

# Constitutional Law Materials

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## Contents

<b>How to Use This Reader</b>	<b>7</b>
<b>The nature of Constitutional Law</b>	<b>9</b>
The subject matter of Constitutional Law and the coverage of our course . . . . .	9
Text + Supreme Court vs. Common Law and a Bunch of States . . . . .	10
The Idea of Limited Government . . . . .	11
Some Basic Historical Facts . . . . .	12
Originalism, Living Constitution, etc. . . . .	13
“Sovereignty” . . . . .	14
Doctrine and theory . . . . .	14
Less doctrine, more argument. . . . .	15
Practical lawyering in Constitutional Law . . . . .	15
Common-law style . . . . .	15
Textual Interpretation . . . . .	16
Goals and Values . . . . .	17
The Upshot . . . . .	17
<b>Marbury v. Madison</b>	<b>18</b>
<b>Lujan v. Defenders of Wildlife</b>	<b>26</b>
<b>Massachusetts v. EPA</b>	<b>31</b>
<b>Luther v. Borden</b>	<b>38</b>
Appendix: some flavor from the proceedings below and notes of the reporter . . . . .	44
<b>Baker v. Carr</b>	<b>49</b>
<b>Justiciability</b>	<b>55</b>
The Five Justiciability Doctrines . . . . .	55
Standing . . . . .	55
Mootness . . . . .	57
Ripeness . . . . .	58
Political question . . . . .	58
<b>Justiciability hypotheses</b>	<b>60</b>
<b>Youngstown Sheet &amp; Tube Co. v. Sawyer</b>	<b>61</b>
<b>Youngstown exercise</b>	<b>68</b>

<b>Zivotofsky v. Kerry</b>	<b>69</b>
<b>INS v. Chadha</b>	<b>75</b>
<b>Free Enterprise Fund v. Public Company Accounting Oversight Board</b>	<b>83</b>
<b>United States v. Nixon</b>	<b>87</b>
<b>Interlude: nonacquiescence</b>	<b>92</b>
<b>Separation of powers and executive power</b>	<b>93</b>
Foundation: The Vesting Clause Question . . . . .	93
Major Areas of Controversy . . . . .	94
A Bit of History . . . . .	95
What's the point? . . . . .	97
Foreign affairs are messy . . . . .	98
Administrative law . . . . .	98
<b>McCulloch v. Maryland</b>	<b>100</b>
<b>Wickard v. Filburn</b>	<b>113</b>
<b>U.S. v. Lopez</b>	<b>116</b>
<b>Gonzales v. Raich</b>	<b>120</b>
<b>New York v. U.S.</b>	<b>132</b>
<b>Printz v. United States</b>	<b>139</b>
<b>South Dakota v. Dole</b>	<b>143</b>
<b>National Federation of Independent Business v. Sebelius</b>	<b>146</b>
Roberts Majority/Plurality/etc. Opinion . . . . .	146
Commerce Clause Argument . . . . .	149
Tax Power Argument . . . . .	154
Spending Clause Argument . . . . .	158
Severability Argument . . . . .	162
Ginsburg/Liberal Justices Concurrence/Dissent . . . . .	164
So-Called "Joint Dissent" . . . . .	179
<b>Summary of Federalism Doctrine</b>	<b>186</b>
Necessary and Proper . . . . .	186
What's Necessary? . . . . .	187
What about Proper? . . . . .	187
Commerce Clause . . . . .	188
Historical Periods . . . . .	188
Key Questions . . . . .	188
What's Commerce? . . . . .	189
What's interstate? . . . . .	189
Interlude: The Substantial Effects Test . . . . .	189
How Much Deference? . . . . .	190
Indirect Regulation? . . . . .	190
The Demand for a Limiting Principle . . . . .	190

Where are we going? . . . . .	191
Summary of “black-letter principles” . . . . .	192
The Dormant Commerce Clause (what?) . . . . .	192
<b>Lopez hypo</b>	<b>193</b>
<b>Commandeering</b>	<b>194</b>
Anti-Commandeering and Sanctuary Cities . . . . .	194
Questions on the Tenth Amendment: . . . . .	194
Notes on the major cases . . . . .	195
New York v. United States . . . . .	195
Prinz v. United States . . . . .	195
<b>Commandeering hypos</b>	<b>196</b>
<b>Spending Clause</b>	<b>197</b>
<b>Notes on NFIB v. Sebelius</b>	<b>197</b>
Basics of the ACA . . . . .	197
The Challenge in NFIB . . . . .	199
<b>Brown v. Board of Education</b>	<b>200</b>
<b>Fisher v. Univ. of Tex. at Austin</b>	<b>204</b>
<b>Bolling v. Sharpe</b>	<b>226</b>
<b>Washington v. Davis</b>	<b>227</b>
<b>Alexander v. Louisiana</b>	<b>232</b>
<b>Equal Protection of the Laws I</b>	<b>234</b>
Let’s be originalist for a second. . . . .	234
Classification vs subordination . . . . .	235
Actually analyzing EPC cases . . . . .	236
More and less suspect classifications . . . . .	236
Levels of scrutiny . . . . .	237
Summary of strict scrutiny . . . . .	238
<b>Exercise: Prison Segregation</b>	<b>239</b>
<b>Exercise: Racial School Acceptance</b>	<b>240</b>
<b>Exercise: Laundry</b>	<b>241</b>
<b>Exercise: Rustville</b>	<b>242</b>
<b>Exercise: Affirmative Action</b>	<b>243</b>
<b>Shelley v. Kraemer</b>	<b>244</b>
<b>State Action</b>	<b>249</b>
<b>Exercise: Noncompete</b>	<b>251</b>

<b>Exercise: Racist Gated Community</b>	<b>252</b>
<b>Exercise: Racist jeweler</b>	<b>253</b>
<b>Exercise: Racist political party</b>	<b>254</b>
Note on this exercise . . . . .	254
<b>United States v. Virginia</b>	<b>255</b>
<b>Equal Protection part II: Gender, intermediate scrutiny</b>	<b>285</b>
Intermediate scrutiny . . . . .	285
Compensatory remedies for women but not for people of color?? . . . . .	285
Why intermediate scrutiny? . . . . .	286
What counts as sex/gender discrimination? . . . . .	287
Some more sex discrimination cases . . . . .	288
<b>Exercise: Senior Executive Service</b>	<b>290</b>
<b>Exercise: Transgender Hair Discrimination</b>	<b>291</b>
<b>United States v. Carolene Products Co.</b>	<b>292</b>
<b>Equal Protection 3: Rational Basis</b>	<b>293</b>
Rational basis is easy . . . . .	294
Animus, Rational basis with “bite” . . . . .	294
<b>Griswold v. Connecticut</b>	<b>297</b>
<b>Roe v. Wade</b>	<b>311</b>
<b>Washington v. Glucksberg</b>	<b>323</b>
<b>Fundamental Rights</b>	<b>343</b>
What’s a fundamental right? . . . . .	343
Discovering new fundamental rights . . . . .	344
Warning on some terminological overlap . . . . .	344
Breaking the traditional story down . . . . .	344
Finding a doctrinal home? . . . . .	345
Is there a textual justification for this stuff? . . . . .	345
Strict Scrutiny, wouldn’t it be nice . . . . .	346
A little more obligatory material on Lochner . . . . .	348
Should there be economic fundamental rights? . . . . .	348
One enumerated economic right (PROPERTY) . . . . .	349
What’s a public use? . . . . .	349
What’s a taking? . . . . .	350
<b>Exercise: Career Counseling</b>	<b>352</b>
<b>Exercise: Flipping Houses</b>	<b>353</b>
<b>Romer v. Evans</b>	<b>354</b>
<b>Lawrence v. Texas</b>	<b>366</b>

<b>Obergefell v. Hodges</b>	<b>372</b>
<b>San Antonio Independent School District v. Rodriguez</b>	<b>397</b>
<b>First Amendment: Free Speech</b>	<b>432</b>
Content-based regulation . . . . .	432
Public Forums . . . . .	433
Time, Place, Manner . . . . .	433
Organizing free speech law. . . . .	434
Kinds of speech . . . . .	434
Kinds of regulation . . . . .	438
<b>Exercise: Volunteer Labor</b>	<b>441</b>
<b>Exercise: Crypto</b>	<b>442</b>
<b>Exercise: Solomon Amendment</b>	<b>443</b>
<b>McCreary County v. ACLU</b>	<b>444</b>
<b>The Establishment Clause</b>	<b>449</b>
The Lemon test . . . . .	449
Theoretical foundations . . . . .	450
<b>Employment Division v. Smith</b>	<b>452</b>
<b>Burwell v. Hobby Lobby</b>	<b>461</b>
<b>Church of the Lukumi Babalu Aye, Inc. v. Hialeah</b>	<b>469</b>
<b>Fulton v. Philadelphia</b>	<b>477</b>
<b>Free Exercise</b>	<b>492</b>
Is there a tension between Free Exercise and Establishment? . . . . .	492
Free Exercise doctrine basics . . . . .	492
The old doctrine: some accommodations . . . . .	493
The modern doctrine: no accommodations . . . . .	493
RFRA . . . . .	494
No judicial theology . . . . .	494
IS ANY OF THIS TRUE ANY MORE?? . . . . .	495
<b>McDonald v. City of Chicago</b>	<b>496</b>
<b>Incorporation and Second Amendment</b>	<b>530</b>
Privileges and Immunities: the Supreme Court's biggest screwup? . . . . .	530
Due Process incorporation . . . . .	531
Total vs partial incorporation . . . . .	531
Second Amendment . . . . .	531
Second Amendment after Reconstruction . . . . .	532
Bear arms for what purpose? . . . . .	532
Onto McDonald. . . . .	533
<b>Exercise: Many Gun Regulations</b>	<b>534</b>

