will not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest 'is a right . explicitly or implicitly guaranteed by the Constitution,'

I would like to know where the Constitution guarantees the right to procreate, Skinner v. Oklahoma ex rel. Williamson, or the right to vote in state elections, e.g., Reynolds v. Simsor the right to an appeal from a criminal conviction, e.g., Griffin v. IllinoisThese are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy fullblown constitutional protection.

Thus, in Buck v. Bellthe Court refused to recognize a substantive constitutional

guarantee of the right to procreate. Nevertheless, in Skinner v. Oklahoma ex rel. Williamsonthe Court, without impugning the continuing validity of Buck v. Bell, held that 'strict scrutiny' of state discrimination affecting procreation 'is essential' for '(m)arriage and procreation are fundamental to the very existence and survival of the race.' Recently, in Roe v. Wade, the importance of procreation has indeed been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any 'right' to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in Buck v. Bell. See Roe v. Wade.

Similarly, the right to vote in state elections has been recognized as a 'fundamental political right,' because the Court concluded very early that it is 'preservative of all rights.' Yick Wo v. Hopkins, ; see, e.g., Reynolds v. SimsS.Ct.—1382. For this reason, 'this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.' Dunn v. Blumstein, 92 S.Ct. (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the statute of an independent constitutional guarantee. 60 See Oregon v. Mitchell; Kramer v. Union Free School District No. 15, ; Harper v. Virginia Board of Elections,

Finally, it is likewise 'true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.' Griffin v. Illinois, Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny. See, e.g., Griffin v. Illinois; Douglas v. California.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective 'picking-and-choosing' between various interests or that it must involve this Court in creating 'substantive constitutional rights in the name of guaranteeing equal protection of the laws,' Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate

processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights62 implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in Eisenstadt v. BairdIn Baird, the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. S.Ct.—1035. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.' See, e.g., McGowan v. Maryland, ; Kotch v. Board of River Port Pilot Comm'rs, And this lenient standard is further weighted in the State's favor by the fact that '(a) statutory discrimination will not be set aside if any state of facts reasonably may be conceived (by the Court) to justify it.' McGowan v. MarylandBut in Baird the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute—e.g., deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles—the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. See 405 U.S.S.Ct.—1039. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. See, e.g., Goesaert v. Cleary; Kotch v. Board of River Port Pilot Comm'rs. Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. See 405 U.S. 454; S.Ct. 1038—1039; —1044 (White, J., concurring in result). See also Roe v. WadeS.Ct.—727.

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to to accorded any particular case. The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial

scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process. See Graham v. Richardson, 91 S.Ct.; United States v. Carolene Products Co.—153, n. 4, 783—784, Moreover, race, nationality, or alienage is "in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, Kiyoshi Hirabayashi v. United States, .' McLaughlin v. Florida, Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce—or at least not to the same degree—in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

In James v. Strangethe Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions afforded civil judgment debtors The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be "some rationality" in the line drawn between the different types of debtors. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus, the Court recognized 'that state recoupment statutes may betoken legitimate state interests' in recovering expenses and discouraging fraud. Nevertheless, Mr. Justice Powell, speaking for the Court, concluded that

'these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self sufficiency and self respect.'

The Court, in short, clearly did not consider the problems of fraud and collection that the state legislature might have concluded were peculiar to indigent criminal defendants to be either sufficiently important or at least sufficiently substantiated to justify denial of the protective exemptions afforded to all civil judgment debtors, to a class composed exclusively of indigent criminal debtors.

Similarly, in Reed v. Reed the Court, in striking down a state statute which gave men preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protecting review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore 'a rational relationship to a state objective,' which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. Accepting such a purpose, the Idaho Supreme

Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of an estate. This Court, however, concluded that '(t)o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex.

James and Reed can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the spector of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. See Weber v. Aetna Casualty & Surety Co., 406 U.S., 164, ; Levy v. Louisiana In Weber, the Court struck down a portion of a state workmen's compensation statute that relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legitimate children of the deceased. The Court acknowledged the true nature of its inquiry in cases such as these: 'What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?' U.S., Embarking upon a determination of the relative substantiality of the State's justifications for the classification, the Court rejected the contention that the classifications reflected what might be presumed to have been the deceased's preference of beneficiaries as 'not compelling . where dependency on the deceased is a prerequisite to anyone's recovery . ..' Likewise, it deemed the relationship between the State's interest in encouraging legitimate family relationships and the burden placed on the illegitimates too tenuous to permit the classification to stand. A clear insight into the basis of the Court's action is provided by its conclusion:

'(I)mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth.

Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations.

Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, '(t)he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.' Dandridge v. Williams, (dissenting opinion). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a 'super-legislature.' I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.

Opinions such as those in Reed and James seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects

the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens. See Missouri ex rel. Gaines v. Canada, Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in Brown v. Board of Education, 74 S.Ct.:

'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . .'

Only last Term, the Court recognized that '(p)roviding public schools ranks at the very apex of the function of a State.' Wisconsin v. Yoder, This is clearly borne out by the fact that in 48 of our 50 States the provision of public education is mandated by the state constitution No other state function is so uniformly recognized69 as an essential element of our society's well-being. In large measure, the explanation for the special importance attached to education must rest, as the Court recognized in Yoder, on the facts that 'some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . .,' and that 'education prepares individuals to be self-reliant and self-sufficient participants in society.' Both facets of this observation are suggestive of the substantial relationship which education bears to guarantees of our Constitution.

Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in Sweezy v. New Hampshire, speaks of the right of students 'to inquire, to study and to evaluate, to gain new maturity and understanding . .' Thus, we have not casually described the classroom as the "marketplace of ideas." Keyishian v. Board of Regents, The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech andassociation guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, 'the

pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.'

Of particular importance is the relationship between education and the political process. 'Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.' School District of Abington Township v. Schempp, (Brennan, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. 71 Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation A system of '(c)ompetition in ideas andgovernmental policies is at the core of our electoral process and of the First Amendment freedoms.' Williams v. Rhodes, But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is 'preservative of other basic civil and political rights,' Reynolds v. Sims, Data from the Presidential Election of 1968 clearly demonstrate a direct relationship between participation in the electoral process and level of educational attainment and, as this Court recognized in Gaston County v. United States, the quality of education offered may influence a child's decision to 'enter or remain in school.' It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has 'never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.' Ante. This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most effective speech nor of the most informed vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in Brown v. Board of Education, the opportunity of education, 'where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' The factors just considered, including the relationship between

education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts75—aconclusion which is only strengthened when we consider the character of the classification in this case.

The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. See, e.g., Griffin v. Illinois; Douglas v. California; McDonald v. Board of Election Comm'rs of Chicago, The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have 'shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.' I cannot agree. The Court's distinctions may be sufficient to explain the decisions in Williams v. Illinois; Tate v. Short; and even Bullock v. CarterBut they are not in fact consistent with the decisions in Harper v. Virginia Board of Electionsor Griffin v. Illinoisor Douglas v. California.

In Harper, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of $1 payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest—the exercise of the state franchise. In addition, though, the Court emphasized that '(l)ines drawn on the basis of wealth or property . are traditionally disfavored.' 383 U.S., Under the first part of the theory announced by the majority, the disadvantaged class in Harper, in terms of a wealth analysis, should have consisted only of those too poor to afford the $1 necessary to vote. But the Harper Court did not see it that way. In its view, the Equal Protection Clause 'bars a system which excludes (from the franchise) those unable to pay a fee to vote or who fail to pay.' (Emphasis added.) So far as the Court was concerned, the 'degree of the discrimination (was) irrelevant.' Thus, the Court struck down the poll tax in toto; it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

Similarly, Griffin and Douglas refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes Griffin as a case concerned simply with the denial of a transcript or an adequate substitute therefor, and Douglas as involving the denial counsel. But in both cases the question was

in fact whether 'a State that (grants) appellate review can do so in a way that discriminates against some convicted defendants on account of their proverty.' Griffin v. Illinois S.Ct. (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies 'the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance,' (emphasis added), and that 'the type of an appeal a person is afforded . hinges upon whether or not he can pay for the assistance of counsel,' Douglas v. CaliforniaS.Ct. (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich It was on these terms that the Court a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the basis of wealth which do not amount to outright denial of the affected right or interest.

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth Here, by contrast, the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

As the Court points out, —29, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. Compare, e.g., Harper v. Virginia Board of Electionswith, e.g., James v. ValtierraThat wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The 'poor' may not be seen as politically powerless as certain discrete and insular minority groups. 79 Personal proverty may entail much the same social stigma as historically attached to certain racial or ethnic groups But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the 'poor' have frequently been a legally disadvantaged group,81 it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See Harper v. Virginia Board of Elections.

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests,82 it bears no relationship whatsoever to the interest

of Texas schoolchildren in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control,83 it represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual's characteristics or his abilities. And thus—particularly in the context of a disadvantaged class composed of children—we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. Cf. Weber v. Aetna Casualty & Surety Co.; Levy v. Louisiana The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment.

Nor can we ignore the extent to which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. Griffin, Douglas, Williams, Tate, and our other prior cases have dealt with discrimination on the basis of indigency which was attributable to the operation of the private sector. But we have no such simple de facto wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use,85 and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as 'unusual in the extent to which governmental action is the cause of the wealth classifications.'

In the final anaylsis, then The invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of Texas.

The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests.

See Police Dept. of City of Chicago v. Mosley, Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a 'compelling,' Shapiro v. Thompson, or a 'substantial' or 'important,' Dunn v. Blumstein, state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose,87 but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses at act as its action affects more directly interests of constitutional significance. See, e.g., United States v. Robel, ; Shelton v. Tucker, Thus, by now, 'less restrictive alternatives' analysis is firmly established in equal protection jurisprudence. See Dunn v. Blumstein S.Ct.; Kramer v. Union Free School District No. 15, It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that '(n)ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.' 337 F.Supp.. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. We observed only last Term that '(d)irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' Wright v. Council of the City of Emporia. The State's interest in local educational control—which certainly includes questions of educational funding—has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's schoolchildren. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For, on this record,

it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas, statewide laws regulate in fact the most minute details of local public education. For example, the State prescribes required courses All textbooks must be submitted for state approval,89 and only approved textbooks may be used The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification The State has even legislated on the length of the school day Texas' own courts have said:

'As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas.' Treadaway v. Whitney Independent School District, 205 S.W d 97, 99 (Tex.Civ.App).

Moreover, even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest—as the Court does, that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967—1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only $26 per pupil through its local property tax, whereas Alamo Heights was able to raise $333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs—under which a property-poor district such as Edgewood is forced to labor In fact, because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same yield as Alamo Heights At present, then, local control is a myth for many of

the local school districts in Texas. As one district court has observed, 'rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes).' Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D.C.Minn).

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well as, if not better than, the present scheme without the current impairment of the educational opportunity of vast numbers of Texas schoolchildren I see no need, however, to explore the practical or constitutional merits of those suggested alternatives at this time for, whatever their positive or negative features, experience with the present financing scheme impugns any suggestion that it constitutes a serious effort to provide local fiscal control. If for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control—namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decision-making a reality for all Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. Both centralized and decentralized plans for educational funding not involving such interdistrict discrimination have been put forward The choice among these or other alternatives would remain with the State, not with the federal courts. In this regard, it should be evident that the degree of federal intervention in matters of local concern would be substantially less in this context than in previous decisions in which we have been asked effectively to impose a particular scheme upon the States under the guise of the Equal Protection Clause. See, e.g., Dandridge v. Williams; Cf. Richardson v. Belcher Still, we are told that this case requires us 'to condemn the State's judgment in conferring on polit-

ical subdivisions the power to tax local property to supply revenues for local interests.' Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.

I would therefore affirm the judgment of the District Court.

Fisher v. Univ. of Tex. at Austin

579 U.S. ____ (2016)

Justice KENNEDY delivered the opinion of the Court. The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See Hopwood v. Texas, –935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included

in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with Hopwood, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to Hopwood as well. It enacted H.B. 588, commonly known as the Top Ten Percent Law. Tex. Educ.Code Ann. § 51 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of Grutter v. Bollingerand Gratz v. BollingerIn Gratz, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. See 539 U.S., 275–276, In Grutter, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. See 539 U.S., 343–344, In upholding this nuanced use of race, Grutter implicitly overruled Hopwood 's categorical prohibition.

In the wake of Grutter, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body … to all of the University's undergraduate students." App. 481a–482a (affidavit of N. Bruce Walker ¶ 11 (Walker Aff.)); see also a–447a. The University concluded that its admissions policy was not providing these benefits. Supp. App. 24a–25a.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." a. After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of Grutter, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through

the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in Grutter for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1–to–6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. See App. 218a–220a, 430a.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. Deposition of Brian Breman 9–14, Record in No. 1: 08–CV–00263, (WD Tex.), Doc. 96–3. The Admissions Office also undertakes regular "reliability analyses" to "measure the frequency of readers scoring within one point of each other." App. 474a (affidavit of Gary M. Lavergne ¶ 8); see also a (deposition of Kedra Ishop (Ishop Dep.)). Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants' scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS.

Therefore, although admissions officers can consider race as a positive feature

of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. 645 F.Supp d 587, 608 (W.D.Tex). Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. ("Plaintiffs cite no evidence to show racial groups other than African–Americans and Hispanics are excluded from benefitting from UT's consideration of race in admissions. As the Defendants point out, the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian–Americans"); see also Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae 12 (the contention that the University discriminates against Asian–Americans is "entirely unsupported by evidence in the record or empirical data"). There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant's background, can alter an applicant's PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant's AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. See U.S. Const., Amdt. 14, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, Fisher v. University of Tex. at Austin, 570 U.S. ——, (Fisher I), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. C.A 2014). This Court granted certiorari for a second time, 576 U.S. ——, and now affirms.

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," Richmond v. J.A. Croson Co., "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," Fisher I, 570 U.S., at ——, Strict scrutiny requires the university to demonstrate with clarity that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of its purpose.' "

Second, Fisher I confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' … is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." ———, A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' " Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals." (internal quotation marks and citation omitted).

Third, Fisher I clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. ——–, 133 S.Ct.–2420. A university, Fisher I explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." ———, 133 S.Ct. (internal quotation marks omitted). Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," Grutter, it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." Fisher I, 570 U.S., at ———,

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." ———, 133 S.Ct. The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. ———, On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by Fisher I See –660. Judge Garza dissented.

The University's program is sui generis Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in Grutter

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of

admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.

In an ordinary case, this evidentiary gap perhaps could be filled by a remand to the district court for further factfinding. When petitioner's application was rejected, however, the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years. While studies undertaken over the eight years since then may be of significant value in determining the constitutionality of the University's current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008. If the Court were to remand, therefore, further factfinding would be limited to a narrow 3–year sample, review of which might yield little insight.

Furthermore, as discussed above, the University lacks any authority to alter the role of the Top Ten Percent Plan in its admissions process. The Plan was mandated by the Texas Legislature in the wake of Hopwood, so the University, like petitioner in this litigation, has likely taken the Plan as a given since its implementation in 1998. If the University had no reason to think that it could deviate from the Top Ten Percent Plan, it similarly had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before Fisher I clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review.

Under the circumstances of this case, then, a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources. Petitioner long since has graduated from another college, and the University's policy—and the data on which it first was based—may have evolved or changed in material ways.

The fact that this case has been litigated on a somewhat artificial basis, furthermore, may limit its value for prospective guidance. The Texas Legislature, in enacting the Top Ten Percent Plan, cannot much be criticized, for it was responding to Hopwood, which at the time was binding law in the State of Texas. That legislative response, in turn, circumscribed the University's discretion in crafting its admissions policy. These circumstances refute any criticism that the University did not make good-faith efforts to comply with the law.

That does not diminish, however, the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy,

of its admissions program. See Supp. App. 32a; App. 448a. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come. Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." Fisher I, 570 U.S., at ———, 133 S.Ct. (internal quotation marks omitted); see also Grutter, As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." (internal quotation marks and alteration omitted). Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." Ibid (internal quotation marks omitted).

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes

the educational benefits of diversity will be obtained. On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.' " Supp. App. 1a; see also a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶ 4) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Supp. App. 23a. All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. Fisher I———, The University's 39–page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Supp. App. 25a; see also App. 481a–482a (Walker Aff. ¶¶ 8–12) (describing the "thoughtful review" the University undertook when it faced the "important decision … whether or not to use race in its admissions process"). Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." See, e.g., a (Ishop Dep.), 314a–318a, 359a (Walker Dep.), 415a–416a (Defendant's Statement of Facts), 478a–479a, 481a–482a (Walker Aff. ¶¶ 4, 10–13). Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Brief for Petitioner 46. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," App. 446a, and concluded that "[t]he use of

race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. See, e.g., post (opinion of ALITO, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4 percent of the incoming class. In 2003, the year Grutter was decided, 267 African–American students enrolled—again, 4 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. See Supp. App. 43a. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation. See, e.g., App. 317a–318a.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African–American students enrolled in them, and 27 percent had only one African–American student. Supp. App. 140a. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. a, 140a. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3 percent were African–American. Supp. App. 157a. In 2007, by contrast, 16 percent of the Texas holistic-review freshmen were Hispanic and 6 percent were African–American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial

consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. Brief for Petitioner 47. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African–American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶ 4–20). Perhaps more significantly, in the wake of Hopwood, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. Grutter, Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." Fisher I, (GINSBURG, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain

above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it. See Grutter, (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [Regents of Univ. of Cal v. Bakke,] envisions"). At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." Gratz, n. 10, (GINSBURG, J., dissenting).

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. Fisher I———, The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Sweatt v. Painter, Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its

identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." United States v. Lopez, (KENNEDY, J., concurring); see also New State Ice Co. v. Liebmann, (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting. Something strange has happened since our prior decision in this case. See Fisher v. University of Tex. at Austin, 570 U.S. ——, (Fisher I). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. See Supp. App. 1a, 24a–25a, 39a; App. 316a. It pointed to a study showing that

African–American, Hispanic, and Asian–American students were underrepresented in many classes. See Supp. App. 26a. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in administering the "holistic" component of its plan, make any effort to determine whether an African–American, Hispanic, or Asian–American student is likely to enroll in classes in which minority students are underrepresented. And although UT's records should permit it to determine without much difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law, Tex. Educ.Code Ann. § 51 (West Cum. Supp. 2015), to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show. Nor has UT explained why the underrepresentation of Asian–American students in many classes justifies its plan, which discriminates against those students.

At times, UT has claimed that its plan is needed to achieve a "critical mass" of African–American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African–American or Hispanic students nor the percentage of African–Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. See App. 314a–315a. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in Fisher I.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits the wrong kind of African–American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African–American or Hispanic. As UT put it in its brief in Fisher I, the race-based component of its admissions plan is needed to admit "[t]he African–American or Hispanic child of successful professionals in Dallas." Brief for Respondents, O.T. 2012, No. 11–345, p. 34.

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. See Brief for Respondents 2 ("Petitioner's argument that UT's interest is favoring 'affluent' minorities is a fabrication"); see also But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help disadvantaged students.