<b>Heart of Atlanta Motel v. United States</b>	<b>535</b>
<b>Jones v. Alfred H. Mayer Co.</b>	<b>540</b>
<b>Katzenbach v. Morgan</b>	<b>546</b>
<b>Shelby County v. Holder</b>	<b>549</b>
<b>City of Boerne v. Flores</b>	<b>563</b>
<b>Civil rights enforcement powers</b>	<b>568</b>
<b>Ableman v. Booth</b>	<b>569</b>
<b>Cooper v. Aaron</b>	<b>575</b>
<b>Planned Parenthood v. Casey</b>	<b>580</b>
<b>Korematsu v. United States</b>	<b>627</b>
<b>Trump v. Hawaii</b>	<b>634</b>
<b>Some Doctrines we Skipped</b>	<b>646</b>
Eleventh Amendment and sovereign immunity . . . . .	646
How did we get here? . . . . .	646
What's The Actual Doctrine? . . . . .	647
Practical Sovereign Immunity Lawyering . . . . .	647
Wrap-up . . . . .	648
Dormant Commerce Clause . . . . .	648
What's the Black-Letter Law? . . . . .	648
What's a discrimination against interstate commerce? . . . . .	649
What's the market participant exception? . . . . .	650
Tell me more about burdening interstate commerce. . . . .	650
Is there anything else I need to know? . . . . .	650
Is the Dormant Commerce Clause Textually Justified? . . . . .	651
Preemption . . . . .	653
Different kinds of preemption. . . . .	653
Legislative intent and statutory interpretation . . . . .	655
Procedural Due Process . . . . .	656
What interests? . . . . .	656
Property interests: summarized . . . . .	657
How much process is "due?" . . . . .	658
What counts as a deprivation? . . . . .	659
Procedural Due Process, Equal Protection, Separation of Powers . . . . .	659
Addendum: an algorithm for PDP problems . . . . .	662

## How to Use This Reader

This document compiles materials for the Northwestern Law Spring 2022 Constitutional Law class taught by Paul Gowder.

This document and the Constitutional Law class assume a basic knowledge of the history and workings of the United States government at least at the level of an introductory college-level Political Science course such as “Introduction to American Politics.” For students who lack this knowledge, some free resources that may be useful (I have not carefully reviewed these, and offer no warranties) include:

- MIT’s OpenCourseware (online lecture notes) for an introductory American Politics course.<sup>1</sup>
- Videos and notes from Harvard University’s introduction to American Government on edX.<sup>2</sup>
- The open textbook, American Government and Politics in the Information Age.<sup>3</sup>

For a deeper view, I would be remiss to not mention my own recently published book, *The Rule of Law in the United States: An Unfinished Project of Black Liberation*, which covers a significant amount of American constitutional history through an approximately critical race lens that focuses on the ongoing effort of Black Americans to obtain the protections of equal law. You can download an open access (that is, free) PDF from <https://rulelaw.us>.

This cases in this collection were collected and edited by me for the purposes of this class. The edits are often, but not always, light (in that very little of the content is removed from many of the cases; some are effectively whole cases), but aggressive with respect to quotes and citations. In particular, I’ve tried to get rid of effectively all citation noise except where I think that seeing them is helpful to the learning process. Also, some of the citations were removed via automated tools written by a highly unprofessional programmer (me), which may have introduced errors.<sup>4</sup> I’ve gone over the resulting text, and had TAs do so as well, but that doesn’t preclude errors entirely. The possibility of quote and citation glitches is the tradeoff for not having to pay hundreds of dollars for a professionally copyedited casebook.

Moreover, my edits are unmarked. As such, please do not rely on the text of cases in this reader for the accuracy of citations or quotes within cases. (Obviously, I expect you to rely on the text as a fair representation of the justices’s arguments!) And if it looks like a Justice is just asserting some random fact, there’s a very good chance that I cut out the citation.

This casebook/reader/thingy is entirely composed of U.S. Supreme Court cases (which are not subject to copyright) and materials written by me. My own materials are ©[Paul Gowder,] (<https://gowder.io>) 2017-2022 and are freely sharable under the Creative Commons Attribution 4.0 International (CC BY 4.0) License.<sup>5</sup>

These materials may be downloaded from <https://courses.gowder.io/conlaw>.

Please note that assignments from these materials refer to **top level items in the table of contents**. Don’t rely on page numbers or the like, as I will have a team of TAs actively working on cleaning them up during the class, and so new versions may be issued with different pagination on the fly.

Finally, you’ll observe that the notes on cases and on areas of law are placed *after* the relevant cases. This is intentional: in an ideal world, you’d read the cases first, try to make sense of them, then read the summary material, and then go *back* to the cases to look over the relevant sections again and

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<sup>1</sup><https://ocw.mit.edu/courses/political-science/17-20-introduction-to-american-politics-spring-2013/>

<sup>2</sup><https://www.edx.org/course/american-government-harvardx-hks101a-0>

<sup>3</sup><https://open.umn.edu/opentextbooks/BookDetail.aspx?bookId=64>

<sup>4</sup>If you’re really curious, and you happen to know some programming, you can see the numerous hacked-together python scripts that I threw at pieces of this at <https://github.com/paultopia/casebook-14amend> — have fun!

<sup>5</sup><https://creativecommons.org/licenses/by/4.0/>

solidify your understanding. I do realize, however, that this process might be more aspirational than real given the time pressures under which law students work.



## The nature of Constitutional Law

### The subject matter of Constitutional Law and the coverage of our course

Constitutional law is the law that governs the government itself.

Consider the distinction between “public law” and “private law.” Most of the 1L classes are “private law” in a strong sense: they govern people’s relationships to each other. Thus, contract and property law govern the voluntary relationships people create with one another, and in contract law we sometimes even say that people make their own private law. Tort law, in that sense, governs the involuntary or unintentional relationships people have with one another.

Criminal law and civil procedure are “public law” in a weak sense: they govern the relationship between people and the government. But the governing goes all in one direction: both criminal law and civil procedure involve the government ordering people not to do things (kidnap and kill in one case, file frivolous lawsuits in the other). The government itself isn’t ordered to do things.

By contrast, Constitutional law is about as public as public law gets, it’s actually about *the government* being ordered about. In a sense, you can think of it as the flip side of criminal law: criminal law is the government ordering people about, and punishing them for wrongs against the public; Constitutional law is the people (as a democratic citizenry) ordering the government about, and suing it for wrongs against the law that governs its behavior.<sup>6</sup>

The word “Constitution” itself explains part of what Constitutional law does: it *constitutes*, that is, *establishes, forms* the United States Government. In that sense, the Constitution is the basic description of how the sovereign people of the United States have established their government—it decrees, for example, that federal statutes shall be passed by majorities of both houses of Congress and signed by the President, and in doing so establishes the only way that federal statutes get made—trying to enact a federal law some other way wouldn’t work.<sup>7</sup>

Third, the U.S. Constitution is *higher law*. By this, I mean that it is the law that governs laws themselves, and not just their procedural enactment (like “laws must be passed by a majority of both houses of Congress”), but also their substance (like “laws may not establish an official religion”). If another law conflicts with the Constitution, that other law must give way. This hierarchy is itself expressed in the Constitution’s Supremacy Clause.

The U.S. isn’t the only country to have a constitution. Some of the ideas underlying constitutional government go back millennia. For example, Athens of the 4th century B.C. had a distinction between higher laws and mere decrees; even earlier it (arguably) had a form of judicial review. Some countries have constitutional principles without higher law or written documents. For example, in Britain, Parliament is considered sovereign and supreme: it can enact any law it pleases, even to the extreme of doing things like abolishing the monarchy, abandoning basic individual rights, changing the rules of its own elections, etc. However, British lawyers still understand there to be constitutional principles governing how Parliament may do so (forbidding it from—or at least limiting its powers to—enacting laws *retroactively*, for example). To the extent the U.S. invented modern constitutional law, the real

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<sup>6</sup>Administrative law shares this character, but to a lesser degree, since administrative law typically just orders about the executive branch, not, for example, Congress (who wrote it).