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African–American and Hispanic students, the Fifth Circuit majority bought a version of that claim. As the panel majority put it, the Top Ten African–American and Hispanic admittees cannot match the holistic African–American and Hispanic admittees when it comes to "records of personal achievement," a "variety of perspectives" and "life experiences," and "unique skills." All in all, according to the panel majority, the Top Ten Percent students cannot "enrich the diversity of the student body" in the same way as the holistic admittees. As Judge Garza put it in dissent, the panel majority

concluded that the Top Ten Percent admittees are "somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." (Garza, J., dissenting).

The Fifth Circuit reached this conclusion with little direct evidence regarding the characteristics of the Top Ten Percent and holistic admittees. Instead, the assumption behind the Fifth Circuit's reasoning is that most of the African–American and Hispanic students admitted under the race-neutral component of UT's plan were able to rank in the top decile of their high school classes only because they did not have to compete against white and Asian–American students. This insulting stereotype is not supported by the record. African–American and Hispanic students admitted under the Top Ten Percent Plan receive higher college grades than the African–American and Hispanic students admitted under the race-conscious program. See Supp. App. 164a–165a.

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be its burden to show that the plan was narrowly tailored to serve compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.

Over the past 20 years, UT has frequently modified its admissions policies, and it has generally employed race and ethnicity in the most aggressive manner permitted under controlling precedent.

Before 1997, race was considered directly as part of the general admissions process, and it was frequently a controlling factor. Admissions were based on two criteria: (1) the applicant's Academic Index (AI), which was computed from standardized test scores and high school class rank, and (2) the applicant's race. In 1996, the last year this race-conscious system was in place, 4 % of enrolled freshmen were African–American, 14 % were Asian–American, and 14 % were Hispanic. Supp. App. 43a.

The Fifth Circuit's decision in Hopwood v. Texas, prohibited UT from using race in admissions. In response to Hopwood, beginning with the 1997 admissions cycle, UT instituted a "holistic review" process in which it considered an applicant's AI as well as a Personal Achievement Index (PAI) that was intended, among other things, to increase minority enrollment. The race-neutral PAI was a composite of scores from two essays and a personal achievement score, which in turn was based on a holistic review of an applicant's leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special circumstances. Special consideration was given to applicants from

poor families, applicants from homes in which a language other than English was customarily spoken, and applicants from single-parent households. Because this race-neutral plan gave a preference to disadvantaged students, it had the effect of "disproportionately" benefiting minority candidates. 645 F.Supp d 587, 592 (W.D.Tex).The Texas Legislature also responded to Hopwood. In 1997, it enacted the Top Ten Percent Plan, which mandated that UT admit all Texas seniors who rank in the top 10% of their high school classes. This facially race-neutral law served to equalize competition between students who live in relatively affluent areas with superior schools and students in poorer areas served by schools offering fewer opportunities for academic excellence. And by benefiting the students in the latter group, this plan, like the race-neutral holistic plan already adopted by UT, tended to benefit African–American and Hispanic students, who are often trapped in inferior public schools. –653.

Starting in 1998, when the Top Ten Percent Plan took effect, UT's holistic, race-neutral AI/PAI system continued to be used to fill the seats in the entering class that were not taken by Top Ten Percent students. The AI/PAI system was also used to determine program placement for all incoming students, including the Top Ten Percent students.

"The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University." Fisher I, 570 U.S., at ———, In 2000, UT announced that its "enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the Hopwood decision prohibited the consideration of race in admissions policies." App. 393a; see also Supp. App. 23a–24a (pre-Hopwood diversity levels were "restored" in 1999); App. 392a–393a ("The 'Top 10 Percent Law' is Working for Texas" and "has enabled us to diversify enrollment at UT Austin with talented students who succeed"). And in 2003, UT proclaimed that it had "effectively compensated for the loss of affirmative action." a; see also a ("Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian–Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process"). By 2004—the last year under the holistic, race-neutral AI/PAI system—UT's entering class was 4 % African–American, 17 % Asian–American, and 16 % Hispanic. Supp. App. 156a. The 2004 entering class thus had a higher percentage of African–Americans, Asian–Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.

Notwithstanding these lauded results, UT leapt at the opportunity to reinsert race into the process. On June 23, 2003, this Court decided Grutter v. Bollinger-which upheld the University of Michigan Law School's race-conscious admissions system. In Grutter, the Court warned that a university contemplating the consideration of race as part of its admissions process must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the di-

versity the university seeks." Nevertheless, on the very day Grutter was handed down, UT's president announced that "[t]he University of Texas at Austin will modify its admissions procedures" in light of Grutter, including by "implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs." App. 406a–407a (emphasis added). UT purports to have later engaged in "almost a year of deliberations," a, but there is no evidence that the reintroduction of race into the admissions process was anything other than a foregone conclusion following the president's announcement.

"The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions" (Proposal). Fisher I———, The Proposal stated that UT needed race-conscious admissions because it had not yet achieved a "critical mass of racial diversity." Supp. App. 25a. In support of this claim, UT cited two pieces of evidence. First, it noted that there were "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population." a. Second, the Proposal "relied in substantial part," Fisher I———, on a study of a subset of undergraduate classes containing at least five students, see Supp. App. 26a. The study showed that among select classes with five or more students, 52% had no African–Americans, 16% had no Asian–Americans, and 12% had no Hispanics. Moreover, the study showed, only 21% of these classes had two or more African–Americans, 67% had two or more Asian–Americans, and 70% had two or more Hispanics. See Based on this study, the Proposal concluded that UT "has not reached a critical mass at the classroom level." a. The Proposal did not analyze the backgrounds, life experiences, leadership qualities, awards, extracurricular activities, community service, personal attributes, or other characteristics of the minority students who were already being admitted to UT under the holistic, race-neutral process.

"To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004." Fisher I, 570 U.S., at ———, "The University asks students to classify themselves from among five predefined racial categories on the application." "Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor." UT decided to use racial preferences to benefit African–American and Hispanic students because it considers those groups "underrepresented minorities." Supp. App. 25a; see also App. 445a–446a (defining "underrepresented minorities" as "Hispanic[s] and African Americans"). Even though UT's classroom study showed that more classes lacked Asian–American students than lacked Hispanic students, Supp. App. 26a, UT deemed Asian–Americans "overrepresented" based on state demographics, 645 F.Supp d ; see also ("It is undisputed that UT considers African–Americans and Hispanics to be underrepresented but does not consider Asian–Americans to be underrepresented").

Although UT claims that race is but a "factor of a factor of a factor of a factor," UT acknowledges that "race is the only one of [its] holistic factors that

appears on the cover of every application," Tr. of Oral Arg. 54 (Oct. 10, 2012). "Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation." 645 F.Supp d ; see also ("[A] candidate's race is known throughout the application process"). Consideration of race therefore pervades every aspect of UT's admissions process. See App. 219a ("We are certainly aware of the applicant's race. It's on the front page of the application that's being read [and] is used in context with everything else that's part of the applicant's file"). This is by design, as UT considers its use of racial classifications to be a benign form of "social engineering." Powers, Why Schools Still Need Affirmative Action, National L. J., Aug. 4, 2014, p. 22 (editorial by Bill Powers, President of UT from 2006–2015) ("Opponents accuse defenders of race-conscious admissions of being in favor of 'social engineering,' to which I believe we should reply, 'Guilty as charged' ").

Notwithstanding the omnipresence of racial classifications, UT claims that it keeps no record of how those classifications affect its process. "The university doesn't keep any statistics on how many students are affected by the consideration of race in admissions decisions," and it "does not know how many minority students are affected in a positive manner by the consideration of race." App. 337a. According to UT, it has no way of making these determinations. See a–322a. UT says that it does not tell its admissions officers how much weight to give to race. See Deposition of Gary Lavergne 43–45, Record in No. 1:08–CV–00263 (WD Tex.), Doc. 94–9 (Lavergne Deposition). And because the influence of race is always "contextual," UT claims, it cannot provide even a single example of an instance in which race impacted a student's odds of admission. See App. 220a ("Q. Could you give me an example where race would have some impact on an applicant's personal achievement score? A. To be honest, not really…. [I]t's impossible to say—to give you an example of a particular student because it's all contextual"). Accordingly, UT asserts that it has no idea which students were admitted as a result of its race-conscious system and which students would have been admitted under a race-neutral process. UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.

UT's race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT's rationales as sufficient to meet its burden, the majority licenses UT's perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out.

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." Richmond v. J.A. Croson Co., (KENNEDY, J., concurring in part and concurring in judgment). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government

must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Miller v. Johnson, (internal quotation marks omitted). "Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." (internal quotation marks omitted). Given our constitutional commitment to "the doctrine of equality," " '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.' " Rice v. Cayetano, (quoting Hirabayashi v. United States,).

"[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications … be subjected to the most rigid scrutiny." Fisher I, 570 U.S., at ———, 133 S.Ct. (internal quotation marks and citations omitted). "[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.' " ; see also Grutter, (KENNEDY, J., dissenting) (" 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination' "). Under strict scrutiny, the use of race must be"necessary to further a compelling governmental interest," and the means employed must be " 'specifically and narrowly' " tailored to accomplish the compelling interest. 333, (O'Connor, J., for the Court).

The "higher education dynamic does not change" this standard. Fisher I———, "Racial discrimination [is] invidious in all contexts," Edmonson v. Leesville Concrete Co., and " '[t]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable,' " Fisher I———, Nor does the standard of review " 'depen[d] on the race of those burdened or benefited by a particular classification.' " Gratz v. Bollinger, (quoting Adarand Constructors, Inc. v. Peã,); see also Miller, ("This rule obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification' " (quoting Croson, (plurality opinion of O'Connor, J.))). "Thus, '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 of judicial scrutiny.' " Gratz, (quoting Adarand,).

In short, in "all contexts," Edmonson, racial classifications are permitted only "as a last resort," when all else has failed, Croson, (opinion of KENNEDY, J.). "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. Fisher I, 570 U.S., at ———, To meet this burden, the government must "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of its purpose.' " ———, 133 S.Ct. (emphasis added).

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy

strict scrutiny.

When UT adopted its challenged policy, it characterized its compelling interest as obtaining a " 'critical mass' " of underrepresented minorities. ———, The 2004 Proposal claimed that "[t]he use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity." Supp. App. 25a; see Fisher v. University of Tex. at Austin, C.A 2011) ("[T]he 2004 Proposal explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity"). But to this day, UT has not explained in anything other than the vaguest terms what it means by "critical mass." In fact, UT argues that it need not identify any interest more specific than "securing the educational benefits of diversity." Brief for Respondents 15.

UT has insisted that critical mass is not an absolute number. See Tr. of Oral Arg. 39 (Oct. 10, 2012) (declaring that UT is not working toward any particular number of African–American or Hispanic students); App. 315a (confirming that UT has not defined critical mass as a number and has not projected when it will attain critical mass). Instead, UT prefers a deliberately malleable "we'll know it when we see it" notion of critical mass. It defines "critical mass" as "an adequate representation of minority students so that the … educational benefits that can be derived from diversity can actually happen," and it declares that it "will … know [that] it has reached critical mass" when it "see[s] the educational benefits happening." a–315a. In other words: Trust us.

This intentionally imprecise interest is designed to insulate UT's program from meaningful judicial review. As Judge Garza explained:

"[T]o meet its narrow tailoring burden, the University must explain its goal to us in some meaningful way. We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends. We cannot tell whether the admissions program closely 'fits' the University's goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve 'critical mass,' or whether there are effective race-neutral alternatives, when it has not described what 'critical mass' requires." (dissenting opinion). Indeed, without knowing in reasonably specific terms what critical mass is or how it can be measured, a reviewing court cannot conduct the requisite "careful judicial inquiry" into whether the use of race was " 'necessary.' " Fisher I———.

To be sure, I agree with the majority that our precedents do not require UT to pinpoint "an interest in enrolling a certain number of minority students." But in order for us to assess whether UT's program is narrowly tailored, the University must identify some sort of concrete interest "Classifying and assigning" students according to race "requires more than … an amorphous end to justify it." Parents Involved in Community Schools v. Seattle School Dist. No. 1, Because UT has failed to explain "with clarity," Fisher I———, why it needs a race-conscious policy and how it will know when its goals have been met, the narrow tailoring

analysis cannot be meaningfully conducted. UT therefore cannot satisfy strict scrutiny.

The majority acknowledges that "asserting an interest in the educational benefits of diversity writ large is insufficient," and that "[a] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." According to the majority, however, UT has articulated the following "concrete and precise goals": "the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry." (internal quotation marks omitted).

These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, see – 2211 (citing only self-serving statements from UT officials), then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.

By accepting these amorphous goals as sufficient for UT to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending " 'inherently suspect' " classifications. Miller, (citing Regents of Univ. of Cal. v. Bakke, (opinion of Powell, J.)); see also, e.g., Miller, ("Our presumptive skepticism of all racial classifications … prohibits us … from accepting on its face the Justice Department's conclusion" (citation omitted)); Croson, ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"); ("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"). Most troublingly, the majority's uncritical deference to UT's self-serving claims blatantly contradicts our decision in the prior iteration of this very case, in which we faulted the Fifth Circuit for improperly "deferring to the University's good faith in its use of racial classifications." Fisher I, 570 U.S., at ——, As we emphasized just three years ago, our precedent "ma[kes] clear that it is for the courts, not for university administrators, to ensure that" an admissions process is narrowly tailored. ——, A court cannot ensure that an admissions process is narrowly tailored if it cannot pin down the goals that the process is designed to achieve. UT's vague policy goals are "so broad and imprecise that they cannot withstand strict scrutiny." Parents Involved, (KENNEDY, J., concurring in part and concurring in judgment).

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," Brief for Respondents 15,

it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

First, both UT and the majority cite demographic data as evidence that African–American and Hispanic students are "underrepresented" at UT and that racial preferences are necessary to compensate for this underrepresentation. See, e.g., Supp. App. 24a; – 2212. But neither UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass.

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African–Americans and Hispanics in Texas, where African–Americans are about 11 % of the population and Hispanics are about 37 %, different from the critical mass in neighboring New Mexico, where the African–American population is much smaller (about 2 %) and the Hispanic population constitutes a higher percentage of the State's total (about 46 %)? See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/35,48 (all Internet materials as last visited June 21, 2016).

UT's answer to this question has veered back and forth. At oral argument in Fisher I, UT's lawyer indicated that critical mass "could" vary "from group to group" and from "state to state." See Tr. of Oral Arg. 40 (Oct. 10, 2012). And UT initially justified its race-conscious plan at least in part on the ground that "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." Supp. App. 24a; see also a ("[A] critical mass in Texas is necessarily larger than a critical mass in Michigan," because "[a] majority of the college-age population in Texas is African American or Hispanic"); Fisher, 631 F d–226, 236 (concluding that UT's reliance on Texas demographics reflects "measured attention to the community it serves"); Brief for Respondents in No. 11–345 (noting that critical mass may hinge, in part, on "the communities that universities serve"). UT's extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian–Americans, see, e.g., 645 F.Supp d ; Supp. App. 25a; App. 445a–446a, because Hispanics, but not Asian–Americans, are underrepresented at UT when compared to the demographics of the State. On the other hand, UT's counsel asserted that the critical mass for the University is "not at all" dependent on the demographics of Texas, and that UT's "concept [of] critical mass isn't tied to demographic[s]." Tr. of Oral Arg. 40, 49 (Oct. 10, 2012). And UT's Fisher I brief expressly agreed that "a university cannot look to racial demographics—and then work backward in its admissions process to meet a target tied to such demographics." Brief for Respondents in No. 11–345; see also Brief for Respondents 26–27 (disclaiming any interest in demographic

parity).

To the extent that UT is pursuing parity with Texas demographics, that is nothing more than "outright racial balancing," which this Court has time and again held "patently unconstitutional." Fisher I, 570 U.S., at ———, 133 S.Ct. ; see Grutter, ("[O]utright racial balancing … is patently unconstitutional"); Freeman v. Pitts, ("Racial balance is not to be achieved for its own sake"); Croson, (rejecting goal of "outright racial balancing"); Bakke, (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected … as facially invalid"). An interest "linked to nothing other than proportional representation of various races … would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." Metro Broadcasting, Inc. v. FCC, (O'Connor, J., dissenting). And as we held in Fisher I, " '[r]acial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." ' " 570 U.S., at ———, 133 S.Ct. (quoting Parents Involved,).

The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms. UT's 2004 Proposal illustrates this approach by repeatedly citing numerical assessments of the racial makeup of the student body and various classes as the justification for adopting a race-conscious plan. See, e.g., Supp. App. 24a–26a, 30a. Instead of focusing on the benefits of diversity, UT seems to have resorted to a simple racial census.

The majority, for its part, claims that "[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives." But even if UT merely "view[s] the demographic disparity as cause for concern," Brief for United States as Amicus Curiae 29, and is seeking only to reduce—rather than eliminate—the disparity, that undefined goal cannot be properly subjected to strict scrutiny. In that case, there is simply no way for a court to know what specific demographic interest UT is pursuing, why a race-neutral alternative could not achieve that interest, and when that demographic goal would be satisfied. If a demographic discrepancy can serve as "a gauge" that justifies the use of racial discrimination, – 2212, then racial discrimination can be justified on that basis until demographic parity is reached. There is no logical stopping point short of patently unconstitutional racial balancing. Demographic disparities thus cannot be used to satisfy strict scrutiny here. See Croson, (rejecting a municipality's assertion that its racial set-aside program was justified in light of past discrimination because that assertion had " 'no logical stopping point' " and could continue until the percentage of government contracts awarded to minorities "mirrored the percentage of minorities in the population as a whole");

Wygant v. Jackson Bd. of Ed., (plurality opinion) (rejecting the government's asserted interest because it had "no logical stopping point").

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity. The Proposal stressed that UT "has not reached a critical mass at the classroom level ." Supp. App. 24a (emphasis added); see also a, 25a, 39a; App. 316a. In support of this proposition, UT relied on a study of select classes containing five or more students. As noted above, the study indicated that 52% of these classes had no African–Americans, 16% had no Asian–Americans, and 12% had no Hispanics. Supp. App. 26a. The study further suggested that only 21% of these classes had two or more African–Americans, 67% had two or more Asian–Americans, and 70% had two or more Hispanics. See Based on this study, UT concluded that it had a "compelling educational interest" in employing racial preferences to ensure that it did not "have large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." a.

UT now equivocates, disclaiming any discrete interest in classroom diversity. See Brief for Respondents 26–27. Instead, UT has taken the position that the lack of classroom diversity was merely a "red flag that UT had not yet fully realized" "the constitutionally permissible educational benefits of diversity." Brief for Respondents in No. 11–345. But UT has failed to identify the level of classroom diversity it deems sufficient, again making it impossible to apply strict scrutiny. A reviewing court cannot determine whether UT's race-conscious program was necessary to remove the so-called "red flag" without understanding the precise nature of that goal or knowing when the "red flag" will be considered to have disappeared.