<sup>7</sup>We might not even say that enacting a law some other way would even be illegal, it might just be a *nullity*. Like, if I declare myself King Gowder I and start issuing decrees, we wouldn’t say that I’ve handed down unconstitutional laws, we’d just laugh at me and say that I didn’t hand down laws at all. But other kinds of things we say are real but unconstitutional. If the President tries to do a “line-item veto,” for example, we say that he acts unconstitutionally—he tries to use the veto power, but in an impermissible way. You need to become comfortable with this kind of distinction, between what we might call an illegal act that’s sort of within the broad territory of someone’s authority but can be successfully challenged, versus an act that’s so far outside the bounds of what law even colorably authorizes that it can just safely be ignored. You’ll see these ideas in thinking about courts acting without jurisdiction too, and even in areas like family law, where we sometimes talk about a difference between a totally *void* marriage, like trying to marry your dog, and a *voidable* marriage, like a marriage entered into because of fraud. You don’t need an annulment to get out of the marriage with Bruiser.

innovations were having one big written definitive document, having explicitly limited government (more on this in a moment), and having written individual rights in addition to allocations of government power.

We can think of Constitutional Law as having two halves (though that won't track the allocation of our time, these are conceptual halves, not chronological halves). The first half is about the allocation of government powers within the government. When the President and Congress disagree about something, who wins? What about when the Supreme Court gets involved? When the states and federal government disagree, who wins? The classical division of first half questions is into the domain of *federalism*—what the states get to decide, vs. what the feds get to decide—and the domain of *separation of powers*—what Congress gets to decide vs. what the President gets to decide vs. what the Supreme Court (& lower courts underneath it) gets to decide.

Sometimes first half challenges to government action will come from other branches of government. For example, sometimes a state will sue the federal government claiming that the feds have intruded into territory left for the states. Very, very rarely, different branches of the federal government (or the personnel comprising same) can sue one another.<sup>8</sup> But the vast majority of cases involve individuals (or companies, etc.) either suing the government to prevent the enforcement of some law, or defending lawsuits or criminal prosecutions from the government, either way on the grounds that the law the government seeks to enforce is beyond the scope of its authority—that the government, or particular branch of government, trying to boss someone around doesn't have the right to do so.

By contrast, the second half of constitutional law is the law of substantive rights people have, that the government can't violate, even if the law or government action in question would otherwise be within the government's authority but for the right in question. These include both specific rights like free speech and freedom of religion, and more abstract individual-rights constraints on the government, like the principles of due process and equal protection of the laws.

Each state has its own state constitutional law too, but we won't cover that here. We also won't cover the criminal stuff (4th Amendment, 5th Amendment right against self-incrimination, etc.). Those are beyond the scope of the traditional constitutional law course—the criminal stuff traditionally lives in your constitutional criminal procedure class or your 1L crim law class. In addition, there are a number of doctrines within the scope of the traditional course that we won't have time to cover in depth, including the dormant commerce clause, privileges and immunities, sovereign immunity, and the First Amendment's speech clause, although some of these are briefly mentioned in the pages that follow.

These materials are also less historically oriented than most constitutional law casebooks. For example, most casebooks include *Lochner v. New York*, which famously expresses a now-discredited doctrine of individual economic rights. While we'll mention *Lochner* at the appropriate point, we won't read it, as I don't believe it's terribly useful for understanding contemporary doctrine and we simply don't have the time.

### Text + Supreme Court vs. Common Law and a Bunch of States

Another important fact about Constitutional Law is that it is not a common-law class. In torts or contracts or property you had a bunch of old rules, many of them passed down from middle-ages England and developed through the wisdom of time.<sup>9</sup> There wasn't a single authoritative written source of those rules (except the UCC in contracts), instead there were a bunch of cases, that could be more or less persuasive. A state has authoritative rules in the form of the rulings of its highest court, but the U.S. in general just has "majority rules" and "minority rules," and states treat one another as persuasive authority only, not authority authority.

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<sup>8</sup>For an example, see this story: <http://www.cnn.com/2016/05/12/politics/obamacare-court-challenge-republicans/>.

<sup>9</sup>Or folly, see e.g. the rule against perpetuities and the pure economic loss rule in negligence law.

Constitutional law isn't like that. There's an authoritative (if vague-ish) text. That text says what the law is. And there is one high authority, the U.S. Supreme Court (though some people still disagree with that), that gets to interpret it (and boy oh boy does it take a lot of interpretation). So there's no "majority rule" or "minority rule," except when the Circuit Courts of Appeals have come to a different answer on something ("a circuit split").<sup>10</sup>

In some sense, this means that judges have less freedom. Common law is judge-made law, and while common law courts respect their own precedents, they're also free to change them when overwhelming policy considerations counsel doing so. By contrast, the Supreme Court has to obey the text. However, the Supreme Court can, and does, change its own interpretation of the text, and in doing so change Constitutional Law ("doctrine") without changing the Constitution itself.<sup>11</sup>

Because there's a text, we have to learn how to interpret text, as authoritative. Interpreting a Constitution or a statute is different from interpreting a case. In particular, we have a bunch of difficult and incredibly controversial questions about what we're trying to do when we interpret authoritative text. This is especially true when we get into ambiguous words (and they all get ambiguous if you poke at them enough). Are we trying to get at what the drafters (people like James Madison) *meant*? Are we trying to get at what ordinary people understand the text to mean? If so, which ordinary people—ordinary people today or ordinary people when it was written? Are we just trying to get at the "plain meaning" of the text? Do we use a dictionary?

Another major feature of the Constitution, as opposed to ordinary statutes, is that the text is often written in terms of *values*. A statute might say "nobody may drive over 65 miles an hour," whereas the Constitution says things like "no cruel and unusual punishment." But "cruel" is a values word, just like the "unreasonable" in "unreasonable searches and seizures" and the "equal" in "equal protection of the laws." A court, in interpreting these Constitutional provisions, has to interpret the underlying *values* those words refer to.<sup>12</sup>

### The Idea of Limited Government

A (even *the*) key principle of Constitutional Law is that the federal government has *limited powers*—each branch, legislative, executive, judicial, has only the powers allocated to it by the Constitution (and those that follow by necessary implication), *nothing else*.

In particular, the federal government does not have a general power to do whatever it wants. Congress cannot legislate on any random subject it wants to: it can only legislate within the scope of its enumerated powers.

This means that there are two kinds of constitutional challenge to any Act of Congress. Let's just call them *first half challenges* and *second half challenges*, to track the division noted above.

A first half challenge is of the form "the Constitution does not grant Congress (or the President, etc.) the authority to act on this subject." For example, suppose Congress passed a "health and fitness" law, requiring every American to get a certain number of minutes of exercise per day. It's pretty clear that law would be unconstitutional: regulating people's exercise habits just isn't within the power of the federal government. This is a first half challenge.

By contrast, suppose Congress passes a law forbidding the sale of the Bible in interstate commerce. There's no first half challenge to this law—regulating interstate commerce is within Congress's enu-

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<sup>10</sup>Of course, in those cases the Supreme Court often decides to hear the issue to resolve it. Federal law is supposed to be uniform.

<sup>11</sup>That's a controversial claim. Some professors essentially think that the Supreme Court does a kind of constitutional amendment.

<sup>12</sup>This is controversial too. In fact, just assume that at least half of constitutional law professors disagree with anything I write in this section.

merated power. But there's a big obvious second half challenge: the First Amendment forbids the government from tampering with freedom of religion.

As far as the federal constitution is concerned, there is no basic first half challenge to a state law. There might be second half challenges, or there might be first half-esque challenges based in state constitutions. In other words, as far as the federal constitution is concerned, the states have a *police power*—a term that just means “the general power to legislate for the public good” (it's not about cops specifically). That “police power” is exactly what the federal government does not have.

The previous paragraph needs to be compromised a little bit, however, because there are some areas that the Constitution commits to the exclusive authority of the federal government. For example, only the federal government can declare war, the states have no such authority. If a state declares war, there will be a kind of first half challenge to that action, but not one rooted in the idea of limited and enumerated powers (the states don't have limited and enumerated powers, they have a general police power); rather, it's rooted in the fact that the Constitution took this power away from the states and gave it to the feds. (There are also many regulatory areas where the states and the federal government both have power.)

The individual branches of the federal government also have limited and enumerated powers that are subsets of the power of the whole. For example, even though the Constitution commits military command to the federal government, that doesn't mean that Congress can go out in the field and start ordering soldiers about. That's something that the Constitution allocates to the President.

### Some Basic Historical Facts

The Union started with the Articles of Confederation, ratified in 1781. It established a very weak central government, very strong states. Essentially the powers of the federal government were to conduct foreign relations and to resolve disputes between the states.

The main problems with the Articles were economic. First, no tax power. Accordingly, no public credit, and, even more dire, no resources for national defense. Second, no power over commerce between states, so states could, for example, impose import duties on one another, get into trade wars with another.

So in 1787, the framers basically went into a locked room and hashed it out. The Constitutional Convention wasn't actually planned by anyone. Basically, Virginia called a conference to talk about how much of a mess the Articles of Confederation were, and then at the conference everyone was like “let's rethink the whole thing.” The Continental Congress eventually got with the program and authorized the convention to recommend revisions to the Articles... one view is that they had a fairly narrow charge, and they just went rogue and redid the whole thing.

The Constitution that came out of the process was very controversial. The states had lots of objections. Many thought the federal government was too powerful, many were upset by the absence of specific protections for individual rights (hence the Bill of Rights that got added right afterward). Lots of states ratified the Constitution with ratification statements saying, basically, “1. protect states rights better, 2. protect individual rights better.”

The Federalist Papers, which get cited a *lot* in con law, were Madison, Hamilton and Jay's defense of the Constitution. They're very widely cited by contemporary Constitutional scholars and sometimes the Supreme Court as a way of getting at what the framing generation thought they were doing when they wrote and ratified the document.

At the time, the political environment had two basic divisions—first the Federalists, who favored a strong central government (and, very roughly, a commercial economy). Exemplars include Alexander Hamilton and George Washington. Second the Anti-Federalists, who favored stronger states (and,

again very roughly, a more agrarian economy). Exemplars include Thomas Jefferson. Madison started out a Federalist but later became a kind of de facto Anti-Federalist and close ally of Jefferson. One huge important issue right at the beginning was the creation of a National Bank—Hamilton was a major advocate, many states strongly opposed. The election of 1800 was a hugely important shift in early power from Federalists to Anti-Federalists.

Of course, the other huge division in the early United States was over slavery. In addition to the nascent moral opposition to slavery, it also gained political significance independent of the brutal oppression of the institution, because it also was part of the reason that the Southern states acted as a bloc to preserve their independent power and outsize influence in the national government (vestiges of which remain today). The constitution was biased in favor of southern states to such an extreme that abolitionists spoke of the “slave power” as an insidious force that controlled their government (and they weren’t wrong). Of course, the most notorious example was the “three-fifths rule,” which provided that slaves would be counted as 3/5 of a person for the purposes of Congressional representation—giving Southern states massively disproportionate representation in the House of Representatives, since they could import slaves, who were not given any of the rights of citizens, and then count them in getting more votes for the masters. The balance of Congressional power between slave and free states continued to influence national politics up to the Civil War, particularly in the question of whether new territories would be admitted as slave or free states. The Missouri Compromise was the most important example of how the fight over the relative influence of slave states or free states would infect the operation of the national government.<sup>13</sup>

### Originalism, Living Constitution, etc.

There are two major theoretical camps about how the Constitution should be interpreted that you should be aware of.

1. *Originalism* is the theory that the meaning of terms in the Constitution should be the meaning given to them by the framing generation. There are many varieties of originalism (it’s a very fertile intellectual field), but the two key positions you should be aware of are: (a) the meaning is what the people who wrote/enacted it (i.e., Madison, Hamilton, etc., plus the other members of the Convention and the legislatures who ratified) thought they were enacting, and (b) the meaning is what the general public would have understood the words to mean at the time. Generally, the second position (“original public meaning”) is more popular today. The late Justice Scalia was one of the most important originalists in America; it’s often (but not necessarily) associated with more conservative Justices and scholars. Originalists can be more “intentionalist,” focusing on what people in the framing generation *meant* by what they wrote, or more “textualist,” focusing on things like dictionary definitions and such from the framing generation.
2. The opposite position is often called *living constitutionalism*, but the label is mostly applied by its opponents (its proponents don’t really have a term for it). Non-originalists/living constitutionalists think that the meaning of terms in the Constitution can change over time as social conditions change and the values of the American people change. It’s typically associated with more liberal Justices and scholars, but, again, there’s no particular reason that it has to be so associated. (Justice Kennedy, a Reagan appointee in the center of the court, was very living constitutionalist in his outlook).

Here’s an example of how the two kinds of views might work. If a judge is trying to figure out whether a punishment violated the 8th Amendment’s prohibition on “cruel and unusual punishments,” an originalist judge would ask questions like “was this punishment customary in 1787?” and “was it considered

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<sup>13</sup>Arguably, some of the protections for thinly populated agricultural states (and small states more generally) as against more densely populated states that would have an advantage in a strict one-person-one-vote electoral system (hence the Senate, and the apportionment of the Electoral College) could be included in the category of supports for slavery too, although given the size of states like Virginia at the founding this could be debated.

cruel in 1787?” They’d use material like the statements of the framers, legislation in the First Congress and the states at the time of the founding, historical works on the extant practices of the criminal justice system in the 18th century, etc. By contrast, a non-originalist judge would ask questions like “what is the best evidence about how much psychological damage this punishment inflicts?” and “have states and/or foreign countries over time moved to ban this practice?” That is, they’d ask about what our current standards are, what we understand today to be “cruel” and what is unusual today.

In reality, in practical constitutional arguments, both lawyers and courts deploy both originalist and non-originalist arguments when they happen to favor the position they think is correct.

## “Sovereignty”

The United States is a system of divided sovereignty between the federal and state governments. But fundamentally, of course, the sovereign is the People. However, do the People exercise their sovereign authority primarily through the nation as a whole or through the states? If you think the answer is “through the states,” then you might have reason to support state claims of autonomy from federal authority; if you say the opposite, you might think the opposite.

Honestly, I think most of this talk about “sovereignty” as a theoretical concept is a bit of a distraction—at most, we might think that the framers had a theory of sovereignty and use it to interpret some ambiguous ideas in the Constitution—but it’s hard to see why we might want to talk about *sovereignty* that way. Consider *Bush v. Gore*, the infamous Supreme Court case that handed the 2000 election to the former by tinkering in how Florida counted its votes: does it really add anything to the debate about its permissibility to start talking about whether the People exercise sovereignty through Florida or through the United States or both?

## Doctrine and theory

Constitutional lawyers tend to understand how doctrine actually works by thinking about how it fits into overarching theories of the structure of rights and responsibility of government.

For example, here’s one way to think of the cases-and-controversies doctrines (advisory opinions, standing, mootness, ripeness—we’ll delve into these very soon). We want the federal courts to not waste their time on cases where there aren’t real issues at stake, and, more importantly, when they develop legal doctrines, we want them to do so in a proper adversary context—that is, with real parties with real issues at stake before the court, who have the incentive to develop evidence and argument, as well as access to real evidence pertinent to the question.

If we have that idea in the background, we can use it to more fully understand how the doctrines get applied. For example: why did Massachusetts have standing to challenge the failure to regulate emissions leading to coastal erosion, while Defenders of Wildlife didn’t have standing to challenge the failure to regulate federally funded foreign products leading to dead fluffy things? Well, Massachusetts clearly had a much more concrete, real interest in keeping its lands from going back to the ocean—and it’s reasonable to think that Massachusetts would have the capacity and incentive to do a much better job of putting forward evidence relating to the consequences of the EPA’s failure to act, etc.<sup>14</sup>

Similarly, we might think that the political question doctrine is fundamentally about how the courts are not fit to decide pure policy questions that lack legal standards—those are the province of the elected branches, it’s just not something courts are capable of doing. We might even think that entertaining policy questions would *corrupt* the courts and undermine their legitimacy: if courts are deciding, for

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<sup>14</sup>Incidentally, this might also explain the court’s maybe-dicta maybe-holding about the special role of states: a state generally has some interest in vindicating a broader set of legal rights than an individual does, as well as a generally greater capacity to produce good evidence and legal argument about such rights. This won’t be clear to you now, but when you read the case it will.

example, on matters of war and peace that aren't amenable to legal resolution, then it compromises their role as neutral arbiters of the law, and undermines their credibility and legitimacy with the people—credibility and legitimacy that they need in order to enforce their rulings on actual legal questions against the other branches.

Having that kind of “theoretical” understanding of the basis of the political question doctrine helps us see how it's applied in real cases. *Baker v. Carr* isn't a political question because the equal protection clause gives the court real legal standards, that aren't just policy judgments, to apply. *Luther v. Borden* is because there aren't legal standards to apply, and because the Constitutional structure anticipates that the political branches will handle fundamental questions like “is group of people X the legitimate government of a state.”

### Less doctrine, more argument.

Students who come to constitutional law often find themselves frustrated by the fact that doctrine in the area is very open-ended—often, the Court seems to be acting more like a political force than a judicial body, and the arguments seem to be very malleable and easy to manipulate. This is a feature of the terrain, and it can be especially jarring in the spring semester of 1L year, when students have just gotten accustomed to the whole doctrine thing through their fall courses—and then it gets taken away in conlaw.