Putting aside UT's effective abandonment of its interest in classroom diversity, the evidence cited in support of that interest is woefully insufficient to show that UT's race-conscious plan was necessary to achieve the educational benefits of a diverse student body. As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out. See (acknowledging that UT submitted no evidence regarding "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"). Nor is there any indication that UT instructed admissions officers to search for African–American and Hispanic applicants who would fill particular gaps at the classroom level. Given UT's failure to present such evidence, it has not demonstrated that its race-conscious policy would promote classroom diversity any better than race-neutral options, such as expanding the Top Ten Percent Plan or using race-neutral holistic admissions.

Moreover, if UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best "nuanced quantitative data" supporting UT's position, —demonstrated that classroom diversity was more lacking for students classified as Asian–American than for those classified as Hispanic. Supp. App. 26a. But the UT plan discriminates against Asian–American students. UT is apparently unconcerned that Asian–Americans "may be made to feel isolated or may be seen as … 'spokesperson[s]' of their race or ethnicity." a; see a. And unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian–Americans), see Part II–C–1it seemingly views the classroom contributions of Asian–American students as less valuable than those of Hispanic students. In UT's view, apparently, "Asian Americans are not worth as much as Hispanics in promoting 'cross-racial understanding,' breaking down 'racial stereotypes,' and enabling students to 'better understand persons of different races.' " Brief for Asian American Legal Foundation et al. as Amici Curiae 11 (representing 117 Asian–American organizations). The majority opinion effectively endorses this view, crediting UT's reliance on the classroom study as proof that the University assessed its need for racial discrimination (including racial discrimination that undeniably harms Asian–Americans) "with care." While both the majority and the Fifth Circuit rely on UT's classroom study, see ; –659, they completely ignore its finding that Hispanics are better represented than Asian–Americans in UT classrooms. In fact, they act almost as if Asian–American students do not exist. See – 2212 (mentioning Asian–Americans only a single time outside of parentheticals, and not in the context of the classroom study); (mentioning Asian–Americans only a single time). Only the District Court acknowledged the impact of UT's policy on Asian–American students. But it brushed aside this impact, concluding—astoundingly—that UT can pick and choose which racial and ethnic groups it would like to favor. According to the District Court, "nothing in Grutter requires a university to give equal preference to every minority group," and UT is allowed "to exercise its discretion in determining which minority groups should benefit from the consideration of race." 645 F.Supp d.

This reasoning, which the majority implicitly accepts by blessing UT's reliance on the classroom study, places the Court on the "tortuous" path of "decid[ing] which races to favor." Metro Broadcasting (KENNEDY, J., dissenting). And the Court's willingness to allow this "discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education." Brief for Asian American Legal Foundation et al. as Amici Curiae 6; see also, e.g., –17 (discussing the placement of Chinese–Americans in " 'separate but equal' " public schools); Gong Lum v. Rice–82, (holding that a 9–year–old Chinese–American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race"). In sum, "[w]hile the Court repeatedly refers to the preferences as favoring 'minorities,' … it must be emphasized that the discriminatory policies upheld today operate to exclude" Asian–American stu-

dents, who "have not made [UT's] list" of favored groups. Metro Broadcasting (KENNEDY, J., dissenting).

Perhaps the majority finds discrimination against Asian–American students benign, since Asian–Americans are "overrepresented" at UT. 645 F.Supp d. But "[h]istory should teach greater humility." Metro Broadcasting, (O'Connor, J., dissenting). " '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." Where, as here, the government has provided little explanation for why it needs to discriminate based on race, " 'there is simply no way of determining what classifications are "benign" … and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " Parents Involved, (opinion of KENNEDY, J.) (quoting Croson, (plurality opinion of O'Connor, J.)). By accepting the classroom study as proof that UT satisfied strict scrutiny, the majority "move[s] us from 'separate but equal' to 'unequal but benign.' " Metro Broadcasting (KENNEDY, J., dissenting).

In addition to demonstrating that UT discriminates against Asian–American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories. Under the UT plan, both the favored and the disfavored groups are broad and consist of students from enormously diverse backgrounds. See Supp. App. 30a; see also Fisher I, 570 U.S., at ——, 133 S.Ct. ("five predefined racial categories"). Because "[c]rude measures of this sort threaten to reduce [students] to racial chits," Parents Involved, (opinion of KENNEDY, J.), UT's reliance on such measures further undermines any claim based on classroom diversity statistics, see (majority opinion) (criticizing school policies that viewed race in rough "white/nonwhite" or "black/'other' " terms); (opinion of KENNEDY, J.) (faulting government for relying on "crude racial categories"); Metro Broadcasting, n. 1 (KENNEDY, J., dissenting) (concluding that " 'the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals,' " and noting that if the government " 'is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935' ").

For example, students labeled "Asian American," Supp. App. 26a, seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population," Brief for Asian American Legal Foundation et al. as Amici Curiae, O.T. 2012, No. 11–345, p. 28. It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against Asian–American students because they are "overrepresented" in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, "Filipino Americans" or "Cambodian Americans." Tr. of Oral Arg. 52 (Oct. 10, 2012). As long as there

are a sufficient number of "Asian Americans," UT is apparently satisfied.

UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African–American," "Hispanic," "Asian American," "Native American," or "White." Supp. App. 30a. And UT evidently labels each student as falling into only a single racial or ethnic group, see, e.g., a–13a, 30a, 43a–44a, 71a, 156a–157a, 169a–170a, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010. A recent survey reported that 26% of Hispanics and 28% of Asian–Americans marry a spouse of a different race or ethnicity. UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student's classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say. It instead relies on applicants to "classify themselves." Fisher I, 570 U.S., at ———, This is an invitation for applicants to game the system.

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. See, e.g., Supp. App. 72a–73a (indicating that the representation of African–Americans and Hispanics in UT classrooms varies substantially from major to major). Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

UT's purported interest in intraracial diversity, or "diversity within diversity," Brief for Respondents 34, also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African–American and Hispanic students admitted through the Top Ten Percent Plan.

Throughout this litigation, UT has repeatedly shifted its position on the need for intraracial diversity. Initially, in the 2004 Proposal, UT did not rely on this alleged need at all. Rather, the Proposal "examined two metrics—classroom

diversity and demographic disparities—that it concluded were relevant to its ability to provide [the] benefits of diversity." Brief for United States as Amicus Curiae 27–28. Those metrics looked only to the numbers of African–Americans and Hispanics, not to diversity within each group.

On appeal to the Fifth Circuit and in Fisher I, however, UT began to emphasize its intraracial diversity argument. UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools. These students, UT argued, tend to come from poor, disadvantaged families, and the University would prefer a system that gives it substantial leeway to seek broad diversity within groups of underrepresented minorities. In particular, UT asserted a need for more African–American and Hispanic students from privileged backgrounds. See, e.g., Brief for Respondents in No. 11–345 (explaining that UT needs race-conscious admissions in order to admit "[t]he African–American or Hispanic child of successful professionals in Dallas"); (claiming that privileged minorities "have great potential for serving as a 'bridge' in promoting cross-racial understanding, as well as in breaking down racial stereotypes"); (intimating that the underprivileged minority students admitted under the Top Ten Percent Plan "reinforc[e]" "stereotypical assumptions"); Tr. of Oral Arg. 43–45 (Oct. 10, 2012) ("[A]lthough the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools," and "we want minorities from different backgrounds"). Thus, the Top Ten Percent Law is faulted for admitting the wrong kind of African–American and Hispanic students

The Fifth Circuit embraced this argument on remand, endorsing UT's claimed need to enroll minorities from "high-performing," "majority-white" high schools. . According to the Fifth Circuit, these more privileged minorities "bring a perspective not captured by" students admitted under the Top Ten Percent Law, who often come "from highly segregated, underfunded, and underperforming schools." For instance, the court determined, privileged minorities "can enrich the diversity of the student body in distinct ways" because such students have "higher levels of preparation and better prospects for admission to UT Austin's more demanding colleges" than underprivileged minorities. ; see also Fisher, 631 F d, n. 149 (concluding that the Top Ten Percent Plan "widens the 'credentials gap' between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences").

Remarkably, UT now contends that petitioner has "fabricat[ed]" the argument that it is seeking affluent minorities. Brief for Respondents 2. That claim is impossible to square with UT's prior statements to this Court in the briefing and oral argument in Fisher I Moreover, although UT reframes its argument, it continues to assert that it needs affirmative action to admit privileged minorities. For instance, UT's brief highlights its interest in admitting "[t]he black student

with high grades from Andover." Brief for Respondents 33. Similarly, at oral argument, UT claimed that its "interests in the educational benefits of diversity would not be met if all of [the] minority students were … coming from depressed socioeconomic backgrounds." Tr. of Oral Arg. 53 (Dec. 9, 2015); see also 45.

Ultimately, UT's intraracial diversity rationale relies on the baseless assumption that there is something wrong with African–American and Hispanic students admitted through the Top Ten Percent Plan, because they are "from the lower-performing, racially identifiable schools." ; see –43 (explaining that "the basis" for UT's conclusion that it was "not getting a variety of perspectives among African–Americans or Hispanics" was the fact that the Top Ten Percent Plan admits underprivileged minorities from highly segregated schools). In effect, UT asks the Court "to assume"—without any evidence—"that minorities admitted under the Top Ten Percent Law … are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." (Garza, J., dissenting). And UT's assumptions appear to be based on the pernicious stereotype that the African–Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian–Americans. See Tr. of Oral Arg. 42–43 (Dec. 9, 2015). These are "the very stereotypical assumptions [that] the Equal Protection Clause forbids." Miller, UT cannot satisfy its burden by attempting to "substitute racial stereotype for evidence, and racial prejudice for reason." Calhoun v. United States, 568 U.S. ———, ———, (SOTOMAYOR, J., respecting denial of certiorari).

In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. See, e.g., Bakke–275, (opinion of Powell, J.) (explaining that the school's affirmative action program was designed "to increase the representation" of " 'economically and/or educationally disadvantaged' applicants"). Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild.

It is also far from clear that UT's assumptions about the socioeconomic status of minorities admitted through the Top Ten Percent Plan are even remotely accurate. Take, for example, parental education. In 2008, when petitioner applied to UT, approximately 79% of Texans aged 25 years or older had a high school diploma, 17% had a bachelor's degree, and 8% had a graduate or professional degree. Dept. of Educ., Nat. Center for Educ. Statistics, T. Snyder & S. Dillow, Digest of Education Statistics 2010, p. 29 (2011). In contrast, 96% of African–Americans admitted through the Top Ten Percent Plan had a parent with a high school diploma, 59% had a parent with a bachelor's degree, and 26% had a parent with a graduate or professional degree. See UT, Office of Admissions, Student Profile, Admitted

Freshman Class of 2008, p. 8 (rev. Aug. 1, 2012) (2008 Student Profile), online at https://uteas.app.box.com/s/twqozsbm2vb9lhm14o0v0czvqs1ygzqr/1/7732448553/23476747441/1. Similarly, 83% of Hispanics admitted through the Top Ten Percent Plan had a parent with a high school diploma, 42% had a parent with a bachelor's degree, and 21% had a parent with a graduate or professional degree. As these statistics make plain, the minorities that UT characterizes as "coming from depressed socioeconomic backgrounds," Tr. of Oral Arg. 53 (Dec. 9, 2015), generally come from households with education levels exceeding the norm in Texas.

Or consider income levels. In 2008, the median annual household income in Texas was $49,453. United States Census Bureau, A. Noss, Household Income for States: 2008 and 2009, p. 4 (2010), online at https://www.census.gov/prod/2010pubs/acsbr09-2.pdf. The household income levels for Top Ten Percent African–American and Hispanic admittees were on par: Roughly half of such admittees came from households below the Texas median, and half came from households above the median. See 2008 Student Profile 6. And a large portion of these admittees are from households with income levels far exceeding the Texas median. Specifically, 25% of African–Americans and 27% of Hispanics admitted through the Top Ten Percent Plan in 2008 were raised in households with incomes exceeding $80,000. In light of this evidence, UT's actual argument is not that it needs affirmative action to ensure that its minority admittees are representative of the State of Texas. Rather, UT is asserting that it needs affirmative action to ensure that its minority students disproportionally come from families that are wealthier and better educated than the average Texas family.

In addition to using socioeconomic status to falsely denigrate the minority students admitted through the Top Ten Percent Plan, UT also argues that such students are academically inferior. See, e.g., Brief for Respondents in No. 11–345 ("[T]he top 10% law systematically hinders UT's efforts to assemble a class that is … academically excellent"). "On average," UT claims, "African–American and Hispanic holistic admits have higher SAT scores than their Top 10% counterparts." Brief for Respondents 43, n. 8. As a result, UT argues that it needs race-conscious admissions to enroll academically superior minority students with higher SAT scores. Regrettably, the majority seems to embrace this argument as well. See ("[T]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence").

This argument fails for a number of reasons. First, it is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees. In fact, as UT's president explained in 2000, "top 10 percent high school students make much higher grades in college than non-top 10 percent students," and "[s]trong academic performance in high school is an even better predictor of success in college than standardized test scores." App. 393a–394a; see also Lavergne Deposition 41–42 (agreeing that "it's generally true that students admitted pursuant to HB 588 [the Top Ten Percent Law] have a higher level of

academic performance at the University than students admitted outside of HB 588"). Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African–American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. Supp. App. 164a. The same is true for Hispanic students. a. These conclusions correspond to the results of nationwide studies showing that high school grades are a better predictor of success in college than SAT scores.

It is also more than a little ironic that UT uses the SAT, which has often been accused of reflecting racial and cultural bias, as a reason for dissatisfaction with poor and disadvantaged African–American and Hispanic students who excel both in high school and in college. Even if the SAT does not reflect such bias (and I am ill equipped to express a view on that subject), SAT scores clearly correlate with wealth.

UT certainly has a compelling interest in admitting students who will achieve academic success, but it does not follow that it has a compelling interest in maximizing admittees' SAT scores. Approximately 850 4–year–degree institutions do not require the SAT or ACT as part of the admissions process. See J. Soares, SAT Wars: The Case for Test–Optional College Admissions 2 (2012). This includes many excellent schools. To the extent that intraracial diversity refers to something other than admitting privileged minorities and minorities with higher SAT scores, UT has failed to define that interest with any clarity. UT "has not provided any concrete targets for admitting more minority students possessing [the] unique qualitative-diversity characteristics" it desires. (Garza, J., dissenting). Nor has UT specified which characteristics, viewpoints, and life experiences are supposedly lacking in the African–Americans and Hispanics admitted through the Top Ten Percent Plan. In fact, because UT administrators make no collective, qualitative assessment of the minorities admitted automatically, they have no way of knowing which attributes are missing. See (admitting that there is no way of knowing "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"); (Garza, J., dissenting) ("The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes"). Furthermore, UT has not identified "when, if ever, its goal (which remains undefined) for qualitative diversity will be reached." UT's intraracial diversity rationale is thus too imprecise to permit strict scrutiny analysis.

Finally, UT's shifting positions on intraracial diversity, and the fact that intraracial diversity was not emphasized in the Proposal, suggest that it was not "the actual purpose underlying the discriminatory classification." Mississippi Univ. for Women v. Hogan, Instead, it appears to be a post hoc rationalization.

UT also alleges—and the majority embraces—an interest in avoiding "feelings of loneliness and isolation" among minority students. ; see Brief for Respon-

dents 7–8, 38–39. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel "isolated." This vague interest cannot possibly satisfy strict scrutiny.If UT is seeking demographic parity to avoid isolation, that is impermissible racial balancing. See Part II–C–1. And linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African–American student attends a university that is 20% African–American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37 % African–American) than if it is located in Montana (which is 0 % African–American). See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/28,30. In reality, however, the student may feel—if anything—less isolated in Mississippi, where African–Americans are more prevalent in the population at large.

If, on the other hand, state demographics are not driving UT's interest in avoiding racial isolation, then its treatment of Asian–American students is hard to understand. As the District Court noted, "the gross number of Hispanic students attending UT exceeds the gross number of Asian–American students." 645 F.Supp d. In 2008, for example, UT enrolled 1,338 Hispanic freshmen and 1,249 Asian–American freshmen. Supp. App. 156a. UT never explains why the Hispanic students—but not the Asian–American students—are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian–Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian–Americans.

Ultimately, UT has failed to articulate its interest in preventing racial isolation with any clarity, and it has provided no clear indication of how it will know when such isolation no longer exists. Like UT's purported interests in demographic parity, classroom diversity, and intraracial diversity, its interest in avoiding racial isolation cannot justify the use of racial preferences.

Even assuming UT is correct that, under Grutter, it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. Narrow tailoring requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." Fisher I, 570 U.S., at ——, "If a '"nonracial approach … could promote the substantial interest about as well and at tolerable administrative expense," ' then the university may not consider race." ——, 133 S.Ct. (citations omitted). Here, there is no evidence that race-blind, holistic review would not achieve UT's goals at least "about as well" as UT's race-based policy. In addition, UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors.

The majority argues that none of these alternatives is "a workable means for the University to attain the benefits of diversity it sought." Tellingly, however, the

majority devotes only a single, conclusory sentence to the most obvious race-neutral alternative: race-blind, holistic review that considers the applicant's unique characteristics and personal circumstances. See Under a system that combines the Top Ten Percent Plan with race-blind, holistic review, UT could still admit "the star athlete or musician whose grades suffered because of daily practices and training," the "talented young biologist who struggled to maintain above-average grades in humanities classes," and the "student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school." All of these unique circumstances can be considered without injecting race into the process. Because UT has failed to provide any evidence whatsoever that race-conscious holistic review will achieve its diversity objectives more effectively than race-blind holistic review, it cannot satisfy the heavy burden imposed by the strict scrutiny standard.

The fact that UT's racial preferences are unnecessary to achieve its stated goals is further demonstrated by their minimal effect on UT's diversity. In 2004, when race was not a factor, 3 % of non-Top Ten Percent Texas enrollees were African–American and 11 % were Hispanic. See Supp. App. 157a. It would stand to reason that at least the same percentages of African–American and Hispanic students would have been admitted through holistic review in 2008 even if race were not a factor. If that assumption is correct, then race was determinative for only 15 African–American students and 18 Hispanic students in 2008 (representing 0 % and 0 %, respectively, of the total enrolled first-time freshmen from Texas high schools). See

The majority contends that "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality." This argument directly contradicts this Court's precedent. Because racial classifications are " 'a highly suspect tool,' " Grutter, they should be employed only "as a last resort," Croson, (opinion of KENNEDY, J.); see also Grutter, ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands"). Where, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result. See Parents Involved–734, (holding that the "minimal effect" of school districts' racial classifications "casts doubt on the necessity of using [such] classifications" and "suggests that other means [of achieving their objectives] would be effective"). As Justice KENNEDY once aptly put it, "the small number of [students] affected suggests that the schoo[l] could have achieved [its] stated ends through different means." (opinion concurring in part and concurring in judgment). And in this case, a race-neutral alternative could accomplish UT's objectives without gratuitously branding the covers of tens of thousands of applications with a bare racial stamp and "tell[ing] each student he or she is to be defined by race." The majority purports to agree with much of the above analysis. The Court acknowledges that " 'because racial characteristics so seldom provide a relevant basis for disparate treatment,' " " '[r]ace may not be considered [by a university] unless the admissions process can

withstand strict scrutiny.' " The Court admits that the burden of proof is on UT, and that "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan," And the Court recognizes that the record here is "almost devoid of information about the students who secured admission to the University through the Plan," and that "[t]he Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." This should be the end of the case: Without identifying what was missing from the African–American and Hispanic students it was already admitting through its race-neutral process, and without showing how the use of race-based admissions could rectify the deficiency, UT cannot demonstrate that its procedure is narrowly tailored.