The best way to deal with this is to view Supreme Court decisions as arguments, not as rules of law—and particularly, as arguments about how to apply, or whether to apply, the doctrinal framework that they tell us they're applying. And by putting ourselves in the places of the justices, and of litigants, we learn to apply constitutional modes of reasoning; the ultimate goal being to be able to make our own constitutional arguments, not in terms of little-respected black letter niceties which we can get out of a book, but in terms of the core principles that drive the area of law.

### Practical lawyering in Constitutional Law

In constitutional law, we have three key modes of argument. These modes also show up in other areas of law, but they look a bit different in this course, and different modes are emphasized in different ways in our cases.

The three kinds of argument are:

1. Fact based/common-law style
2. Textual interpretation
3. Goals/values based.

These are all kinds of arguments that show up in cases, and that you will deploy as practicing lawyers. By learning to spot and understand them in the cases we read, you also learn to make them effectively in your eventual practice of law.

#### Common-law style

You should be most familiar with this mode of argument. In contracts, or torts, or property, you spent most of your time reading cases with slightly different facts and trying to figure out how and why those factual differences lead to legal (outcome) differences. In practice, you'll turn to doing the same thing as an advocate: arguing that some should be followed because their facts are similar to the facts of the cases you have, and the results are good for your clients, while arguing that some other cases should be distinguished because their facts are different from your facts, and their results are bad for your clients.

This shows up in constitutional law too, of course. Consider some standing cases: we can distinguish *Massachusetts v. E.P.A.* from *Lujan v. Defenders of Wildlife* because in the one case the plaintiff had a relatively concrete/definite and imminent injury (the undermining of coastal land), while the plaintiff in the other did not (vague plans to maybe go see some animals one day, which would be undermined if the government let them go extinct).

Note that to carry out this kind of argument you have to be able to argue that the facts you rely on are *relevantly* similar or different. For example, you can't distinguish two cases because the plaintiff in one is a redhead and in the other is a blonde.

So why does the difference between *Mass v. EPA* and *Lujan* matter? Sometimes, you can make this relevance argument because the court in a prior case will have explained it: the majority opinion will explicitly say “we make this holding because of fact X, and if it had been fact Y it would have come out differently for the following reasons.”

Sometimes, however, you have to use one of the other modes of argument to fill out the case for why the facts that you want to be relevant actually are relevant. For example, you might want to argue that there's some kind of textual (mode 2) or normative (mode 3) basis for thinking that concrete and definite injuries are more appropriate as a basis of standing than less definite injuries.

#### Textual Interpretation

Sometimes, you've got a written authoritative text, like a statute or the constitution—or sometimes a contract. Then, your goal is often to resolve uncertainty about what the words in that text mean. For example, “is this a regulation of interstate commerce” sometimes requires not just factual comparison to prior cases but also knowing something about what “commerce” means in the given context.

For example, the Court in *Marbury v. Madison* parsed the text of Article III and concluded (in part) that because the text explicitly gave Congress the power to mess around with the Court's *appellate* jurisdiction, but said nothing about a similar power with respect to the Court's *original* jurisdiction, that Congress lacked that power.

Sometimes, you can make an argument from the “plain meaning” of those words. Other times, you can make use of conventional interpretive principles (“canons” or “maxims” of interpretation—like *expressio unius est exclusio alterius*, which is one way to read *Marbury*—the Constitution explicitly said that the Supreme Court had jurisdiction over X, Y, and Z, so it doesn't have jurisdiction over anything else).

More often, however, you'll have to make an argument about *people*. Words don't have meaning on their own, they only have meaning to human beings who use them, and many words have different meanings to different groups of people, in the different social contexts in which they find themselves.

This means that the interpretive argument is at least two arguments:

1. Who counts? If you're doing constitutional law, should we care about the meaning the framers gave the words, ordinary people at the time, ordinary people now, or whoever? If we're doing contract law, do we interpret the terms via trade usage or ordinary usage of the general public?
2. How do we learn the meaning the people who count give to the words? Do we look at dictionaries? Do we look at legislative history? Do we look at the Federalist Papers, at James Madison's letters, at contemporary opinion polls?

Again, we often have to bring other modes of argument to bear on answering these questions (all three are deeply intertwined): we might think that the framers count, for example, because we have normative commitments (mode 3) to an ideal of the rule of law that privileges legal stability and finding the intentions of authoritative lawmakers. We might also/instead use the actions of the framers (or whomever we care about) as common-law style precedent (mode 1) to figure out what meaning they



give to the words in the text—if the First Congress enacted some law that depends on a controversial interpretation of the Necessary and Proper Clause, that gives us some reason to think that they understood the kind of law they enacted to be within the meaning of those words. (When we get there, try to find an argument like that in *McCulloch v. Maryland*!)

#### Goals and Values

Finally, you sometimes have to appeal to explicitly purposive or normative ideas. Sometimes these are structural or conceptual: you might argue our Constitution, taken as a whole, creates a certain kind of balance of state and federal power, or a certain kind of balance of Congress and Presidential power, and then argue from that general claim to the result in a particular case.

Sometimes, these are also values-based. The Constitution explicitly incorporates normative ideas, and sometimes you need to make arguments about what those values mean. Sometimes, for example, a court will just say “we made X constitutional decision because decision Y would have been super-undemocratic”—only usually in much more long-winded terms.

This mode of argument shows up in other areas of law as well. Thus far in your law school careers, you’ve probably heard it referred to as “policy argument.” Think, for example, about debates about what a reasonable person would do in tort law, or about efficient choices of damages in tort or in contract. It’s fair to say, though, that the explicit goals and values-based arguments are much more prominent in constitutional law than your other courses.

Once again, this mode of argument is closely tied in with the others. As you might imagine, there’s a lot of disagreement about these big questions of structure and values; in order to resolve them we often have to appeal to the other modes. Why, for example, should my opinion of what it means to make a decision that accords with democratic values trump yours, if we have equally plausible arguments? Well, one reason might be if we think we can read the authoritative text (mode 2) that way, i.e., because the framers or some other relevant group meant to write it in there.

#### The Upshot

All of these modes of argument show up in our constitutional law cases. By the end of 1L year, your goal should be to become sufficiently fluent in all of them that you can both understand them in the cases and deploy them in advocating for your own positions. Much of what we do in this course will be practice for developing this fluency.

## Marbury v. Madison

5 U.S. 137 (1803)

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

[extended very interesting argument about vested rights]

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties: when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had

depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

It is, then, the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his Commentaries, page 110. defines a mandamus to be “a command issuing in the king’s name from the court of king’s bench, and directed to any person, corporation, or inferior court of judicature within the king’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king’s bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord Mansfield, in 3 Burrow, 1266. in the case of *The King v. Baker et al.*, states, with much precision and explicitness the cases in which this writ may be used.

“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.” In the same case he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice.” Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered \*by some, as an attempt to intrude into the cabinet, and to inter-meddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court “to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of

mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to

original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternative there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares “that no bill of attainder or ex post facto law shall be passed.”

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, \*179 must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.



Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or, to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

## Lujan v. Defenders of Wildlife

504 U.S. 555 (1992)

### Justice SCALIA delivered the opinion of the Court.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA) in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether the respondents here, plaintiffs below, have standing to seek judicial review of the rule.

The ESA seeks to protect species of animals against threats to their continuing existence caused by man. The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. Section 7(a)(2) of the Act then provides, in pertinent part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was promulgated in 1986.

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2), and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation.

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to

the government action or inaction and perhaps on the response of others as well. The existence of one or more of the essential elements of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily “substantially more difficult” to establish.

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary’s motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

Respondents’ claim to injury is that the lack of consultation with respect to certain funded activities abroad “increas[es] the rate of extinction of endangered and threatened species.” Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing. “But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” To survive the Secretary’s summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be “directly” affected apart from their “ ‘special interest’ in th[e] subject.”

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders’ members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,” and that she “will suffer harm in fact as a result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt’s . . . Master Water Plan.” Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and “observed th[e] habitat” of “endangered species such as the Asian elephant and the leopard” at what is now the site of the Mahaweli Project funded by the Agency for International Development (AID), although she “was unable to see any of the endangered species;” “this development project,” she continued, “will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [ , which] may severely shorten the future of these species;” that threat, she concluded, harmed her because she “intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.” When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.”