Yet, somehow, the majority concludes that petitioner must lose as a result of UT's failure to provide evidence justifying its decision to employ racial discrimination. Tellingly, the Court frames its analysis as if petitioner bears the burden of proof here. See – 2225. But it is not the petitioner's burden to show that the consideration of race is unconstitutional. To the extent the record is inadequate, the responsibility lies with UT. For "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State," Parents Involved, (opinion of KENNEDY, J.), particularly where, as here, the summary judgment posture obligates the Court to view the facts in the light most favorable to petitioner, see Matsushita Elec. Industrial Co. v. Zenith Radio Corp., Given that the University bears the burden of proof, it is not surprising that UT never made the argument that it should win based on the lack of evidence. UT instead asserts that "if the Court believes there are any deficiencies in [the] record that cast doubt on the constitutionality of UT's policy, the answer is to order a trial, not to grant summary judgment." Brief for Respondents 51; see also –53 ("[I]f this Court has any doubts about how the Top 10% Law works, or how UT's holistic plan offsets the tradeoffs of the Top 10% Law, the answer is to remand for a trial"). Nevertheless, the majority cites three reasons for breaking from the normal strict scrutiny standard. None of these is convincing.

First, the Court states that, while "th[e] evidentiary gap perhaps could be filled by a remand to the district court for further factfinding" in "an ordinary case," that will not work here because "[w]hen petitioner's application was rejected, … the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years," so "further factfinding" "might yield little insight." This reasoning is dangerously incorrect. The Equal Protection Clause does not provide a 3–year grace period for racial discrimination. Under strict scrutiny, UT was required to identify evidence that race-based admissions were necessary to achieve a compelling interest before it put them in place—not three or more years after. See ("Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan" (emphasis added)); Fisher I, 570 U.S., at ——, 133 S.Ct. ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that

available, workable race-neutral alternatives do not suffice" (emphasis added)). UT's failure to obtain actual evidence that racial preferences were necessary before resolving to use them only confirms that its decision to inject race into admissions was a reflexive response to Grutter, and that UT did not seriously consider whether race-neutral means would serve its goals as well as a race-based process.

Second, in an effort to excuse UT's lack of evidence, the Court argues that because "the University lacks any authority to alter the role of the Top Ten Percent Plan," "it similarly had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before Fisher I clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review." But UT has long been aware that it bears the burden of justifying its racial discrimination under strict scrutiny. See, e.g., Brief for Respondents in No. 11–345 ("It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny," and "that inquiry is undeniably rigorous"). In light of this burden, UT had every reason to keep data on the students admitted through the Top Ten Percent Plan. Without such data, how could UT have possibly identified any characteristics that were lacking in Top Ten Percent admittees and that could be obtained via race-conscious admissions? How could UT determine that employing a race-based process would serve its goals better than, for instance, expanding the Top Ten Percent Plan? UT could not possibly make such determinations without studying the students admitted under the Top Ten Percent Plan. Its failure to do so demonstrates that UT unthinkingly employed a race-based process without examining whether the use of race was actually necessary. This is not—as the Court claims—a "good-faith effor[t] to comply with the law." The majority's willingness to cite UT's "good faith" as the basis for excusing its failure to adduce evidence is particularly inappropriate in light of UT's well-documented absence of good faith. Since UT described its admissions policy to this Court in Fisher I, it has been revealed that this description was incomplete. As explained in an independent investigation into UT admissions, UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014. See Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 4 (Feb. 6, 2015) (Kroll Report). Under this longstanding, secret process, university officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students. –14; see also Blanchard & Hoppe, Influential Texans Helped Underqualified Students Get Into UT, Dallas Morning News, July 20, 2015, online at http://www.dallasnews.com/news/education/headlines/20150720-influential-texans-helped-underqualified-students-get-into-ut.ece ("Dozens of highly influential Texans—including lawmakers, millionaire donors and univer-

sity regents—helped underqualified students get into the University of Texas, often by writing to UT officials, records show").

UT officials involved in this covert process intentionally kept few records and destroyed those that did exist. See, e.g., Kroll Report 43 ("Efforts were made to minimize paper trails and written lists during this end-of-cycle process. At one meeting, the administrative assistants tried not keeping any notes, but this proved difficult, so they took notes and later shredded them. One administrative assistant usually brought to these meetings a stack of index cards that were subsequently destroyed"); see also (finding that "written records or notes" of the secret admissions meetings "are not maintained and are typically shredded"). And in the course of this litigation, UT has been less than forthright concerning its treatment of well-connected applicants. Compare, e.g., Tr. of Oral Arg. 51 (Dec. 9, 2015) ("University of Texas does not do legacy, Your Honor"), and App. 281a ("[O]ur legacy policy is such that we don't consider legacy"), with Kroll Report 29 (discussing evidence that "alumni/legacy influence" "results each year in certain applicants receiving a competitive boost or special consideration in the admissions process," and noting that this is "an aspect of the admissions process that does not appear in the public representations of UT–Austin's admissions process"). Despite UT's apparent readiness to mislead the public and the Court, the majority is "willing to be satisfied by [UT's] profession of its own good faith." Grutter, (KENNEDY, J., dissenting). Notwithstanding the majority's claims to the contrary, UT should have access to plenty of information about "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." UT undoubtedly knows which students were admitted through the Top Ten Percent Plan and which were admitted through holistic review. See, e.g., Supp. App. 157a. And it undoubtedly has a record of all of the classes in which these students enrolled. See, e.g., UT, Office of the Registrar, Transcript—Official, online at https://registrar.utexas.edu/students/transcripts-official (instructing graduates on how to obtain a transcript listing a "comprehensive record" of classes taken). UT could use this information to demonstrate whether the Top Ten Percent minority admittees were more or less likely than the holistic minority admittees to choose to enroll in the courses lacking diversity.

In addition, UT assigns PAI scores to all students—including those admitted through the Top Ten Percent Plan—for purposes of admission to individual majors. Accordingly, all students must submit a full application containing essays, letters of recommendation, a resume, a list of courses taken in high school, and a description of any extracurricular activities, leadership experience, or special circumstances. See App. 212a–214a; 235a–236a; , n. 14 (Garza, J., dissenting). Unless UT has destroyed these files, it could use them to compare the unique personal characteristics of Top Ten minority admittees with those of holistic minority admittees, and to determine whether the Top Ten admittees are, in fact, less desirable than the holistic admittees. This may require UT to expend some resources, but that is an appropriate burden in light of the strict scrutiny standard and the fact that all of the relevant information is in UT's

possession. The cost of factfinding is a strange basis for awarding a victory to UT, which has a huge budget, and a loss to petitioner, who does not.

Finally, while I agree with the majority and the Fifth Circuit that Fisher I significantly changed the governing law by clarifying the stringency of the strict scrutiny standard, that does not excuse UT from meeting that heavy burden. In Adarand, for instance, another case in which the Court clarified the rigor of the strict scrutiny standard, the Court acknowledged that its decision "alter[ed] the playing field in some important respects." 515 U.S., As a result, it "remand[ed] the case to the lower courts for further consideration in light of the principles [it had] announced ." (emphasis added). In other words, the Court made clear that—notwithstanding the shift in the law—the government had to meet the clarified burden it was announcing. The Court did not embrace the notion that its decision to alter the stringency of the strict scrutiny standard somehow allowed the government to automatically prevail.

Third, the majority notes that this litigation has persisted for many years, that petitioner has already graduated from another college, that UT's policy may have changed over time, and that this case may offer little prospective guidance. At most, these considerations counsel in favor of dismissing this case as improvidently granted. But see, e.g., Gratz, and n. 1, 260–262, (rejecting the dissent's argument that, because the case had already persisted long enough for the petitioners to graduate from other schools, the case should be dismissed); (Stevens, J., dissenting). None of these considerations has any bearing whatsoever on the merits of this suit. The majority cannot side with UT simply because it is tired of this case.

It is important to understand what is and what is not at stake in this case. What is not at stake is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," App. 396a, and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

Gender and Intermediate Scrutiny

Craig v. Boren

Mr. Justice BRENNAN delivered the opinion of the Court. The interaction of two sections of an Oklahoma statute, Okla.Stat., Tit. 37, §§ 241 and 245 (1958 and Supp),1 prohibits the sale of "nonintoxicating" 3 % beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment.

Before 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males. Okla.Stat., Tit. 15, § 13 (1972 and Supp). In contrast, females were held criminally responsible as adults at age 18 and males at age 16. Okla.Stat., Tit. 10, § 1101(a) (Supp). After the Court of Appeals for the Tenth Circuit held in 1972, on the authority of Reed v. Reedthat the age distinction was unconstitutional for purposes of establishing criminal responsibility as adults, Lamb v. Brown, the Oklahoma Legislature fixed age 18 as applicable to both males and females. Okla.Stat., Tit. 10, § 1101(a) (Supp). In 1972, 18 also was established as the age of majority for males and females in civil matters, Okla.Stat., Tit. 15, § 13 (1972 and Supp), except that §§ 241 and 245 of the 3 % beer statute were simultaneously codified to create an exception to the gender-free rule.

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations, Schlesinger v. Ballardconcerning the financial position of servicewomen, Frontiero v. Richardsonn. 23, and working women, Weinberger v. Wiesenfeld, could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. Stanton v. Stanton; Taylor v. Louisianan. 17, In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. See, e. g., Stanley v. Illinois S.Ct.; cf. Cleveland Board of Education v. LaFleur,

In this case, too, "Reed, we feel is controlling . .," Stanton v. StantonWe turn then to the question whether, under Reed, the difference between males and females with respect to the purchase of 3 % beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

The District Court recognized that Reed v. Reed was controlling. In applying

the teachings of that case, the court found the requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the gender-based distinction was substantially related to achievement of that goal.

We accept for purposes of discussion the District Court's identification of the objective underlying §§ 241 and 245 as the enhancement of traffic safety. 7 Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18-20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period Similarly, youths aged 17-21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts. 10Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for "driving under the influence." 11 Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma's experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. Conceding that "the case is not free from doubt," 399 F.Supp., the District Court nonetheless concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification."

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate driving while under the influence of alcohol the statistics broadly establish that % of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." 12 Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious method-

ological problems,14 the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3 % beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3 % beverage to be "nonintoxicating." Okla.Stat., Tit. 37, § 163 (1958); see State ex rel. Springer v. Bliss, 199 Okl. 198, 185 P d 220 (1947). Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer albeit apparently not of the diluted 3 % variety reached results that hardly can be viewed as impressive in justifying either a gender or age classification There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3 % beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under Reed, Oklahoma's 3 % beer statute invidiously discriminates against males 18-20 years of age.

Mr. Justice POWELL, concurring.

I join the opinion of the Court as I am in general agreement with it. I do have reservations as to some of the discussion concerning the appropriate standard for equal protection analysis and the relevance of the statistical evidence. Accordingly, I add this concurring statement.

With respect to the equal protection standard, I agree that Reed v. Reedis the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. Reed and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present. * I view this as a relatively easy case. No one questions the legitimacy or importance of the asserted governmental objective: the promotion of highway safety. The decision of the case turns on whether the state legislature, by the classification it has chosen, had adopted a means that bears a " 'fair and substantial relation' " to this objective. quoting Royster Guano Co. v. Virginia,

It seems to me that the statistics offered by appellees and relied upon by the District Court do tend generally to support the view that young men drive more, possibly are inclined to drink more, and for various reasons are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that it so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

Mr. Justice STEVENS, concurring.

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. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

In this case, the classification is not as obnoxious as some the Court has condemned,1 nor as inoffensive as some the Court has accepted. It is objectionable because it is based on an accident of birth,2 because it is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket,3 and because, to the extent it reflects any physical difference between males and females, it is actually perverse. 4 The question then is whether the traffic safety justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.

The classification is not totally irrational. For the evidence does indicate that there are more males than females in this age bracket who drive and also more who drink. Nevertheless, there are several reasons why I regard the justification as unacceptable. It is difficult to believe that the statute was actually intended to cope with the problem of traffic safety,5 since it has only a minimal effect on access to a not very intoxicating beverage and does not prohibit its consumption Moreover, the empirical data submitted by the State accentuate the unfairness of treating all 18-21-year-old males as inferior to their female counterparts. The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages. 7 It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But

even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.

Mr. Justice REHNQUIST, dissenting.

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in Frontiero to support its invocation of strict scrutiny. There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.

The Court does not discuss the nature of the right involved, and there is no reason to believe that it sees the purchase of 3 % beer as implicating any important interest, let alone one that is "fundamental" in the constitutional sense of invoking strict scrutiny. Indeed, the Court's accurate observation that the statute affects the selling but not the drinking of 3 % beer, further emphasizes the limited effect that it has on even those persons in the age group involved. There is, in sum, nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.

It is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. E. g., Frontiero v. Richardson S.Ct.; Reed v. Reed, However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution There being no such interest here, and there being no plausible argument that this is a discrimination against females,2 the Court's reliance on our previous sex-discrimination cases is ill-founded. It treats gender classification as a talisman which without regard to the rights involved or the persons affected calls into effect a heavier burden of judicial review.

The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular

types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are "important," and which are not. As for the second part of the Court's new test, the Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is any rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb "substantially" requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them. And even if we manage to avoid both confusion and the mirroring of our own preferences in the development of this new doctrine, the thousands of judges in other courts who must interpret the Equal Protection Clause may not be so fortunate.

Michael M. v. Superior Court of Sonoma County

450 U.S. 464 (1981)

Note on this case: the actual facts do not involve a mere statutory rape, but a violent forcible rape. I have removed the description of that crime in recognition of the fact that some students may have experienced similar trauma, but it is worth noting the court's utter and utterly unjustifiable failure to confront the violent nature of the crime.

Justice Rehnquist announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Stewart, and Justice Powell joined.

The question presented in this case is whether California's "statutory rape" law, § 261 of the Cal. Penal Code Ann. (West Supp. 1981), violates the Equal Protection Clause of the Fourteenth Amendment. Section 261 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

The Supreme Court held that "section 261 discriminates on the basis of sex because only females may be victims, and only males may violate the section." 25 Cal. 3d 608, 611, 601 P. 2d 572, 574. The court then subjected the classification to "strict scrutiny," stating that it must be justified by a compelling state interest. It found that the classification was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant." Canvassing "the tragic human costs of

illegitimate teenage pregnancies," including the large number of teenage abortions, the increased medical risk associated with teenage .pregnancies, and the social consequences of teenage childbearing, the court concluded that the State has a compelling interest in preventing such pregnancies. Because males alone can "physiologically cause the result which the law properly seeks to avoid," the court further held that the gender classification was readily justified as a means of identifying offender and victim. For the reasons stated below, we affirm the judgment of the California Supreme Court.

As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications. The issues posed by such challenges range from issues of standing, see Orr v. Orr, to the appropriate standard of judicial review for the substantive classification. Unlike the California Supreme Court, we have not held that gender-based classifications are "inherently suspect" and thus we do not apply so-called "strict scrutiny" to those classifications. See Stanton v. Stanton, 421 U. S. 7 (1975). Our cases have held, however, that the traditional minimum rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged. See Craig v. Borenn." (1976) (Powell, J., concurring). In Reed v. Reed, for example, the Court stated that a gender-based classification will be upheld if it bears a "fair and substantial relationship" to legitimate state ends, while in Craig v. Boren, the Court restated the test to require the classification to bear a "substantial relationship" to "important governmental objectives."

Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes (plurality opinion of Stewart, J.). But because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require " 'things which are different in fact… to be treated in law as though they were the same/ " Rinaldi v. Yeager, quoting Tigner v. Texas, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Parham v. Hughes; Califano v. Webster; Schlesinger v. Ballard; Kahn v. Shevin. As the Court has stated, a legislature may "provide for the special problems of women." Weinberger v. Wiesenfeld.

Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct Precisely why the legislature desired that result is of course somewhat less clear. This Court has long recognized that "[¿Inquiries into congressional motives or purposes are a hazardous matter," United States v. O'Brien (1968); Palmer v. Thompson, and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. Arlington Heights v. Metropolitan Housing Dev. Corp.; McGin-

nis v. Royster (1973). Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. Reitman v. Mulkey (1967). And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it "could not have been a goal of the legislation," Weinberger v. Wiesenfeld, n. 16, this is not such a case.

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades,3 have significant social, medical, and economic consequences for both the mother and her child, and the State Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female We hold that such a statute is sufficiently related to the State's objectives to pass constitutional muster.

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.

We are unable to accept petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. It is argued that this statute

is not necessary to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. Kahn v. Shevin, n. 10.

In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution In an area already fraught with prose-cutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.

We similarly reject petitioner's argument that § 261 is impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant. Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, see Rundlett v. Oliver, CA1 1979), it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.

There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under 18 at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under 18, the male is the culpable aggressor We find petitioner's contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be. prevented.

In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it "invidiously discriminates" against females. To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made "solely for . administrative convenience," as in Frontiero v. Richardson (emphasis omitted), or rests on "the baggage of sexual stereotypes" as in Orr v. Orr. As we have held, the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

Accordingly the judgment of the California Supreme Court is Affirmed.

United States v. Virginia

518 U.S. 515 (1996)

JUSTICE GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

From its establishment in 1839 as one of the Nation's first state military colleges, see 1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to the control of the [Virginia] General Assembly," Va. Code Ann. Â§ 23-92 (1993). First southern college to teach engineering and industrial chemistry, see H. Wise, Drawing Out the Man: The VMI Story 13 (1978) (The VMI Story), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, Â§ 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2-year period). n1 Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. The VMI Story 47.

VMI today enrolls about 1,300 men as cadets. n2 Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school" 'to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.' " 766 F. Supp. 1407, 1425 (WD Va. 1991) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "only about 15% of VMI cadets enter career military service." 766 F. Supp..

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." As one Commandant of Cadets described it, the adversative method " 'dissects the young student,' " and makes him aware of his " 'limits and capabilities,' " so that he knows " 'how far he can go with his anger, . how much he can take under stress, . exactly what he can do when he is physically exhausted.' " -1422 (quoting Col. N. Bissell).

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. 1432. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors.

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet " 'does not lie, cheat, steal nor tolerate those who do.' " -1423.

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." "Women have no opportunity anywhere to gain the benefits of [the system of education at VMI]."

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. n3 Trial of the action consumed six days and involved an array of expert witnesses on each side.

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. "Some women, at least," the court said, "would want to attend the school if they had the opportunity." The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment" – "a sufficient 'critical mass' to provide the female cadets with a positive educational experience." -1438. And it was also established that "some women are capable of all of the individual activities required of VMI cadets." In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army."

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that Mississippi Univ. for Women v. Hogan 1090, (1982), was the closest guide. 766 F. Supp.. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. Mississippi Univ. for Women, 458 U.S. (internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (internal quotation marks omitted).

The District Court reasoned that education in "a single gender environment, be it male or female," yields substantial benefits. 766 F. Supp.. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the only means of achieving the objective "is to exclude women from the all-male institution – VMI."

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered" if women were admitted, : "Allowance for personal privacy would have to be made," ; "physical education requirements would have to be altered, at least for the women," ; the adversative environment could not survive unmodified, -1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy."

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women."

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and

undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: " 'It is extremely important that [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin.' " (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." 976 F d. Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the movement away from [single-sex education] in Virginia by public colleges and universities." In short, the court concluded, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."

The parties agreed that "some women can meet the physical standards now imposed on men," and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach – would be materially affected by coeducation." -897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. In May 1993, this Court denied certiorari. See 508 U.S. 946; see also (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission – to produce "citizen-soldiers" – the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources.

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. See Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), reprinted in 2 App. in Nos. 94-1667 and 94-1717 (CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F. Supp.. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition. See

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. Training its attention on methods of instruction appropriate for "most women," the Task Force determined that a military model would be "wholly inappropriate" for VWIL. ; see CA4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, but the VWIL House would not have a military format, 852 F. Supp., and VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F d.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F. Supp., and the VMI Foundation agreed to supply a $ 5 million endowment for the VWIL program, Mary Baldwin's own endowment is about $ 19 million; VMI's is $ 131 million. Mary Baldwin will add $ 35 million to its endowment based on future commitments; VMI will add $ 220 million. The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, but those graduates will not have the advantage afforded by a VMI degree.

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. The District Court again acknowledged evidentiary support for these determinations: "The VMI methodology could be used to educate women and, in fact, some women . may prefer the VMI methodology to the VWIL methodology." But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." The court anticipated that the two schools would "achieve substantially similar outcomes." It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."

A divided Court of Appeals affirmed the District Court's judgment. CA4 1995). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." The official objective or purpose, the court said, should be reviewed deferentially. Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitimacy" of the governmental objective and refusing approval for any purpose revealed to be "pernicious."

"Providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the

appeals court observed, ; that objective, the court added, is "not pernicious," Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . any sense of decency that still permeates the relationship between the sexes."

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish [its] objective of providing single-gender education."

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypassing any equal protection scrutiny." The court therefore added another inquiry, a decisive test it called "substantive comparability." The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other means offered by the State." Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable."

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an " 'exceedingly persuasive [justification]' " for the Commonwealth's action. (quoting Mississippi Univ. for Women, 458 U.S.). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." 44 F d. That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . nor to further diversify the Commonwealth's higher education system[,] . but [was] simply . to allow VMI to continue to exclude women in order to preserve its historic character and mission."

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short . from providing substantially equal tangible and intangible educational benefits to men and women."

The Fourth Circuit denied rehearing en banc. Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion. Judge Motz agreed with Judge Phillips that Virginia had not shown an " 'exceedingly persuasive justification' " for the disparate opportunities the Commonwealth

supported. (quoting Mississippi Univ. for Women). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" "Women need not be guaranteed equal 'results,' " Judge Motz said, "but the Equal Protection Clause does require equal opportunity [and] that opportunity is being denied here."

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI – extraordinary opportunities for military training and civilian leadership development – deny to women "capable of all of the individual activities required of VMI cadets," the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, – as Virginia's sole single-sex public institution of higher education – offends the Constitution's equal protection principle, what is the remedial requirement?

We note, once again, the core instruction of this Court's pathmarking decisions in J. E. B. v. Alabama ex rel. T. B., and Mississippi Univ. for Women: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Frontiero v. Richardson, (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; n5 not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, e. g., Goesaert v. Cleary, (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females – except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to . monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. Reed v. Reed, (holding unconstitutional Idaho Code prescription that, among " 'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females' "). Since Reed, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, e. g., Kirchberg v. Feenstra, (1981) (affirming invalidity of Louisiana law that made husband "head and master"

of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); Stanton v. Stanton 688, (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

Without equating gender classifications, for all purposes, to classifications based on race or national origin, n6 the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See J. E. B. (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See Mississippi Univ. for Women, 458 U.S.. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " (quoting Wengler v. Druggists Mut. Ins. Co., (1980)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See Loving v. Virginia. Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." Ballard v. United States.

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," Califano v. Webster, (1977) (per curiam), to "promote equal employment opportunity," see California Fed. Sav. & Loan Assn. v. Guerra, (1987), to advance full development of the talent and capacities of our Nation's people. n7 But such classifications may not be used, as they once were, see Goesaert, 335 U.S., to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia – the Mary Baldwin VWIL program – does not cure the constitutional violation, i.e., it does not provide equal opportunity,

we reverse the Fourth Circuit's final judgment in this case.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F d. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross-Petitioners 20, and the option of single-sex education contributes to "diversity in educational approaches," Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. -36 (internal quotation marks omitted). We consider these two justifications in turn.

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. n8 Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. See Wiesenfeld, 420 U.S., and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); Goldfarb, 430 U.S. (rejecting government-proffered purposes after "inquiry into the actual purposes") (internal quotation marks omitted).

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensating for discrimination against women." 458 U.S.. Undertaking a "searching analysis," the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; n9 reflecting widely held views about women's proper place, the Nation's first universities and colleges – for example, Harvard in Massachusetts, William and Mary in Virginia – admitted only men. See E. Farello, A History of the Education of Women in the United States 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

"No struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of Virginia." 2 T. Woody, A History of Women's Education in the United States 254 (1929) (History of Women's Education). In 1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia " 'has never, at any period of her history,' " provided for the higher education of her daughters, though she " 'has liberally provided for the higher education of her sons.' " (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women. n

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 766 F. Supp.. By the mid-1970's, all four schools had become coeducational.

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." 2 History of Women's Education 255.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. See Kirstein v. Rector and Visitors of Univ. of Virginia, 309 F. Supp. 184, 186 (ED Va. 1970). A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the State."

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross-Petitioners 30. But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. The state legislature, prior to the advent of this controversy, had repealed "all Virginia statutes requiring individual institutions to admit only men or women." 766 F. Supp.. And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy "'of affording broad access" while maintaining "autonomy and diversity."' 976 F d (quoting Report of the Virginia Commission on the University of the 21st Century). Significantly, the Commission reported:" 'Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that

they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.' " (emphasis supplied by Court of Appeals deleted).This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions."

Our 1982 decision in Mississippi Univ. for Women prompted VMI to reexamine its male-only admission policy. See 766 F. Supp.. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. See Reply Brief for Cross-Petitioners 6. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." See 766 F. Supp. (internal quotation marks omitted). Whatever internal purpose the Mission Study Committee served – and however well meaning the framers of the report – we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focused on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how the conclusion was reached."

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.' " See 976 F d. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." A purpose genuinely to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan – a plan to "afford a unique educational benefit only to males." However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross-Petitioners 34-36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminate the very aspects of [the] program that distinguish [VMI] from . other institutions of higher education in Virginia."

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach." 976 F d. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross-Respondent 11,

29-30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F. Supp.. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See "Some women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F. Supp., and "some women," the expert testimony established, "are capable of all of the individual activities required of VMI cadets," The parties, furthermore, agree that "some women can meet the physical standards [VMI] now impose[s] on men." 976 F d. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's raison d'etre, "nor VMI's implementing methodology is inherently unsuitable to women."

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." 766 F. Supp.. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." For example, "males tend to need an atmosphere of adversativeness," while "females tend to thrive in a cooperative atmosphere." "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." (internal quotation marks omitted).

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in Reed v. Reed, we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, 66 N. Y. U. L. Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." Mississippi Univ. for Women, 458 U.S.; see J. E. B., 511 U.S., n. 11 (equal protection principles, as applied to gender classifications, mean state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F d. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women – or men – should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities

that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, n11 is a judgment hardly proved, n12 a prediction hardly different from other "self-fulfilling prophec[ies]," see Mississippi Univ. for Women, 458 U.S., once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which"forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . is to any extent the outgrowth of . 'old fogyism[.]' . It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C. P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added). A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although"the faculty . never maintained that women could not master legal learning . . No, its argument has been . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz-Sanchez, Sympathy and Science: Women Physicians in American Medicine 51(1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121-122 (1977) (quoting E. Clarke, Medical Education of Women, 4 Boston Med. & Surg. J. 345, 346 (1869) (" 'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system . .' ")); cf., n. 9. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, Women in Control? 201 (1992); deprive male partners of adequate assistance, see -185; and lead to sexual misconduct, see C. Milton et al., Women in Policing 32-33 (1974). Field studies did not confirm these fears. See Heidensohn; P. Bloch & D. Anderson, Policewomen on Patrol: Final Report (1974).

Women's successful entry into the federal military academies, n13 and their participation in the Nation's military forces, n14 indicate that Virginia's fears for the future of VMI may not be solidly grounded. n15 The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and

thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test Mississippi Univ. for Women described, see 458 U.S., was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals" 'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . to defend their country in time of national peril.' " 766 F. Supp. (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps. n16 Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,' " Mississippi Univ. for Women, 458 U.S., that must be the solid base for any gender-defined classification.

In the second phase of the litigation, Virginia presented its remedial plan – maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F d, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afforded to both genders benefits comparable in substance, [if] not in form and detail," the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, -1241. The United States challenges this "remedial" ruling as pervasively misguided.

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See Milliken v. Bradley, (1977) (internal quotation marks omitted). The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." Louisiana v. United States, (1965).

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. n17 Having violated the Constitution's equal protection requirement, Virginia was

obliged to show that its remedial proposal "directly addressed and related to" the violation, see Milliken, 433 U.S., i. e., the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See Louisiana, 380 U.S.. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See, 526-527.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F. Supp. ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F d, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F. Supp..

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, see 44 F d, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day. See 852 F. Supp., 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See 766 F. Supp.. "The most important aspects of the VMI educational experience occur in the barracks," the District Court found, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, see 852 F. Supp., episodes and encounters lacking the "physical rigor, mental stress, . minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training, see 766 F. Supp.. n18 Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets,

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." Brief for Respondents 28 (internal quotation marks omitted). The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin

College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women." 852 F. Supp. (emphasis added). See also 44 F d (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for women as a group") (emphasis added). The Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F. Supp..

As earlier stated, see, generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits most men. It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." 852 F. Supp.. By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or as a group, for "only about 15% of VMI cadets enter career military service." See 766 F. Supp..

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F d; "some women . do well under [the] adversative model," 766 F. Supp. (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," ; "some women are capable of all of the individual activities required of VMI cadets," and "can meet the physical standards [VMI] now impose[s] on men," 976 F d. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, n19 a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." Louisiana, 380 U.S..

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. 852 F. Supp.. The Mary Baldwin faculty holds "significantly fewer Ph. D.'s," and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and

mechanical engineering. See 852 F. Supp.; Virginia Military Institute: More than an Education 11 (Govt. exh. 75, lodged with Clerk of this Court). VWIL students attend a school that "does not have a math and science focus," 852 F. Supp.; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see

For physical training, Mary Baldwin has "two multi-purpose fields" and "one gymnasium." VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track."

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation has agreed to endow VWIL with $ 5 million, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $ 19 million, will gain an additional $ 35 million based on future commitments; VMI's current endowment, $ 131 million – the largest public college per-student endowment in the Nation – will gain $ 220 million.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. See 976 F d. "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 F. Supp.. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . interested in hiring VMI graduates," 852 F. Supp., will be equally responsive to her search for employment, see 44 F d (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. See (Phillips, J., dissenting).

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African Americans could not be denied a legal education at a state facility. See Sweatt v. Painter 1114, (1950). Reluctant to admit African Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. Nevertheless, the state trial and appellate courts were satisfied that

the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas." (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who had become a member of the Texas Bar." This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over 65,000 volumes, scholarship funds, a law review, and moot court facilities. -633.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." Facing the marked differences reported in the Sweatt opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. In line with Sweatt, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]." Milliken, 433 U.S. (internal quotation marks omitted). Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." 44 F d. The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no "comparable single-gender women's institution." Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program satisfactory. The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent, see, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see, a brand of review inconsistent with the more exacting standard our precedent requires, see. Quoting in part from Mississippi Univ. for Women, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference

to [the] legislative will." 44 F d, 1236. Recognizing that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, and proceeded to find that new test satisfied,

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See J. E. B., 511 U.S.. Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. See. n20 In sum, Virginia's remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertained the [then] relatively new idea that there must be no discrimination by sex in offering educational opportunity." Kirstein, 309 F. Supp.. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." ; see. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offered courses of instruction . not available elsewhere." 309 F. Supp.. The court further noted: "There exists at Charlottesville a 'prestige' factor [not paralleled in] other Virginia educational institutions."

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige" – associated with its success in developing "citizen-soldiers" – is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. Sweatt, 339 U.S.. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . school," including "position and influence of the alumni, standing in the community, traditions and prestige." Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. n21 VMI's story continued as our comprehension of "We the People" expanded. See, n. 16. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

For the reasons stated, the initial judgment of the Court of Appeals, CA4 1992), is affirmed, the final judgment of the Court of Appeals, CA4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

Two decades ago in Craig v. Boren, (1976), we announced that "to withstand constitutional challenge, . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See Califano v. Goldfarb, (1977); Califano v. Webster, (1977); Orr v. Orr, (1979); Caban v. Mohammed, (1979); Davis v. Passman, 235, n. 9, (1979); Personnel Administrator of Mass. v. Feeney, (1979); Califano v. Westcott, (1979); Wengler v. Druggists Mut. Ins. Co., (1980); Kirchberg v. Feenstra, (1981); Michael M. v. Superior Court, Sonoma Cty., (1981); Mississippi Univ. for Women v. Hogan, (1982); Heckler v. Mathews, (1984); J. E. B. v. Alabama ex rel. T. B., n. 6, (1994). While the majority adheres to this test today, it also says that the Commonwealth must demonstrate an " 'exceedingly persuasive justification' " to support a gender-based classification. See 530, 531, 533, 534, 545, 546, 556. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, e. g., Feeney ("These precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," Hogan; Heckler, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." Feeney.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See -536. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Commonwealth has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and, as the Court notes, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause. The Court refers to our decision in Goesaert v. Cleary 163, (1948). Likewise representing that now abandoned view was Hoyt v. Florida 118, (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life."

Then, in 1971, we decided Reed v. Reed 225, which the Court correctly refers to as a seminal case. But its facts have nothing to do with admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the Fourteenth Amendment because "a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." The brief opinion in Reed made no mention of either Goesaert or Hoyt.

Even at the time of our decision in Reed v. Reed, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In Mississippi Univ. for Women v. Hogana case actually involving a single-sex admissions policy in higher education, the Court held that the exclusion of men from a nursing program violated the Equal Protection Clause. This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine "the legality and wisdom of VMI's single-sex policy in light of" Hogan. 766 F. Supp. 1407, 1427 (WD Va. 1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After three years of study, the committee found " 'no information' " that would warrant a change in VMI's status. Even the District Court, ultimately sympathetic to VMI's position, found that "the Report provided very little indication

of how [its] conclusion was reached" and that "the one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." The reasons given in the report for not changing the policy were the changes that admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after Hogan.

Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only. * But, unlike the majority, I would consider only evidence that postdates our decision in Hogan, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after Hogan, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When Hogan placed Virginia on notice that VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal

Protection Clause, but, until the decision in Hogan, a condition that had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the stark choice of either admitting women to VMI, on the one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." Post. The private women's colleges are treated by the Commonwealth exactly as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is pedagogically beneficial for some students, see 766 F. Supp., and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in " 'the position they would have occupied in the absence of [discrimination],' " , the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution. As the foregoing discussion suggests, I would not define the violation in this way; it is not the "exclusion of women" that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any – much less a comparable – institution for women.

Accordingly, the remedy should not necessarily require either the admission of

women to VMI or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. See Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

If a State decides to create single-sex programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume a priori, without evidence, that there would be no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed minded they were – as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so,

and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy – so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States – the old one – takes no sides in this educational debate, I dissent.

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," Clark v. Jeter, (1988) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," Michael H. v. Gerald D., (1989) (plurality opinion of SCALIA, J.); but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex. See, e. g., Turner Broadcasting System, Inc. v. FCC, (1994); Mills v. Habluetzel, (1982); Craig v. Boren, (1976).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede – and indeed ought to be crafted so as to reflect – those constant and unbroken national traditions that embody the people's understanding of ambiguous

constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." Rutan v. Republican Party of Ill., (1990) (SCALIA, J., dissenting). The same applies, mutatis mutandis, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment. See, e. g., Burnham v. Superior Court of Cal., County of Marin 631, (1990) (plurality opinion of SCALIA, J.) (Due Process Clause); J. E. B. v. Alabama ex rel. T. B., (1994) (SCALIA, J., dissenting) (Equal Protection Clause); Planned Parenthood of Southeastern Pa. v. Casey, 1000-1001, (1992) (SCALIA, J., dissenting) (various alleged "penumbras").

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges – West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954 – admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies, see nn. 13, 15) came not by court decree, but because the people, through their elected representatives, decreed a change. See, e. g., Â§ 803(a), 89 Stat. 537, note following 10 U.S.C. Â§ 4342. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by today's decision with the cutoff of all state and federal support. Government-run nonmilitary educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] coeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." Mississippi Univ. for Women v. Hogan, (1982) (Powell, J., dissenting); see -739. These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, see and n. 10, 537, the Court favors current notions

so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as JUSTICE O'CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "between the extremes of rational basis review and strict scrutiny." Clark v. Jeter, 486 U.S.. We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "substantially related to an important governmental objective." See, e. g., Heckler v. Mathews, (1984); Wengler v. Druggists Mut. Ins. Co., (1980); Craig v. Boren, 429 U.S..

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court avoids doing so. Notwithstanding our above-described precedents and their " 'firmly established principles,' " Heckler (quoting Hogan), the United States urged us to hold in this litigation "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." Brief for United States in No. 94-2107, p. 16. (This was in flat contradiction of the Government's position below, which was, in its own words, to "state unequivocally that the appropriate standard in this case is 'intermediate scrutiny.' " 2 Record, Doc. No. 88, p. 3 (emphasis added).) The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in Hogan, see -533, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," 458 U.S. (internal quotation marks omitted), the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from Hogan. The Court's nine invocations of that phrase, see 530, 531, 533, 534, 545, 546, 556, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in J. E. B. v. Alabama ex rel. T. B. 89, (1994), and Hogansee would be unobjectionable if the Court acknowledged that whether a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of Hogan and our other precedents.