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Mss. Kelly and Skilbred. That the women “had visited” the areas of the projects before the projects commenced proves nothing. As we have said in a related context, “ ‘[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.’ ” And the affiants’ profession of an “inten[t]” to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the “actual or imminent” injury that our cases require.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing

theories. The first, inelegantly styled “ecosystem nexus,” proposes that any person who uses any part of a “contiguous ecosystem” adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly “in the vicinity” of it. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents’ other theories are called, alas, the “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the “vocational nexus” approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of AID did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic exercise in the conceivable,” but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a “procedural injury.” The so-called “citizen-suit” provision of the ESA provides, in pertinent part, that “any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.” The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a “procedural righ[t]” to consultation in all “persons”—so that anyone can file suit in federal court to challenge the Secretary’s (or presumably any other official’s) failure to follow the assertedly correct consultative procedure, notwithstanding their inability to allege any discrete injury flowing from that failure. To understand the remarkable nature of this holding one must be clear about what it does not rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does

the public at large—does not state an Article III case or controversy. For example, [i]n *Frothingham v. Mellon*, (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case. . . . [T]heir complaint . . . is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”

More recent cases are to the same effect. In *United States v. Richardson* (1974) we dismissed for lack of standing a taxpayer suit challenging the Government’s failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” We held that such a suit rested upon an impermissible “generalized grievance,” and was inconsistent with “the framework of Article III” because “the impact on [plaintiff] is plainly undifferentiated and common to all members of the public.” And in *Schlesinger v. Reservists Committee to Stop the War* (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, “standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance. And only two Terms ago, we rejected the notion that Article III permits a citizen-suit to prevent a condemned criminal’s execution on the basis of”the public interest protections of the Eighth Amendment;” once again, “[t]his allegation raise[d] only the generalized interest of all citizens in constitutional governance . . . and [was] an inadequate basis on which to grant . . . standing.” Whitmore.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court,” as Chief Justice Marshall said in *Marbury v. Madison*, “is, solely, to decide on the rights of individuals.” Vindicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” and to become “ ‘virtually continuing monitors of the wisdom and soundness of Executive action.’

Nothing in this contradicts the principle that “[t]he . . . injury required by Art. III may exist solely

by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” Both of the cases used by [quoted case] as an illustration of that principle involved Congress’s elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law (namely, injury to an individual’s personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.* (1972), and injury to a company’s interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.* (1968)). As we said in *Sierra Club*, “[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”

**Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.**

While it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced.

## Massachusetts v. EPA

549 U.S. 497 (2007)

### **Justice STEVENS delivered the opinion of the Court.**

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species of the most important species of a “greenhouse gas.”

Calling global warming “the most pressing environmental challenge of our time,” a group of States, local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, “the gist of the question of standing” is whether petitioners have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.”

While it does not matter how many persons have been injured by the > challenged action, the party bringing suit must show that the action injures > him in a concrete and personal way. This requirement is not just an empty > formality. It preserves the vitality of the adversarial process by assuring > both that the parties before the court have an actual, as opposed to > professed, stake in the outcome, and that the legal questions presented ... > will be resolved, not in the rarified atmosphere of a debating society, but > in a concrete factual context conducive to a realistic appreciation of the > consequences of judicial action.

Only one of the petitioners needs to have standing to permit us to consider the petition for review. We stress here, as did Judge Tatel below, the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual.

Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction. As Justice Holmes explained in *Georgia v. Tennessee Copper Co.*, (1907), a case in which Georgia sought to protect its citizens from air pollution originating outside its borders:

The case has been argued largely as if it were one between two private > parties; but it is not. The very elements that would be relied upon in a > suit between fellow-citizens as a ground for equitable relief are wanting > here. The State owns very little of the territory alleged to be affected, > and the damage to it capable of estimate in money, possibly, at least, is > small. This is a suit by a State for an injury to it in its capacity of > quasi-sovereign. In that capacity the State has an interest independent > of and behind the titles of its citizens, in all the earth and air within > its domain. It has the last word as to whether its mountains shall be > stripped of their forests and its inhabitants shall breathe pure air.

Just as Georgia’s “independent interest... in all the earth and air within its domain” supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign

territory today. That Massachusetts does in fact own a great deal of the “territory alleged to be affected” only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motorvehicle emissions might well be pre-empted. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez* (1982) (“One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers”).

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the “emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.

With that in mind, it is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both “actual” and “imminent.” There is, moreover, a “substantial likelihood that the judicial relief requested” will prompt EPA to take steps to reduce that risk.

### *The Injury*

The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself, which EPA regards as an “objective and independent assessment of the relevant science,” identifies a number of environmental changes that have already inflicted significant harms, including “the global retreat of mountain glaciers, reduction in snowcover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years ....” Petitioners allege that this only hints at the environmental damage yet to come. According to the climate scientist Michael MacCracken, “qualified scientific experts involved in climate change research” have reached a “strong consensus” that global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, “severe and irreversible changes to natural ecosystems,” a “significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences,” and an increase in the spread of disease. He also observes that rising ocean temperatures may contribute to the ferocity of hurricanes.

That these climate-change risks are “widely shared” does not minimize Massachusetts’ interest in the outcome of this litigation. According to petitioners’ unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts’ coastal land. Because the Commonwealth “owns a substantial portion of the state’s coastal property,” it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be “either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.” Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars.

### *Causation*



EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.

EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.

And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere, according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. That accounts for more than 6% of worldwide carbon dioxide emissions. To put this in perspective: Considering just emissions from the transportation sector, which represent less than onethird of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.

#### *The Remedy*

While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

We moreover attach considerable significance to EPA's "agree[ment] with the President that 'we must address the issue of global climate change,'" and to EPA's ardent support for various voluntary emission-reduction programs. As Judge Tatel observed in dissent below, "EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming."

In sum, at least according to petitioners' uncontested affidavits, the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.

**Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.**

Our modern framework for addressing standing is familiar: "A plaintiff must allege personal injury

fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Applying that standard here, petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency's failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.

Before determining whether petitioners can meet this familiar test, however, the Court changes the rules. It asserts that "States are not normal litigants for the purposes of invoking federal jurisdiction," and that given "Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis."

A claim of *parens patriae* standing is distinct from an allegation of direct injury. Far from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a "quasi-sovereign interest" "apart from the interests of particular private parties." Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III. Focusing on Massachusetts's interests as *quasi-sovereign* makes the required showing here harder, not easier. The Court, in effect, takes what has always been regarded as a necessary condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a sufficient showing for purposes of Article III.

What is more, the Court's reasoning falters on its own terms. The Court asserts that Massachusetts is entitled to "special solicitude" due to its "quasi-sovereign interests," but then applies our Article III standing test to the asserted injury of the State's loss of coastal property. See *ante*, at 1456 (concluding that Massachusetts "has alleged a particularized injury *in its capacity as a landowner*" (emphasis added)). In the context of *parens patriae* standing, however, we have characterized state ownership of land as a "nonsovereign interest[t]" because a State "is likely to have the same interests as other similarly situated proprietors."

On top of everything else, the Court overlooks the fact that our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government. As a general rule, we have held that while a State might assert a quasi-sovereign right as *parens patriae* "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them."

It is not at all clear how the Court's "special solicitude" for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability.

When the Court actually applies the three-part test, it focuses on the State's asserted loss of coastal land as the injury in fact. If petitioners rely on loss of land as the Article III injury, however, they must ground the rest of the standing analysis in that specific injury. That alleged injury must be "concrete and particularized," and "distinct and palpable." Central to this concept of "particularized" injury is the requirement that a plaintiff be affected in a "personal and individual way," and seek relief that "directly and tangibly benefits him" in a manner distinct from its impact on "the public at large." Without "particularized injury, there can be no confidence of a real need to exercise the power of judicial review' or that relief can be framed no broader than required by the precise facts to which the court's ruling would be applied."

The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon "harmful to humanity at large," and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.

If petitioners' particularized injury is loss of coastal land, it is also that injury that must be "actual or imminent, not conjectural or hypothetical."

As to "actual" injury, the Court observes that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming" and that "[t]hese rising seas have already begun to swallow Massachusetts' coastal land." But none of petitioners' declarations supports that connection. One declaration states that "a rise in sea level due to climate change is occurring on the coast of Massachusetts, in the metropolitan Boston area," but there is no elaboration. And the declarant goes on to identify a "significan[t]" non-global-warming cause of Boston's rising sea level: land subsidence. Thus, aside from a single conclusory statement, there is nothing in petitioners' standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture.

The Court's attempts to identify "imminent" or "certainly impending" loss of Massachusetts coastal land fares no better. One of petitioners' declarants predicts global warming will cause sea level to rise by 20 to 70 centimeters by the year 2100. Another uses a computer modeling program to map the Commonwealth's coastal land and its current elevation, and calculates that the high-end estimate of sea level rise would result in the loss of significant state-owned coastal land. But the computer modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters. As an initial matter, if it is possible that the model underrepresents the elevation of coastal land to an extent equal to or in excess of the projected sea level rise, it is difficult to put much stock in the predicted loss of land. But even placing that problem to the side, accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be *certainly impending* to constitute injury in fact."

Petitioners' reliance on Massachusetts's loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability. To establish standing, petitioners must show a causal connection between that specific injury and the lack of new motor vehicle greenhouse gas emission standards, and that the promulgation of such standards would likely redress that injury. As is often the case, the questions of causation and redressability overlap. And importantly, when a party is challenging the Government's allegedly unlawful regulation, or lack of regulation, of a third party, satisfying the causation and redressability requirements becomes "substantially more difficult."