That is essential to the Court's result, which can only be achieved by establishing

that intermediate scrutiny is not survived if there are some women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Thus, the Court summarizes its holding as follows:

"In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's implementing methodology is not inherently unsuitable to women; some women do well under the adversative model; some women, at least, would want to attend VMI if they had the opportunity; some women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men." (internal quotation marks, citations, and punctuation omitted; emphasis added). Similarly, the Court states that "the Commonwealth's justification for excluding all women from 'citizen-soldier' training for which some are qualified . cannot rank as 'exceedingly persuasive' . ." n

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Footnotes

n1 Accord, ("In sum . ., neither the goal of producing citizen-soldiers, VMI's raison d'etre, nor VMI's implementing methodology is inherently unsuitable to women") (internal quotation marks omitted; emphasis added); ("The question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords"); (the "violation" is that "equal protection [has been] denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers"); ("As earlier stated, see, generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in Califano v. Webster 360, (1977) (per curiam), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women on the average received lower retirement benefits than men." and n. 5 (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In Rostker v. Goldberg 478, (1981), we held that selective-service registration

could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." In Metro Broadcasting, Inc. v. FCC, 582-583, (1990), overruled on other grounds, Adarand Constructors, Inc. v. Pena, (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

Not content to execute a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even in principle, a higher standard (i. e., strict scrutiny) should apply. "The Court has," it says, "thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . .," n. 6 (emphasis added); and it describes our earlier cases as having done no more than decline to "equate gender classifications, for all purposes, to classifications based on race or national origin," (emphasis added). The wonderful thing about these statements is that they are not actually false – just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications. See, e. g., Heckler v. Mathews (1984) (upholding state action after applying only intermediate scrutiny); Michael M. v. Superior Court, Sonoma Cty. (same) (plurality and both concurring opinions); Califano v. Webster(same) (per curiam). And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law – not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know before they act the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's. And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in United States v. Carolene Products Co, which said (intimatingly) that we did not have to inquire in the case at hand"whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to

curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." It is hard to consider women a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false. See, e. g., Equal Pay Act of 1963, 29 U.S.C. Â§ 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. Â§ 2000e-2; Title IX of the Education Amendments of 1972, 20 U.S.C. Â§ 1681; Women's Business Ownership Act of 1988, Pub. L. 100Stat. 2689; Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

With this explanation of how the Court has succeeded in making its analysis seem orthodox – and indeed, if intimations are to be believed, even overly generous to VMI – I now proceed to describe how the analysis should have been conducted. The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective."

It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a fact established in this case." CA4 1995) (emphasis added).

The evidence establishing that fact was overwhelming – indeed, "virtually uncontradicted" in the words of the court that received the evidence. As an initial matter, Virginia demonstrated at trial that "[a] substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." While no one questioned that for many students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

"One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain

positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." .See also -1435 (factual findings). "In the light of this very substantial authority favoring single-sex education," the District Court concluded that "the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's teaching and training." This finding alone, which even this Court cannot dispute, see should be sufficient to demonstrate the constitutionality of VMI's all-male composition.

But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." 766 F. Supp., 1421. "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [i. e., adversative] program, the program would attract an insufficient number of participants to make the program work," 44 F d; and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether," 766 F. Supp.. Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

There can be no serious dispute that, as the District Court found, single-sex education and a distinctive educational method "represent legitimate contributions to diversity in the Virginia higher education system." As a theoretical matter, Virginia's educational interest would have been best served (insofar as the two factors we have mentioned are concerned) by six different types of public colleges – an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method." But as a practical matter, of course, Virginia's financial resources, like any State's, are not limitless, and the Commonwealth must select among the available options. Virginia thus has decided to fund, in addition to some 14 coeducational 4-year colleges, one college that is run as an all-male school on the adversative model: the Virginia Military Institute.

Virginia did not make this determination regarding the make-up of its public college system on the unrealistic assumption that no other colleges exist. Substantial evidence in the District Court demonstrated that the Commonwealth has long proceeded on the principle that " 'higher education resources should be viewed as a whole – public and private' " – because such an approach enhances diversity and because " 'it is academic and economic waste to permit unwarranted

duplication.' " (quoting 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia). It is thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one private all-male college," which "indicates that the private sector is providing for the [former] form of education to a much greater extent that it provides for all-male education." In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model – and to concentrate its resources in a single entity that serves both these interests in diversity – is substantially related to the Commonwealth's important educational interests.

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.

1. I have already pointed out the Court's most fundamental error, which is its reasoning that VMI's all-male composition is unconstitutional because "some women are capable of all of the individual activities required of VMI cadets," and would prefer military training on the adversative model. See. This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution – its asserted interest in promoting diversity of educational options – is not "genuine," but is a pretext for discriminating against women. ; see To support this charge, the Court would have to impute that base motive to VMI's Mission Study Committee, which conducted a 3-year study from 1983 to 1986 and recommended to VMI's Board of Visitors that the school remain all male. The committee, a majority of whose members consisted of non-VMI graduates, "read materials on education and on women in the military," "made site visits to single-sex and newly coeducational institutions" including West Point and the Naval Academy, and "considered the reasons that other institutions had changed from single-sex to coeducational status"; its work was praised as "thorough" in the accreditation review of VMI conducted by the Southern Association of Colleges and Schools. See 766 F. Supp., 1428; see also -1430 (detailed findings of fact concerning the Mission Study Committee). The Court states that "whatever internal purpose the Mission Study Committee served – and however well meaning the framers of the report – we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options." But whether it is part of the evidence to prove that diversity was the Commonwealth's objective (its short report said nothing on that particular subject) is quite separate from whether it is part of the evidence to prove that antifeminism was not. The relevance of the Mission Study Committee is that its very creation, its

sober 3-year study, and the analysis it produced utterly refute the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason.

The Court also supports its analysis of Virginia's "actual state purposes" in maintaining VMI's student body as all male by stating that there is no explicit statement in the record " 'in which the Commonwealth has expressed itself' " concerning those purposes. That is wrong on numerous grounds. First and foremost, in its implication that such an explicit statement of "actual purposes" is needed. The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "that failure itself renders the VMI policy invalid." Brief for United States in No. 94-2107. This is an unheard-of doctrine. Each state decision to adopt or maintain a governmental policy need not be accompanied – in anticipation of litigation and on pain of being found to lack a relevant state interest – by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a "statement of basis and purpose" for their sovereign Acts, see 5 U.S.C. Â§ 553(c). The situation would be different if what the Court assumes to have been the 1839 policy had been enshrined and remained enshrined in legislation – a VMI charter, perhaps, pronouncing that the institution's purpose is to keep women in their place. But since the 1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that today's Commonwealth continues to fund VMI "is enough to answer [the United States'] contention that the [classification] was the 'accidental by-product of a traditional way of thinking about females.' "

It is, moreover, not true that Virginia's contemporary reasons for maintaining VMI are not explicitly recorded. It is hard to imagine a more authoritative source on this subject than the 1990 Report of the Virginia Commission on the University of the 21st Century (1990 Report). As the parties stipulated, that report "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.' " Stipulations of Fact 37, reprinted in Lodged Materials from the Record 64 (Lodged Materials). It said: "The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, traditionally black and single-sex." 1990 Report, quoted in relevant part at Lodged Materials 64-65 (emphasis added). n2 The Court's only response to this is repeated reliance on the Court of Appeals' assertion that " 'the only explicit [statement] that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions' " (namely, the statement in the 1990 Report that the Commonwealth's institutions must "deal with faculty, staff, and students without regard to sex") had nothing to do with the purpose of diversity. (quoting 976 F d). This proves, I suppose, that the Court of Appeals

did not find a statement dealing with sex and diversity in the record; but the pertinent question (accepting the need for such a statement) is whether it was there. And the plain fact, which the Court does not deny, is that it was.

This statement is supported by other evidence in the record demonstrating, by reference to both public and private institutions, that Virginia actively seeks to foster its " 'rich heritage of pluralism and diversity in higher education,' " 1969 Report of the Virginia Commission on Constitutional Revision, quoted in relevant part at Lodged Materials 53; that Virginia views " 'one special characteristic of the Virginia system [as being] its diversity,' " 1989 Virginia Plan for Higher Education, quoted in relevant part at Lodged Materials 64; and that in the Commonwealth's view "higher education resources should be viewed as a whole – public and private" because " 'Virginia needs the diversity inherent in a dual system of higher education,' " 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, quoted in 766 F. Supp. 1407, 1420 (WD Va. 1991). See also Budget Initiatives for 1990-1992 of State Council of Higher Education for Virginia 10 (June 21, 1989) (Budget Initiatives), quoted at n. 3, infra. It should be noted (for this point will be crucial to my later discussion) that these official reports quoted here, in text and footnote, regard the Commonwealth's educational system – public and private – as a unitary one.

The Court contends that "[a] purpose genuinely to advance an array of educational options . is not served" by VMI. It relies on the fact that all of Virginia's other public colleges have become coeducational. The apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham. This fails to take account of the fact that Virginia's resources cannot support all possible permutations of schools, see, and of the fact that Virginia coordinates its public educational offerings with the offerings of in-state private educational institutions that the Commonwealth provides money for its residents to attend and otherwise assists – which include four women's colleges. n

The Commonwealth provides tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia who attend private colleges in the Commonwealth. These programs involve substantial expenditures: for example, Virginia appropriated $ 4,413,750 (not counting federal funds it also earmarked) for the College Scholarship Assistance Program for both 1996 and 1997, and for the Tuition Assistance Grant Program appropriated $ 21,568,000 for 1996 and $ 25,842,000 for 1997.

In addition, as the parties stipulated in the District Court, the Commonwealth provides other financial support and assistance to private institutions – including single-sex colleges – through low-cost building loans, state-funded services contracts, and other programs. The State Council of Higher Education for Virginia, in a 1989 document not created for purposes of this litigation but introduced into evidence, has described these various programs as a "means by which the Commonwealth can provide funding to its independent institutions,

thereby helping to maintain a diverse system of higher education."

Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized decisionmaking to achieve diversity – its granting of substantial autonomy to each institution with regard to student-body composition and other matters, see 766 F. Supp.. The Court adopts the suggestion of the Court of Appeals that it is not possible for "one institution with autonomy, but with no authority over any other state institution, [to] give effect to a state policy of diversity among institutions." (internal quotation marks omitted). If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution, that is to say, has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants. And of course none of the institutions is entirely autonomous; if and when the legislature decides that a particular school is not well serving the interest of diversity – if it decides, for example, that a men's school is not much needed – funding will cease.

The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to " 'the Charlottesville campus' " of the University of Virginia. See The University of Virginia, an institution even older than VMI, though not as old as another of the Commonwealth's universities, the College of William and Mary, occupies the portion of Charlottesville known, not as the "campus," but as "the grounds." More importantly, even if it were a "campus," there would be no need to specify "the Charlottesville campus," as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York (e. g., the State University of New York at Binghamton or Buffalo), Illinois (University of Illinois at Urbana-Champaign or at Chicago), and California (University of California, Los Angeles, or University of California, Berkeley), there is only one University of Virginia. It happens (because Thomas Jefferson lived near there) to be located at Charlottesville. To many Virginians it is known, simply, as "the University," which suffices to distinguish it from the Commonwealth's other institutions offering 4-year college instruction, which include Christopher Newport College, Clinch Valley College, the College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington University, Norfolk State University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, Virginia State University – and, of course, VMI.

1. In addition to disparaging Virginia's claim that VMI's single-sex status serves a state interest in diversity, the Court finds fault with Virginia's failure to offer education based on the adversative training method to women.

> It dismisses the District Court's " 'findings' on 'gender-based developmental differences' " on the ground that "these 'findings' restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.' " (quoting 766 F. Supp.). How remarkable to criticize the District Court on the ground that its findings rest on the evidence (i. e., the testimony of Virginia's witnesses)! That is what findings are supposed to do. It is indefensible to tell the Commonwealth that "the burden of justification is demanding and it rests entirely on [you]," and then to ignore the District Court's findings because they rest on the evidence put forward by the Commonwealth – particularly when, as the District Court said, "the evidence in the case . is virtually uncontradicted."

Ultimately, in fact, the Court does not deny the evidence supporting these findings. See It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial – it never says that a single finding of the District Court is clearly erroneous – in favor of the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this litigation en banc, see (2) citations of nonevidentiary materials such as amicus curiae briefs filed in this Court, see nn. 13, 14, and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days."

It is not too much to say that this approach to the litigation has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion. Not a single witness contested, for example, Virginia's "substantial body of 'exceedingly persuasive' evidence . that some students, both male and female, benefit from attending a single-sex college" and "[that] for those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." 766 F. Supp.. Even the United States' expert witness "called himself a 'believer in single-sex education,' " although it was his "personal, philosophical preference," not one "born of educational-benefit considerations," "that single-sex education should be provided only by the private sector."

1. The Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "training their argument on 'means' rather than 'end,' " The Court focuses on "VMI's mission," which is to produce individuals "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . to defend their country in time of national peril." 766 F. Supp. (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16,

1986). "Surely," the Court says, "that goal is great enough to accommodate women."

This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of all Virginia colleges. Which of them would the Old Dominion continue to fund if they did not aim to create individuals "imbued with love of learning, etc.," right down to being ready "to defend their country in time of national peril"? It can be summed up as "learning, leadership, and patriotism." To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But imparting those values in that fashion – i. e., in a military, adversative, all-male environment – is the distinctive mission of VMI. And as I have discussed (and both courts below found), that mission is not "great enough to accommodate women."

The Court's analysis at least has the benefit of producing foreseeable results. Applied generally, it means that whenever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective – no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.

1. The Court argues that VMI would not have to change very much if it were to admit women. See, e. g., The principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss, that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "The evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." 766 F. Supp.. Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "the intensity and aggressiveness of the current program"; and various modifications in other respects of the adversative training program that permeates student life. See As the Court

of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach – would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training."

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "the notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." (footnote omitted). The point about "downgrading VMI's stature" is a straw man; no one has made any such claim. The point about "destroying the adversative system" is simply false; the District Court not only stated that "evidence supports this theory," but specifically concluded that while "without a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." And the point about "destroying the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women, and "would eventually find it necessary to drop the adversative system altogether."

The Court's do-it-yourself approach to factfinding, which throughout is contrary to our well-settled rule that we will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," is exemplified by its invocation of the experience of the federal military academies to prove that not much change would occur. In fact, the District Court noted that "the West Point experience" supported the theory that a coeducational VMI would have to "adopt a [different] system," for West Point found it necessary upon becoming coeducational to "move away" from its adversative system. "Without a doubt, VMI's present methods of training and education would have to be changed as West Point's were."

1. Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. In Mississippi Univ. for Women v. Hogan, we attached no constitutional significance to the absence of an all-male nursing school. As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, "the opinion in Hogan could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.' "

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL because it is, under our established test, irrelevant, so long as VMI's all-male character is "substantially related" to an important

state goal. But VWIL now exists, and the Court's treatment of it shows how far reaching today's decision is.

VWIL was carefully designed by professional educators who have long experience in educating young women. The program rejects the proposition that there is a "difference in the respective spheres and destinies of man and woman," Bradwell v. State, and is designed to "provide an all-female program that will achieve substantially similar outcomes [to VMI's] in an all-female environment." After holding a trial where voluminous evidence was submitted and making detailed findings of fact, the District Court concluded that "there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially similar ends." The Court of Appeals undertook a detailed review of the record and affirmed. But it is Mary Baldwin College, which runs VWIL, that has made the point most succinctly:

"It would have been possible to develop the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation." Brief for Mary Baldwin College as Amicus Curiae 5.It is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women. This Court, however, does not care. Even though VWIL was carefully designed by professional educators who have tremendous experience in the area, and survived the test of adversarial litigation, the Court simply declares, with no basis in the evidence, that these professionals acted on " 'overbroad' generalizations."

The Court is incorrect in suggesting that the Court of Appeals applied a "deferential" "brand of review inconsistent with the more exacting standard our precedent requires." That court "inquired (1) whether the state's objective is 'legitimate and important,' and (2) whether 'the requisite direct, substantial relationship between objective and means is present.' " To be sure, such review is "deferential" to a degree that the Court's new standard is not, for it is intermediate scrutiny. (The Court cannot evade this point or prove the Court of Appeals too deferential by stating that that court "devised another test, a 'substantive comparability' inquiry,"' for as that court explained, its "substantive comparability" inquiry was an "additional step" that it engrafted on "the traditional test" of intermediate scrutiny.

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more implausible. The concurrence offers three reasons: First, that there is "scant evidence in the record," that diversity of educational offering was the real reason for Virginia's maintaining VMI. "Scant" has the advantage of being an imprecise term. I have cited the clearest statements of diversity as a goal for higher education in the 1990 Report, the 1989 Virginia

Plan for Higher Education, the Budget Initiatives prepared in 1989 by the State Council of Higher Education for Virginia, the 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, and the 1969 Report of the Virginia Commission on Constitutional Revision. See, 581-582, and n. 2, 583, n. 3. There is no evidence to the contrary, once one rejects (as the concurrence rightly does) the relevance of VMI's founding in days when attitudes toward the education of women were different. Is this conceivably not enough to foreclose rejecting as clearly erroneous the District Court's determination regarding "the Commonwealth's objective of educational diversity"? 766 F. Supp.. Especially since it is absurd on its face even to demand "evidence" to prove that the Commonwealth's reason for maintaining a men's military academy is that a men's military academy provides a distinctive type of educational experience (i. e., fosters diversity). What other purpose would the Commonwealth have? One may argue, as the Court does, that this type of diversity is designed only to indulge hostility toward women – but that is a separate point, explicitly rejected by the concurrence, and amply refuted by the evidence I have mentioned in discussing the Court's opinion. What is now under discussion – the concurrence's making central to the disposition of this litigation the supposedly "scant" evidence that Virginia maintained VMI in order to offer a diverse educational experience – is rather like making crucial to the lawfulness of the United States Army record "evidence" that its purpose is to do battle. A legal culture that has forgotten the concept of res ipsa loquitur deserves the fate that it today decrees for VMI.

The concurrence states that it "read[s] the Court" not "as saying that the diversity rationale is a pretext" for discriminating against women, but as saying merely that the diversity rationale is not genuine. The Court itself makes no such disclaimer, which would be difficult to credit inasmuch as the foundation for its conclusion that the diversity rationale is not "genuine," is its antecedent discussion of Virginia's "deliberate" actions over the past century and a half, based on "familiar arguments," that sought to enforce once "widely held views about women's proper place,"

Second, the concurrence dismisses out of hand what it calls Virginia's "second justification for the single-sex admissions policy: maintenance of the adversative method." The concurrence reasons that "this justification does not serve an important governmental objective" because, whatever the record may show about the pedagogical benefits of single-sex education, "there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." That is simply wrong. See, e. g., 766 F. Supp. (factual findings concerning character traits produced by VMI's adversative methodology); (factual findings concerning benefits for many college-age men of an adversative approach in general). In reality, the pedagogical benefits of VMI's adversative approach were not only proved, but were a given in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as soon as she entered.

She wanted the distinctive adversative education that VMI provided, and the battle was joined (in the main) over whether VMI had a basis for excluding women from that approach. The Court's opinion recognizes this, and devotes much of its opinion to demonstrating that " 'some women . do well under [the] adversative model' " and that "it is on behalf of these women that the United States has instituted this suit." (quoting 766 F. Supp.). Of course, in the last analysis it does not matter whether there are any benefits to the adversative method. The concurrence does not contest that there are benefits to single-sex education, and that alone suffices to make Virginia's case, since admission of a woman will even more surely put an end to VMI's single-sex education than it will to VMI's adversative methodology.

A third reason the concurrence offers in support of the judgment is that the Commonwealth and VMI were not quick enough to react to the "further developments" in this Court's evolving jurisprudence. Specifically, the concurrence believes it should have been clear after Hogan that "the difficulty with [Virginia's] position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women." If only, the concurrence asserts, Virginia had "made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation." That is to say, the concurrence believes that after our decision in Hogan (which held a program of the Mississippi University for Women to be unconstitutional – without any reliance on the fact that there was no corresponding Mississippi all-men's program), the Commonwealth should have known that what this Court expected of it was . yes!, the creation of a state all-women's program. Any lawyer who gave that advice to the Commonwealth ought to have been either disbarred or committed. (The proof of that pudding is today's 6-Justice majority opinion.) And any Virginia politician who proposed such a step when there were already four 4-year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs, see n. 3) ought to have been recalled.

In any event, "diversity in the form of single-sex, as well as coeducational, institutions of higher learning" is "available to women as well as to men" in Virginia. The concurrence is able to assert the contrary only by disregarding the four all-women's private colleges in Virginia (generously assisted by public funds) and the Commonwealth's longstanding policy of coordinating public with private educational offerings, see, 581-582, and n. 2, 583-584, and n. 3. According to the concurrence, the reason Virginia's assistance to its four all-women's private colleges does not count is that "the private women's colleges are treated by the State exactly as all other private schools are treated." But if Virginia cannot get credit for assisting women's education if it only treats women's private schools as it does all other private schools, then why should it get blame for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement.

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test – asking whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification – the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to other public schools at all. "We address specifically and only an educational opportunity recognized . as 'unique.' "

The Supreme Court of the United States does not sit to announce "unique" dispositions. Its principal function is to establish precedent – that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the "rationale upon which the Court based the results of its earlier decisions." Seminole Tribe of Fla. v. Florida, (1996) (emphasis added). That is the principal reason we publish our opinions.

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. See. Indeed, the Court indicates that if any program restricted to one sex is "unique," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.

In this regard, I note that the Court – which I concede is under no obligation to do so – provides no example of a program that would pass muster under its reasoning today: not even, for example, a football or wrestling program. On the Court's theory, any woman ready, willing, and physically able to participate in such a program would, as a constitutional matter, be entitled to do so.

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the

record evidence – indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "support [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." 766 F. Supp. (emphasis added). "The evidence in this case," for example, "is virtually uncontradicted" to that effect. Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on Hogan, and the Detroit Board of Education voted to abandon the litigation and thus abandon the plan, see Detroit Plan to Aid Blacks with All-Boy Schools Abandoned, Los Angeles Times, Nov. 8, 1991, p. A4, col. 1. Today's opinion assures that no such experiment will be tried again.

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to private single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College – which designed and runs VWIL – notes that private institutions of higher education in the 1990-1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, not including financial aid to students. See Brief for Mary Baldwin College as Amicus Curiae 22, n. 13 (citing U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics, p. 38 and Note (1993)). Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today's decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex.

The Court adverts to private single-sex education only briefly, and only to make the assertion (mentioned above) that "we address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique.' " n. 7. As I have already remarked, see, that assurance assures nothing, unless it is to be taken as a promise that in the future the Court will disclaim the reasoning it has used today to destroy VMI. The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not

thereby necessarily converted into state actors to which the Equal Protection Clause is then applicable. That is true. It is also virtually meaningless.

The issue will be not whether government assistance turns private colleges into state actors, but whether the government itself would be violating the Constitution by providing state support to single-sex colleges. For example, in Norwood v. Harrison, we saw no room to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and 'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' " ; see also Cooper v. Aaron, (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); Grove City College v. Bell, (1984) (case arising under Title IX of the Education Amendments of 1972 and stating that "the economic effect of direct and indirect assistance often is indistinguishable"). When the Government was pressed at oral argument concerning the implications of these cases for private single-sex education if government-provided single-sex education is unconstitutional, it stated that the implications will not be so disastrous, since States can provide funding to racially segregated private schools, "depending on the circumstances," Tr. of Oral Arg. 56. I cannot imagine what those "circumstances" might be, and it would be as foolish for private-school administrators to think that that assurance from the Justice Department will outlive the day it was made, as it was for VMI to think that the Justice Department's "unequivocal" support for an intermediate-scrutiny standard in this litigation would survive the Government's loss in the courts below.

The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this litigation is "unique"? I would not advise the foundation of any new single-sex college (especially an all-male one) with the expectation of being allowed to receive any government support; but it is too soon to abandon in despair those single-sex colleges already in existence. It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, (1932) (dissenting opinion). But

it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a " 'more perfect Union,' " (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in Mississippi Univ. for Women v. Hogan. Many of the points made in his dissent apply with equal force here – in particular, the criticism of judicial opinions that purport to be "narrow" but whose "logic" is "sweeping." But there is one statement with which I cannot agree. Justice Powell observed that the Court's decision in Hogan, which struck down a single-sex program offered by the Mississippi University for Women, had thereby "left without honor . an element of diversity that has characterized much of American education and enriched much of American life." Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled "The Code of a Gentleman":

"Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defense-less and the champion of justice . or he is not a Gentleman.

"A Gentleman .

"Does not discuss his family affairs in public or with acquaintances.

"Does not speak more than casually about his girl friend.

"Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

"Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

"Does not hail a lady from a club window.

"A gentleman never discusses the merits or demerits of a lady.

"Does not mention names exactly as he avoids the mention of what things cost.

"Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

" Does not display his wealth, money or possessions.

"Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

"Does not slap strangers on the back nor so much as lay a finger on a lady.

"Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

"Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

"A Gentleman respects the reserves of others, but demands that others respect those which are his.

"A Gentleman can become what he wills to be. . ."I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

Gay Rights at the Intersection of Substantive Due Process and Equal Protection

Bowers v. Hardwick

478 U.S. 186 (1986)

JUSTICE WHITE delivered the opinion of the Court.

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a

right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in Carey v. Population Services International. Pierce v. Society of Sisters, and Meyer v. Nebraska, were described as dealing with child rearing and education; Prince v. Massachusetts, with family relationships; Skinner v. Oklahoma ex rel. Williamson, with procreation; Loving v. Virginia, 388 U. S. 1 (1967), with marriage; Griswold v. Connecticutand Eisenstadt v. Bairdwith contraception; and Roe v. Wade, with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. Carey v. Population Services International.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U. S., n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. Meyer, Prince, and Pierce fall in this category, as do the privacy cases from Griswold to Carey.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in Moore v. East Cleveland (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

(POWELL, J.). See also Griswold v. Connecticut.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws In fact, until 1961,7 all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls for short of overcoming this resistance.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than Stanley v. Georgia, was about a

fundamental right to watch obscene movies, or Katz v. United States, was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." Olmstead v. United States (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16-6-2 is valid essentially because "the laws of . many States . still make such conduct illegal and have done so for a very long time." But the fact that the moral judgments expressed by statutes like § 16-6-2 may be "'natural and familiar . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.' " Roe v. Wade, quoting Lochner v. New York (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.' " Herring v. State, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe® a fundamental right upon homosexuals to engage in sodomy," the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity I therefore see no basis for the Court's decision

to treat this case as an "as applied" challenge to § 16-6-2, see n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4-5; cf. -1206 (CA11 1985). But his claim that § 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on Griswold v. Connecticut, which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10-12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is any ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bramlet v. Wilson, CA8 1974); see Parr v. Great Lakes Express Co., CA7 1973); Due v. Tallahassee Theaters, Inc., CA5 1964); United States v. Howell, CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601-602 (1969); see also Conley v. Gibson (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one.

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." Thornburgh v. American College of Obstetricians & Gynecologists. In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. E. g., Roe v. Wade; Pierce v. Society of Sisters. Second, it has recognized a privacy interest with reference to certain places without

regard for the particular activities in which the individuals who occupy them are engaged. E. g., United States v. Karo; Payton v. New York; Rios v. United States. The case before us implicates both the decisional and the spatial aspects of the right to privacy.

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." While it is true that these cases may be characterized by their connection to protection of the family, see Roberts v. United States Jaycees, the Court's conclusion that they extend no further than this boundary ignores the warning in Moore v. East Cleveland (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the'moral fact that a person belongs to himself and not others nor to society as a whole.' " Thornburgh v. American College of Obstetricians & Gynecologists, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977). And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. Thornburgh v. American College of Obstetricians & Gynecologists, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. Moore v. East Cleveland (plurality opinion). The Court recognized in Roberts, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," Paris Adult Theatre I v. Slaton; see also Carey v. Population Services International. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. Eisenstadt v. Baird; Roe v. Wade.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is'right' and the Amish and others like them are'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Wisconsin v. Yoder (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a'place,"' Katz v. United States (Harlan, J., concurring), "the essence of a Fourth Amendment violation is'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is'the invasion of his indefensible right of personal security, personal liberty and private property."' California v. Ciraolo (POWELL, J., dissenting).

The Court's interpretation of the pivotal case of Stanley v. Georgia, is entirely unconvincing. Stanley held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, Stanley relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. But that is not what Stanley said. Rather, the Stanley Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

"'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.' ..... "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home."

The central place that Stanley gives Justice Brandeis' dissent in Olmstead, a case raising no First Amendment claim, shows that Stanley rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in Paris Adult Theatre I v. Slaton, the Court suggested that reliance on the Fourth Amendment not only supported the Court's outcome in Stanley but actually was necessary to it: "If obscene material unprotected by the First Amendment in itself carried with it a'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of the'privacy of the home,' which was hardly more than a reaffirmation that'a man's home is his castle."' 413 U. S.. "The right of the people to be secure in their . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . support in the text of the Constitution," Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

The core of petitioner's defense of § 16-6-2, however, is that respondent and others who engage in the conduct prohibited by § 16-6-2 interfere with Georgia's exercise of the "'right of the Nation and of the States to maintain a decent society,' " Paris Adult Theater I v. Slaton, quoting Jacobellis v. Ohio (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16-6-2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's security. See, e. g., Roe v. Wade; Loving v. Virginia, 388 U. S. 1 (1967); Brown v. Board of Education As Justice Jackson wrote so eloquently for the Court in West Virginia Board of Education v. Barnette (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J.. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to

religious doctrine. See, e. g., McGowan v. Maryland (1961); Stone v. Graham. Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti. No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." O'Connor v. Donaldson. See also Cleburne v. Cleburne Living Center, Inc.; United States Dept. of Agriculture v. Moreno.

Nor can § 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," Paris Adult Theatre I. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See Paris Adult Theatre I, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in Griswold v. Connecticut).

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. Diamond v. Charles (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

With respect to the Equal Protection Clause's applicability to § 16-6-2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See Yick Wo v. Hopkins (1886). The legislature having decided that the sex of the participants is irrele-

vant to the legality of the acts, I do not see why the State can defend § 16-6-2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class.

Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points,), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted. See Tr. of Oral Arg. 21-22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

The parallel between Loving and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S. (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20-21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in Loving v. Virginia, O. T. 1966, No. 395, pp. 28-29, with and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., n. 5 (noting that 16 States still outlawed interracial marriage), with (noting that 24 States and the District of Columbia have sodomy statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England.

25 Hen. VIII, ch. 6. Until that time, the offense was, in Sir James Stephen's words, "merely ecclesiastical." 2J. Stephen, A History of the Criminal Law of England 429-430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16-6-2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10-11. The suggestion misses the point entirely. If the law is not invalid, then the police can invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in Griswold v. Connecticut, was precisely the possibility, and repugnance, of permitting searches to obtain evidence regarding the use of contraceptives. -486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16-6-2 seems no less intrusive, or repugnant. Cf. Winston v. Lee; Mary Beth G. v. City of Chicago, CA7 1983).

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting. Like the statute that is challenged in this case, the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law That condemnation was equally damning for heterosexual and homosexual sodomy Moreover, it provided no special exemption for married couples The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration

of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Griswold v. Connecticut. Moreover, this protection extends to intimate choices by unmarried as well as married persons. Carey v. Population Services International; Eisenstadt v. Baird.

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

"These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating'basic values,' as being'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom — the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." Fitzgerald v. Porter Memorial Hospital, -720 (CA7 1975) (footnotes omitted), cert. denied.

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them — not the State — to decide The essential "liberty" that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive, sexual conduct that others may consider

offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," Griswold, or, indeed, between unmarried heterosexual adults. Eisenstadt. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.

If the Georgia statute cannot be enforced as it is written — if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens — the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest — something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." But the Georgia electorate has expressed no such belief — instead, its representatives enacted a law that presumably reflects the belief that all sodomy is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does not Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representations about the importance of the State's selective application of its generally applicable law.

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, simpliciter, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's post hoc explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.

I respectfully dissent.

Romer v. Evans

Justice Kennedy delivered the opinion of the Court. One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Plessy v. Ferguson (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Denver Rev. Municipal Code, Art. IV, §§ 28-91 to 28-116 (1991); Aspen Municipal Code § 13-98 (1977); Boulder Rev. Code §§ 12-1—1 to 12-1—11 (1987). What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code § 12-1—1 (defining "sexual orientation" as "the choice of sexual partners, i. e., bisexual, homosexual or heterosexual"); Denver Rev. Municipal Code, Art. IV, § 28-92 (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality"). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

"No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. Evans v. Romer, 854 P. 2d 1270 (Colo. 1993) (Evans I). To reach this conclusion, the state court relied on our voting rights cases, e. g., Reynolds v. Sims; Carrington v. Rash; Harper v. Virginia Bd. of Elections; Williams v. Rhodes, and on our precedents involving discriminatory restructuring of governmental decisionmaking, see, e. g., Hunter v. Erickson; Reitman v. Mulkey; Washington v. Seattle School Dist. No. 1; Gordon v. Lance,403 U. S. 1 (1971). On remand, the State advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. 882 P. 2d 1335 (1994) (Evans II). We granted certiorari, and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

The State's principal argument in defense of Amendment 2 is that it puts gays

and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out in Evans I, is as follows:

"The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. See Aspen, Colo., Mun. Code § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); Boulder, Colo., Rev. Code §§ 12-1—2 to —4 (1987) (same); Denver, Colo., Rev. Mun. Code art. IV, §§ 28-91 to —116 (1991) (same); Executive Order No. D0035 (December 10, 1990) (prohibiting employment discrimination for'all state employees, classified and exempt' on the basis of sexual orientation); Colorado Insurance Code, § 10-3A C. R. S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern antidiscrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.. The duty was a general one and did not specify protection for particular groups. The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, Civil Rights Cases. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes. See, e. g., S. D. Codified Laws §§ 20-13-23 (1995); Iowa Code §§ 216 -216 (1994); Okla. Stat., Tit. 25, §§ 1302, 1402 (1987); 43 Pa. Cons. Stat. §§ 953, 955 (Supp. 1995); N. J. Stat. Ann. §§ 10:5:5-4 (West Supp.

1995); N. H. Rev. Stat. Ann. §§ 354—A:7, 354—A:10, 354—A:17 (1995); Minn. Stat. § 363 (1991 and Supp. 1995).

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." Boulder Rev. Code § 12-1—1(j) (1987). The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind," Denver Rev. Municipal Code, Art. IV, § 28-92 (1991).

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. See, e. g., J. E. B. v. Alabama ex rel. T. B. (sex); Lalli v. Lalli (illegitimacy); McLaughlin v. Florida (1964) (race); Oyama v. California(ancestry). Rather, they set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—-and, in recent times, sexual orientation. Aspen Municipal Code § 13-98(a)(1) (1977); Boulder Rev. Code §§ 12-1—1 to 12-1—4 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28-92 to 28-119 (1991); Colo. Rev. Stat. §§ 24-34-401 to 24-34-707 (1988 and Supp. 1995).

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. See, e. g., Aspen Municipal Code §§ 13-98(b), (c) (1977); Boulder Rev. Code §§ 12-1—3 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28-93 to 28 (1991).

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado Executive Order

D0035 (1990), which forbids employment discrimination against " 'all state employees, classified and exempt' on the basis of sexual orientation." 854 P. 2d. Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." 1285. The repeal of these measures and the prohibition against their future reenactment demonstrate that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as well as ordinary legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. See, e. g., Colo. Rev. Stat. § 24-4—106(7) (1988) (agency action subject to judicial review under arbitrary and capricious standard); § 18-8—405 (making it a criminal offense for a public servant knowingly, arbitrarily, or capriciously to refrain from performing a duty imposed on him by law); § 10-3—1104(1)(f) (prohibiting "unfair discrimination" in insurance); 4 Colo. Code of Regulations 801-1, Policy 11-1 (1983) (prohibiting discrimination in state employment on grounds of specified traits or "other nonmerit factor"). At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we. In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many antidiscrimination laws protecting nonsuspect classes, Romer II, 882 P. 2d, n. 9. In our view that does not resolve the issue. In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number

of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. Personnel Administrator of Mass. v. Feeney (1979); F. S. Royster Guano Co. v. Virginia. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e. g., Heller v. Doe (1993).

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See New Orleans v. Dukes (tourism benefits justified classification favoring pushcart vendors of certain longevity); Williamson v. Lee Optical of Okla., Inc. (assumed health concerns justified law favoring optometrists over opticians); Railway Express Agency, Inc. v. New York(potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. See Railroad Retirement Bd. v. Fritz (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect").

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies

them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Louisville Gas & Elec. Co. v. Coleman (1928).

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " Sweatt v. Painter (quoting Shelley v. Kraemer). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of'equal protection of the laws is a pledge of the protection of equal laws."' Skinner v. Oklahoma ex rel. Williamson (quoting Yick Wo v. Hopkins).

Davis v. Beason, not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In Davis, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. Brandenburg v. Ohio (per curiam). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. Dunn v. Blumstein; cf. United States v. Brown; United States v. Robel. To the extent Davis held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See Richardson v. Ramirez.

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of'equal protection of the laws' means anything, it must at the very least mean that a bare . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Department of Agriculture v. Moreno. Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose

on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, Kadrmas v. Dickinson Public Schools, and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . [is] obnoxious to the prohibitions of the Fourteenth Amendment . ." Civil Rights Cases.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting. The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a " 'bare . desire to harm' " homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by

normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality, is evil. I vigorously dissent.

The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the State Constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i. e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.

The Court might reply that the example I have given is not a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the substantive discrimination against relatives (i. e., the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the electoral-procedural discrimination against them (i. e., the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral-procedural discrimination" has not hitherto been heard of: A law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something special —something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort

to a higher decisionmaking level. That proposition finds no support in law or logic.

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In Bowers v. Hardwick, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling Bowers,and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling, Tr. of Oral Arg. 53. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: "If the Court [in Bowers] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." Padula v. Webster, .) And a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter Bowers with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual "orientation." Some Courts of Appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference. See Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati, CA6 1995) ("[F]or purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct"); Steffan v. Perry, -690 (CADC 1994). The Supreme Court of Colorado itself appears to be of this view. See 882 P. 2d ("Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons") (emphasis added).