Petitioners view the relationship between their injuries and EPA's failure to promulgate new motor vehicle greenhouse gas emission standards as simple and direct: Domestic motor vehicles emit carbon dioxide and other greenhouse gases. Worldwide emissions of greenhouse gases contribute to global warming and therefore also to petitioners' alleged injuries. Without the new vehicle standards, greenhouse gas emissions—and therefore global warming and its attendant harms—have been higher than they otherwise would have been; once EPA changes course, the trend will be reversed.

The Court ignores the complexities of global warming, and does so by now disregarding the "particularized" injury it relied on in step one, and using the dire nature of global warming itself as a bootstrap for finding causation and redressability. First, it is important to recognize the extent of the emissions at issue here. Because local greenhouse gas emissions disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years, it is global emissions data that are relevant. According to one of petitioners' declarations, domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global greenhouse gas emissions. The amount of global emissions at issue here is smaller still; § 202(a)(1) of the Clean Air Act covers only new motor vehicles and new motor vehicle engines, so petitioners' desired emission standards might reduce only a fraction of 4 percent of global emissions.

This gets us only to the relevant greenhouse gas emissions; linking them to global warming and ul-

timately to petitioners' alleged injuries next requires consideration of further complexities. As EPA explained in its denial of petitioners' request for rulemaking,

“predicting future climate change necessarily involves a complex web of economic and physical factors including: our ability to predict future global anthropogenic emissions of [greenhouse gases] and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health impacts).”

Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.

Redressability is even more problematic. To the tenuous link between petitioners' alleged injury and the indeterminate fractional domestic emissions at issue here, add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States. As the Court acknowledges, “developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century,” at 1458, so the domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners' desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.

Petitioners offer declarations attempting to address this uncertainty, contending that “[i]f the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program.” In other words, do not worry that other countries will contribute far more to global warming than will U.S. automobile emissions; someone is bound to invent something, and places like the People's Republic of China or India will surely require use of the new technology, regardless of cost. The Court previously has explained that when the existence of an element of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” a party must present facts supporting an assertion that the actor will proceed in such a manner. The declarations' conclusory (not to say fanciful) statements do not even come close.

No matter, the Court reasons, because any decrease in domestic emissions will “slow the pace of global emissions increases, no matter what happens elsewhere.” Every little bit helps, so Massachusetts can sue over any little bit.

The Court's sleight-of-hand is in failing to link up the different elements of the three-part standing test. What must be likely to be redressed is the particular injury in fact. The injury the Court looks to is the asserted loss of land. The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, and therefore redress Massachusetts's injury. But even if regulation does reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it likely that the injury in fact—the loss of land—will be redressed. Schoolchildren know that a kingdom might be lost “all for the want of a horseshoe nail,” but “likely” redressability is a different matter. The realities make it pure conjecture to suppose that

EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

## Luther v. Borden

48 U.S. 1 (1849)

Martin Luther, a citizen of the State of Massachusetts, brought an action of trespass against the defendants, citizens of the State of Rhode Island, for breaking and entering the house of Luther.

The defendants filed four pleas in justification, averring, in substance,

- An insurrection of men in arms to overthrow the government of the State by military force
- That, in defence of the government, martial law was declared by the General Assembly of the State.
- That the plaintiff was aiding and abetting said insurrection.
- That at the time the trespasses were committed, the State was under martial law, and the defendants were enrolled in the fourth company of infantry.
- That the defendants were ordered to arrest the plaintiff, and, if necessary, to break and enter his dwelling-house.
- That it was necessary, and they did break and enter, &c., doing as little injury as possible, &c., and searched said house, &c.

**Mr. Chief Justice TANEY delivered the opinion of the court.**

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial.

The evidence offered by the plaintiff and the defendants is stated at large in the record; and the questions decided by the Circuit Court, and brought up by the writ of error, are not such as commonly arise in an action of trespass. The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.

This is a new question in this court, and certainly a very grave one; and at the time when the trespass is alleged to have been committed it had produced a general and painful excitement in the State, and threatened to end in bloodshed and civil war.

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavouring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like

the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this Union; and it continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new constitution to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which the offered to vote for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people, permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as unlawful and disorganizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But, notwithstanding the determination of the charter government, and of those who adhered to it, to

maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings, which it is not material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island.

The difficulties with the government of which Mr. Dorr was the head were soon over. They had ceased before the constitution was framed by the convention elected by the authority of the charter government. For after an unsuccessful attempt made by Mr. Dorr in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepachet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation the charter government continued to assert its authority and exercise its powers, and to enforce obedience, throughout the State, arresting and imprisoning, and punishing in its judicial tribunals, those who had appeared in arms against it.

We do not understand from the argument that the constitution under which the plaintiff acted is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the secretary of state of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas.

It is this opinion of the Circuit Court that we are now called upon to review. It is set forth more at large in the exception, but is in substance as above stated; and the question presented is certainly a very serious one: For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff,



and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavouring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavoured to maintain its authority. Indeed, we do not see how the question could be tried and judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government.

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court

is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful established government during the time of this contest.

Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

And if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence, such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgments as to the freehold qualification of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

The court had not the power to order a census of the freeholders to be taken; nor would the census of the United States of 1840 be any evidence of the number of freeholders in the State in 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen, and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?

But this is not all. The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted. The decision would, therefore, have depended upon the relative credibility of witnesses, and the weight of testimony; and as the case before the Circuit Court was an action at common law, the question of fact, according to the seventh amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the constitution which the plaintiff supported was adopted by a majority of the citizens of the State, or of the voters entitled to vote by the existing law. Another jury in another case might find otherwise. And as a verdict is not evidence in a suit between different parties, if the courts of the United States have been jurisdiction contended for by the plaintiff, the question whether the acts done under the charter government during the period in contest are valid or not must always remain unsettled and open to dispute. The authority and security of the State governments do not rest on such unstable foundations.

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind,

and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, 'in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), 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 such insurrection.'

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then 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 or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

#### Appendix: some flavor from the proceedings below and notes of the reporter

[You just need to skim this stuff. I'd just like you to have some more context for the kinds of claims that were showing up before the Court.]

*[From the ruling of a trial court, quoted in the opinion. The point of the below is that Luther claimed that the trespassers weren't lawful the government of Rhode Island, that in fact the people had made a new constitution.]*

The plaintiff then offered to prove that the said constitution was adopted by a large majority of the male people of this State, of the age of twenty-one years and upwards, who were qualified to vote under said constitution, and also adopted by a majority of the persons entitled to vote for general officers under the then existing laws of the said State, and according to the provisions thereof; and that so much of the same as relates to the election of the officers named in the sixth section of the fourteenth article of said constitution, on the Monday before the 3d Wednesday of April, A. D. 1842, to wit, on the 18th day of said April, and all the other parts thereof on the first Tuesday of May, 1842, to wit, on the 3d day of said May, and then and there became, and was, the rightful and legal constitution of said State, and paramount law of said State; and this he offered to prove by the production of the original votes or ballots cast or polled by the persons voting for or against the adoption of said constitution, by the production of the original registers of the persons so voting, verified by the oaths of the several moderators and clerks of the meetings held for such votings, by the testimony of all the persons so voting, and by the said constitution.

22d. The plaintiff offered to prove, that, by virtue of, and in conformity with, the provisions of said constitution, so adopted as aforesaid, the people of said State entitled to vote for general officers, Senators and Representatives, to the General Assembly of said State, under said constitution, did meet, in legal town and ward meetings, on the third Wednesday of April next preceding the first Tuesday

of May, 1842, to wit, on the 18th day of April, 1842, and did elect duly the officers required by said constitution for the formation of the government under said constitution; and that said meetings were conducted and directed according to the provisions of said constitution and the laws of said State; and this he offered to prove by the evidence of the moderators and clerks of said meetings, and the persons present at the same.

23d. The plaintiff offered in evidence that the said general officers, to wit, the Governor, Lieutenant-Governor, Secretary of State, Senators and Representatives, all constituting the General Assembly of said State under said constitution, did assemble in said city of Providence on the first Tuesday of May, A. D. 1842, to wit, on the 3d day of May, 1842, and did then and there organize a government for the said State, in conformity with the provisions and requirements of said constitution, and did elect, appoint, and qualify officers to carry the said constitution and laws into effect; and, to prove the same, he offered exemplified copies of the acts and doings of said General Assembly

Whereupon, the counsel for the plaintiff requested the court to charge the jury, that, under the facts offered in evidence by the plaintiff, the constitution and frame of government prepared, adopted, and established in the manner and form set forth and shown thereby was, and became thereby, the supreme law of the State of Rhode Island, and was in full force and effect, as such, during the time set forth in the plaintiff's writ and declaration, when the trespass alleged therein was committed by the defendants, as admitted in their pleas.