The foregoing suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits

what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice.

First, as to its eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct —that is, it prohibits favored status for homosexuality.

But though Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. See 1971 Colo. Sess. Laws, ch. 121, § 1. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae in Bowers v. Hardwick,O. T. 1985, No. 85-140, p. 25, n. 21 (antisodomy statutes are "unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources"); Kadish, The Crisis of Overcriminalization, 374 The Annals of the American Academy of Political and Social Science 157, 161 (1967) ("To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution").

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. See Aspen Municipal Code § 13-98 (1977); Boulder Rev. Municipal Code §§ 12-1—1 to 12-1—11 (1987); Denver Rev. Municipal

Code, Art. IV, §§ 28-91 to 28-116 (1991). The phenomenon had even appeared statewide: The Governor of Colorado had signed an executive order pronouncing that "in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form," and directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on, among other things, "sexual orientation." Executive Order No. D0035 (Dec. 10, 1990). I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never happened before.

The Court today, announcing that Amendment 2 "defies . conventional [constitutional] inquiry," and "confounds [the] normal process of judicial review," employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values. The Court's stern disapproval of "animosity" towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in Murphy v. Ramsey, rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

"[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing

more than " 'a bare . desire to harm a politically unpopular group,' " quoting Department of Agriculture v. Moreno, is nothing short of insulting. (It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2, see App. to Pet. for Cert. C-18.)

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6 in 1995 Handbook, Association of American Law Schools. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, see, e. g., Employment NonDiscrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments of 1975, H. R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990, see 42 U. S. C. § 12211(a) (1988 ed., Supp. V).

Lawrence v. Texas

JUSTICE KENNEDY delivered the opinion of the Court. Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21 (a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or"(B) the penetration of the genitals or the anus of another person with an object." § 21 (1).

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in Bowers.

The historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

This emerging recognition should have been apparent when Bowers was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213 Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as Amicus Curiae 15-16.

In Bowers the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U. S.. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. -198, n. 2 ("The history

of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H. R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. State v. Morales, 869 S. W. 2d 941, 943.

Two principal cases decided after Bowers cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define

the attributes of personhood were they formed under compulsion of the State."

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right.

The second post-Bowers case of principal relevance is Romer v. Evans. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or

control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Obergefell v. Hodges

576 U.S. ____ (2015)

JUSTICE KENNEDY, delivered the opinion of the Court. The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, infra. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. DeBoer v. Snyder, The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. ____ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented

by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a

plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14-556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9-17 (2000); S. Coontz, Marriage, A History 15-16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as Amici Curiae 16-19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as Amicus Curiae 5-28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as Amici Curiae 7-17.

In the late 20th century, following substantial cultural and political develop-

ments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in Bowers v. Hardwick. There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in Romer v. Evans, the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled Bowers, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." Lawrence v. Texas.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. Baehr v. Lewin, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See Goodridge v. Department of Public Health, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, infra. Two Terms ago, in United States v. Windsor, 570 U. S. ____ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." ____ (slip op.).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see Citizens for Equal Protection v.

Bruning, -868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, infra.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See Duncan v. Louisiana (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., Eisenstadt v. Baird; Griswold v. Connecticut (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Poe v. Ullman (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See Lawrence. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In Loving v. Virginia, which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in Zablocki v. Redhail, which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in Turner v. Safley, which held the right to marry was abridged by regulations limiting the

privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., M. L. B. v. S. L. J.; Cleveland Bd. of Ed. v. LaFleur (1974); Griswold; Skinner v. Oklahoma ex rel. Williamson; Meyer v. Nebraska.

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., Lawrence; Turner; Zablocki; Loving; Griswold. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. See 388 U. S.; see also Zablocki (observing Loving held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." Goodridge, 440 Mass., 798 N. E. 2d.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See Windsor, -____ (slip op.). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. Loving

("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to Griswold v. Connecticut, which held the Constitution protects the right of married couples to use contraception. 381 U. S.. Suggesting that marriage is a right "older than the Bill of Rights," Griswold described marriage this way:

"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

And in Turner, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S.. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." Windsor____ (slip op.). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Lawrence invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S.. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See Pierce v. Society of Sisters; Meyer. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." Zablocki (quoting Meyer). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor____ (slip op.). Marriage also affords the permanency and stability im-

portant to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as Amici Curiae 22-27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as Amicus Curiae 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See Windsor____ (slip op.).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

"There is certainly no country in the world where the tie of marriage is so much respected as in America . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In Maynard v. Hill, the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the MaynardCourt said, has long been " 'a great public institution, giving character to our whole civil polity.' " This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our

history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as Amicus Curiae 6-9; Brief for American Bar Association as Amicus Curiae 8-29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See Windsor, -____ (slip op.). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to Washington v. Glucksberg, which called for a " 'careful description' " of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14-556, p. 8. Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. Loving did not ask about a "right to interracial marriage"; Turner did not ask about a "right of inmates to marry"; and Zablocki did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also

Glucksberg (Souter, J., concurring in judgment); -792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See Loving 388 U. S.; Lawrence.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See M. L. B.; -129 (KENNEDY, J., concurring in judgment); Bearden v. Georgia. This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In Lovingthe Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S.. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." The reasons why marriage is a fundamental right became more clear and compelling

from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in Zablocki. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S.. It was the essential nature of the marriage right, discussed at length in Zablocki, see -387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in Reed v. Reed, O. T. 1971, No. 70-4, pp. 69-88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. §53-501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., Kirchberg v. Feenstra; Wengler v. Druggists Mut. Ins. Co.,446 U. S. 142 (1980); Califano v. Westcott; Orr v. Orr; Califano v. Goldfarb (plurality opinion); Weinberger v. Wiesenfeld; Frontiero v. Richardson. Like Loving and Zablocki, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In M. L. B. v. S. L. J., the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S.. In Eisenstadt v. Baird, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S.. And in Skinner v. Oklahoma ex rel. Williamson, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U. S..

In Lawrence the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S.. Although Lawrence elaborated its holding under the Due Process

Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See Lawrence therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., Zablocki; Skinner.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See DeBoer, 772 F. 3d.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, infra.Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 amici make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities— have

devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in Schuette v. BAMN, 572 U. S. ____ (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." - (slip op.). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as Schuette also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." ____ (slip op.). Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. ____ (slip op.). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Ed. v. Barnette,319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In Bowers, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., 190-195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the Bowers Court. That is why Lawrence held Bowers was "not correct when it was decided." Although Bowers was eventually repudiated in Lawrence, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like Bowers,would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See Kitchen v. Herbert, CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-

sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. Williams v. North Carolina (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting. Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through

marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." Lochner v. New York (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." Id.,at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes

for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

Petitioners and their amici base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—who decides what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. Town of Greecev. Galloway, 572 U. S. **,** (2014) (slip op.).

As the majority acknowledges, marriage "has existed for millennia and across civilizations." For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See ; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." United States v. Windsor, 570 U. S. **,** (2013) (slip op.).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries ; J. Locke, Second Treatise of Civil Government §§78-79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." Windsor, (slip op.) (quoting In re Burrus (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See DeBoer v. Snyder, -399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See Jones v. Hallahan, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . promoting domestic felicity, and . securing the maintenance and education of children."

1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," Murphy v. Ramsey,114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," Maynard v. Hill. We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. Loving v. Virginia; see Skinner v. Oklahoma ex rel. Williamson. More recent cases have directly connected the right to marry with the "right to procreate." Zablocki v. Redhail.

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. Loving.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. Shortly after this Court struck down racial restrictions on marriage in Loving, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to Loving, and this Court summarily dismissed an appeal. Baker v. Nelson.

In the decades after Baker, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003

interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.". That decision interpreted the Constitution correctly, and I would affirm.

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as Lochner v. New York. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

Petitioners'"fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an enumerated constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution.

See They argue instead that the laws violate a right implied by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." Reno v. Flores. The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. Snyder v. Massachusetts.

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Washington v. Glucksberg (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in Dred Scott v. Sandford, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . could hardly be dignified with the name of due process of law." In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently Lochner v. New York, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., 61. In Lochner it-

self, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law."

The dissenting Justices in Lochner explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. The Constitution "is not intended to embody a particular economic theory. . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." -76.

In the decades after Lochner, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." Adkins v. Children's Hospital of D. C. (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the Lochner line of cases left "no alternative to regarding the court as a . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa; see Day-Brite Lighting, Inc. v. Missouri ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical of Okla., Inc..

Rejecting Lochner does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating Lochner's error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." Collins v. Harker Heights. Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in Glucksberg, many other cases both before and after have adopted the same approach. See, e.g., Moore v. East Cleveland (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); Troxel v. Granville (2000) (KENNEDY, J., dissenting) (consulting " '[o]ur Nation's history, legal traditions, and practices' " and concluding that "[w]e owe it to the Nation's domestic relations legal structure to proceed with caution" (quoting Glucksberg)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few "guideposts for responsible decisionmaking in this unchartered area," Collins, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," Moore, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, does not provide a meaningful constraint on a judge, for "what he is really likely to be'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." Griswoldv. Connecticut (Harlan, J., concurring in judgment).

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of Lochner.

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." Turner v. Safley; Zablocki,434 U. S.; see Loving. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In Loving, the Court held that racial restrictions on the right to marry lacked a

compelling justification. In Zablocki, restrictions based on child support debts did not suffice. In Turner, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in Zablocki and Turner did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in Loving define marriage as "the union of a man and a woman of the same race." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners."

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage as traditionally defined violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See Windsor, (ALITO, J., dissenting) (slip op.) ("What Windsor and the United States seek is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

The majority suggests that "there are other, more instructive precedents" informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." Griswold. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. -486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone."

The Court also invoked the right to privacy in Lawrence v. Texas, which struck down a Texas statute criminalizing homosexual sodomy. Lawrence relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . in the most private of places, the home."

Neither Lawrence nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their

families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in Poe v. Ullman. As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in Glucksberg. It is revealing that the majority's position requires it to effectively overrule Glucksberg,the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: Lochner v. New York. The majority opens its opinion by announcing petitioners' right to "define and express their identity." The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be free in his person and in his power to contract in relation to his own labor." Lochner (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear

"as we learn [the] meaning" of liberty. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in Lochner. See 198 U. S. ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the Lochner era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

Near the end of its opinion, the majority offers perhaps the clearest insight into

its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." This argument again echoes Lochner, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act."

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in Lochner, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." As petitioners put it, "times can blind." But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

"Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See Northwest Austin Municipal Util. Dist. No. One v. Holder. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States'"legitimate state interest" in "preserving the traditional institution of marriage." Lawrence (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." Republican Party of Minn. v. White (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description— and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" amicus briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high

time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." The answer is surely there in one of those amicus briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." Schuette v. BAMN.

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." Post (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator

observed about another issue, "The political process was moving . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N. C. L. Rev. 375, 385-386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority— actually spelled out in the Constitution.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "exercise" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage

that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See post (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting. I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact— and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied

(as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

The Constitution places some constraints on self-rule— constraints adopted by the People themselves when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," denying "Full Faith and Credit" to the "public Acts" of other States,4 prohibiting the free exercise of religion,5 abridging the freedom of speech,6 infringing the right to keep and bear arms,7 authorizing unreasonable searches and seizures,8 and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove that issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

"[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."

"[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the Peo-

ple never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions. ."14 One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."15 The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."16 Thus, rather than focusing on the People's understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, in the majority's view, prohibit States from defining marriage as an institution consisting of one man and one woman.

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices'"reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers18 who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans19), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; they

say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003 They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds— minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly— could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices know that limiting marriage to one man and one woman is contrary to reason; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago,21cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."23 (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."24 (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except

those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."26 With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting. The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise

children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely because of the government. They want, for example, to receive the State's imprimatur on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

The suggestion of petitioners and their amici that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "`freeborne English women" and "`Negro Sla[v]es"' was passed as part of the very act that authorized lifelong slavery in the colony. -20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe.

Congress's Enforcement Power

City of Boerne v. Flores

Justice Kennedy delivered the opinion of the Court. A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488, 42 U. S. C. § 2000bb et seq. The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order

to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the commission must preapprove construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The Archbishop brought this suit challenging the permit denial in the United States District Court for the Western District of Texas.

The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality. The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit. The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal and the Fifth Circuit reversed, finding RFRA to be constitutional. We granted certiorari, and now reverse.

Smith held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law," nor deny any person "equal protection of the laws."

In defense of the Act, respondent the Archbishop contends, with support from the United States, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under Smith It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations. It is further contended that Congress' § 5 power is not limited to remedial or preventive legislation.

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress, Katzenbach v. Morgan. In Ex parte Virginia (1880), we explained the scope of Congress' § 5 power in the following broad terms:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial

or invasion, if not prohibited, is brought within the domain of congressional power."

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzer. For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U. S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, South Carolina v. Katzenbach (1966), despite the facial constitutionality of the tests under Lassiter v. Northampton County Bd. of Elections. We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. South Carolina v. Katzenbach (upholding several provisions of the Voting Rights Act of 1965); Katzenbach v. Morgan (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); Oregon v. Mitchell (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); City of Rome v. United States (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); see also James Everard's Breweries v. Day (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." Oregon v. Mitchell (opinion of Black, J.). In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in Cantwell v. Connecticut, that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment." See also United States v. Price (there is "no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal quotation marks and citation omitted)).

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," South Carolina v. Katzenbach. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft Amendment to the House of Representatives on behalf of the Joint Committee:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the Civil Rights Cases, 109 U. S. 3 (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . ." -14. The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. See also United States v. Reese; United States v. Harris; James v. Bowman. Although the specific holdings of these early cases might have been superseded or modified, see, e. g., Heart of Atlanta Motel, Inc. v. United States; United States v. Guest, their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been

questioned.

Recent cases have continued to revolve around the question whether § 5 legislation can be considered remedial. In South Carolina v. Katzenbachwe emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . it reflects." There we upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests. The Act's new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by Smith. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See Church of Lukumi Babalu Aye, Inc. v. Hialeah ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be ap-

propriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See City of Rome (since "jurisdictions with a demonstrable history of intentional racial discrimination . create the risk of purposeful discrimination," Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions). Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." Civil Rights Cases.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. See Smith ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is'central' to his personal faith?"); ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine . .") (O'Connor, J., concurring in judgment). Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says . many laws will not meet the test. . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." Laws valid under Smith would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in Smith but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional

conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. Cf. Washington v. Davis. RFRA's substantial-burden test, however, is not even a discriminatory-effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

United States v. Morrison

529 U.S. 598 (2000)

Chief Justice Rehnquist delivered the opinion of the Court.

Because we conclude that the Commerce Clause does not provide Congress with authority to enact §13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under §5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact §13981.

The principles governing an analysis of congressional legislation under §5 are well settled. Section 5 states that Congress may " 'enforce,' by'appropriate legislation' the constitutional guarantee that no State shall deprive any person of'life, liberty or property, without due process of law,' nor deny any person'equal protection of the laws."' City of Boerne v. Flores. Section 5 is "a positive grant of legislative power," Katzenbach v. Morgan, that includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrud[e] into'legislative spheres of autonomy previously reserved to the States."' Flores (quoting Fitzpatrick v. Bitzer). However, "[a]s broad as the congressional enforcement power

is, it is not unlimited." Oregon v. Mitchell. In fact, as we discuss in detail below, several limitations inherent in §5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' §5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

As our cases have established, state-sponsored gender discrimination violates equal protection unless it serves "important governmental objectives and _ the discriminatory means employed" are "substantially related to the achievement of those objectives." However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See Flores (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief that the Amendment "does not concentrate power in the general government for any purpose of police government within the States"). Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, United States v. Harris, and the Civil Rights Cases, 109 U.S. 3 (1883). In Harris, the Court considered a challenge to §2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." We concluded that this law exceeded Congress' §5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." In so doing, we reemphasized our statement from Virginia v. Rives, that

"these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals."

We reached a similar conclusion in the Civil Rights Cases. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the §5 enforcement power. ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment"). See also, e.g., Romer v. Evans ("[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); Lugar v. Edmondson Oil Co. ("Careful adherence to the'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); United States v. Cruikshank ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society").

The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur-and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' §5 authority. They rely on United States v. Guest for the proposition that the rule laid down in the Civil Rights Cases is no longer good law. In Guest, the Court reversed the construction of an indictment under 18 U.S.C. § 241 saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." Three Members of the Court, in a separate opinion by Justice Brennan, expressed the view that the Civil Rights Cases were wrongly decided, and that Congress could under §5 prohibit actions by private individuals. Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could "punis[h] all conspiracies-with or without state action-that interfere with Fourteenth Amendment rights." Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

"The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part I seems to me, to say the very least, extraordinary."

Though these three Justices saw fit to opine on matters not before the Court in Guest, the Court had no occasion to revisit the Civil Rights Cases and Harris,

having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contain[ed] an express allegation of state involvement." The Court concluded that the implicit allegation of "active connivance by agents of the State" eliminated any need to decide "the threshold level that state action must attain in order to create rights under the Equal Protection Clause." All of this Justice Clark explicitly acknowledged.

To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the Civil Rights Cases were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast any doubt upon the enduring vitality of the Civil Rights Cases and Harris.

Petitioners also rely on District of Columbia v. Carter. Carter was a case addressing the question whether the District of Columbia was a "State" within the meaning of Rev. Stat. §1979, 42 U.S.C. § 1983-a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting Guest that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the §5 power contained in the Civil Rights Cases is correct:

"But where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular [s]tate legislation or [s]tate action in reference to that subject, the power given is limited by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers."

Petitioners alternatively argue that, unlike the situation in the Civil Rights Cases, here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting §13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

"[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." (statement of

Rep. Garfield).

"The Legislature of South Carolina has passed a law giving precisely the rights contained in your'supplementary civil rights bill.' But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it." (statement of Sen. Sumner).

But even if that distinction were valid, we do not believe it would save §13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers." Civil Rights Cases. Or, as we have phrased it in more recent cases, prophylactic legislation under §5 must have a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank; Flores. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, §13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the §5 remedies that we have previously upheld. For example, in Katzenbach v. Morgan, Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In South Carolina v. Katzenbach, Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. The remedy was also directed at state officials in those States. Similarly, in Ex parte Virginia, Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the §5 remedy upheld in Katzenbach v. Morganwas directed only to the State where the evil found by Congress existed, and in South Carolina v. Katzenbach the remedy was directed only to those States in which Congress found that there had been discrimination.

Note on other sources of Congressional authority to prohibit discrimination

Jones v. Alfred H. Mayer Co. held that Congress has authority to prohibit the "badges and incidents of slavery" under the 13th Amendment, including the power to regulate private discrimination. Congress also has, of course, broad Commerce Clause powers to regulate economic activity, and a number of civil rights laws have been upheld on that basis. The Voting Rights Act has been upheld and then partially struck down under Congress's enforcement power under the 15th Amendment. See Shelby County v. Holder