That a majority of the free white male citizens of Rhode Island, of twenty-one years and upwards, in the exercise of the sovereignty of the people, through the forms and in the manner set forth in said evidence, offered to be proved by the plaintiff, and in the absence, under the then existing frame of government of the said State of Rhode Island, of any provision therein for amending, altering, reforming, changing, or abolishing the said frame of government, had the right to reassume the powers of government, and establish a written constitution and frame of a republican form of government; and that having so exercised such right as aforesaid, the pre existing charter government, and the authority and the assumed laws under which the defendants in their plea claim to have acted, became null and void and of no effect, so far as they were repugnant to and conflicted with said constitution, and are no justification of the acts of the defendants in the premises.

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[From plaintiff's filings before the Court:

And upon these facts the plaintiff in error will maintain, that, by the fundamental principles of government and of the sovereignty of the people acknowledged and acted upon in the United States, and the several States thereof, at least ever since the Declaration of Independence in 1776, the constitution and frame of government prepared, adopted, and established as above set forth was, and became thereby, the supreme fundamental law of the State of Rhode Island, and was in full force and effect, as such, when the trespass alleged in the plaintiff's writ was committed by the defendants.

That this conclusion also follows from one of the foregoing fundamental principles of the American system of government, which is, that government is instituted by the people, and for the benefit, protection, and security of the people, nation, or community. And that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish the same, in such manner as shall be judged most conducive to the public weal.

But that, in the case at bar, the argument is sufficient, even should it limit the right (which the plaintiff disclaims) to a majority of the voting people, such majority having, in fact, adopted and affirmed the said constitution of Rhode Island.

To sustain this general view, the following proposition is submitted as the theory of American government, upon which the decision of this cause must depend.

The institution of American liberty is based upon the principles, that the people are capable of self-government, and have an inalienable right at all times, and in any manner they please, to establish and alter or change the constitution or particular form under which that government shall be effected. This is especially true of the several States composing the Union, subject only to a limitation provided by the United States Constitution, that the State governments shall be republican.

In order to support this proposition, we have to establish the following points,

1st. That the sovereignty of the people is supreme, and may act in forming government without the assent of the existing government.

2d. That the people are the sole judges of the form of government best calculated to promote their safety and happiness.

120

3d. That, as the sovereign power, they have a right to adopt such form of government.

4th. That the right to adopt necessarily includes the right to abolish, to reform, and to alter any existing form of government, and to substitute in its stead any other that they may judge better adapted to the purposes intended.

5th. That if such right exists at all, it exists in the States under the Union, not as a right of force, but a right of sovereignty; and that those who oppose its peaceful exercise, and not those who support it, are culpable.

6th. That the exercise of this right, which is a right original, sovereign, and supreme, and not derived from any other human authority, may be, and must be, effected in such way and manner as the people may for themselves determine.

7th. And more especially is this true in the case of the then subsisting government of Rhode Island, which derived no power from the charter or from the people to alter or amend the frame of government, or to change the basis of representation, or even to propose initiatory measures to that end.

Upon the foregoing hypothesis, then, the following questions arise:

1st. Had the people of Rhode Island, in the month of December, 1841, without the sanction or assent of the Legislature, a right to adopt a State constitution for themselves, that constitution establishing a government, republican in form, within the meaning of the Constitution of the United States?

2d. Was the evidence of the adoption by the people of Rhode Island of such a constitution, offered in the court below by the plaintiff in this cause, competent to prove the fact of the adoption of such constitution?

3d. Upon the issuing of the proclamation of the convention, by which it had been declared duly adopted, namely, on the 13th day of January, 1842, and the acts under it, did not that constitution become the supreme law of the State of Rhode Island?

If these questions are answered in the negative, then the theory of American free governments for the States is unavailable in practice.

If they be answered in the affirmative, then the consequences which necessarily follow are,

1st. The charter government was, ipso facto, dissolved by the adoption of the people's constitution, and by the organization and proceedings of the new government under the same.

2d. Consequently, the act of March, 1842, 'in relation to offences against the sovereign power of the State,' and the act 'declaring martial law,' passed June 24, 1842, were both void.

3d. The act of June, 1842, being void, affords no justification of the acts complained of in the plaintiff's declaration.

4th. Those acts, by the common law, amount to trespass, the facts being admitted by the defendants.

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135

It has already been said that *Mr. Hallett* alone argued the case on behalf of the plaintiff in error, but the Reporter is much at a loss how to give even a skeleton of the argument, which lasted for three days, and extended over a great variety of matter. The following points were discussed, and authorities read.

136

1st. What is a state?

137

Sydney on Government, pp. 15, 24, 349, 399; Locke on Government, B. 2, ch. 8, §§ 95, 96, &c.; Burgh's Pol. Dis., Vol. I. pp. 3, 4, 6; Vattel, L. N., p. 18; Virginia Convention, 1775; Wilson's Works, Vol. I. pp. 17, 304, 305; Federalist, No. 39, p. 150; 2 Dall. Rep. 419, 463, 464; 3 Dall. Rep. 93, 94; 1 Tuck. Bl. Com., App., p. 10; 1 Story's Com. on Const., p. 193, § 208; 1 Elliott's Deb., Gilp. ed., p. 65.

138

2d. What are the people?

139

The early political writers indiscriminately use the words *community*, *society*, *state*, *nation*, *body of the community*, and *great body of the people*, to express the same idea, and sometimes the words *the governed* are used in the same sense.

140

Sydney on Government, ch. 1, 2, 3; Locke on Government, B. 2, ch. 8, §§ 95 et seq., ch. 13, &c.; Burgh's Pol. Dis., Vol. I. ch. 2, 3, Vol. III. pp. 275-278; Vattel, L. N., p. 18; Virginia Convention, 1775, pp. 16, 27, 42, 78; Declaration of Amer. Ind., &c.; *Trevett v. Weeden*, Varnum's Argument in 1787; Wilson's Works, Vol. I. pp. 17, 20, 25, 417, 420, Vol. II. p. 128, Vol. III. p. 291; Federalist, Nos. 1, 7, 14, 21, 22, 39, 40, 63; Virginia Convention, 1788, pp. 46, 57, 58, 64, 65, 67-70, 79, 87, 95, &c.; 2 Dall. Rep. 448, 449, 452, 454, 458, 470-472; 3 Dall. Rep. 86, 92-94; 1 Tuck. Bl. Com., Pt. 1, note at p. 89, App., pp. 4, 9, 87; 1 Cranch, Rep. 176; Helvidius, p. 78 (by Mr. Madison); Rayner's Life of Jefferson, 377, 378; John Taylor, of Car., pp. 4, 412, 413, 519, 447; Rawle on the Const., pp. 14-17.

141

He cites Vattel, and uses the word *people* in the same sense Vattel had used the word *state*.

142

4 Wheaton's Reports, p. 404; Story's Com. on the Const., Vol. I., B. 2, §§ 201-204, &c.; Virginia Convention, 1829, 1830; Debates in Congress, (Michigan,) Reg. Deb., Vol. XIII. Pt. 1; Everett's Address, Jan. 9, 1836; Burke's Report.

143

All the American political writers, &c., use the term *people* to express the entire numerical aggregate of the community, whether state or national, in contradistinction to the *government* or *legislature*.

144

Mr. Burke, in his Report, cited above, says, that ‘the (political) people include all *free white male persons* of the age of twenty-one years, who are *citizens* of the state, are of sound mind, and have not forfeited their right by some crime against the society of which they are members.’

145

3d. Where resides the ultimate power or sovereignty?

146

Sydney on Government, pp. 70, 349, 436; Locke on Government, p. 316; Burgh’s Pol. Dis., Vol. I. pp. 3, 4, 6, Vol. III. pp. 277, 278, 299, 447; Paine’s Rights of Man, p. 185; Roger Williams on Civil Liberty; Virginia Convention of 1775; Dec. of Amer. Ind.; Wash. Farewell Address; *Trevett v. Weeden*, Varnum’s Argument; Wilson’s Works, Vol. I. pp. 17, 21, 25, 415, 417, 418, 420, Vol. II. p. 128, Vol. III. pp. 277, 278, 299, 447; Federalist, No. 22, p. 87, No. 39, p. 154, No. 40, p. 158, No. 46, p. 188; Virginia Deb. of 1788, pp. 46, 65, 69, 79, 187, 230, 248, 313; *Chisholm v. Georgia*, 2 Dall. Rep. 448 (Iredell), 454, 457, 458 (Wilson), 470-472 (Jay), 304 (Patterson); Vanhorne’s Case, 3 Dall. Rep. 93 (Iredell); Doane’s Case, 3 Dall. Rep. 93 (Iredell); 1 Tuck. Bl. Com., App., pp. 4, 9, 10; 1 Cranch, Rep. 176; Rayner’s Life of Jefferson, pp. 377, 378; John Taylor, of Car., pp. 412, 413, 489, 490; 4 Wheaton’s Rep., p. 404 (Marshall); Rawle on the Const., p. 17; 1 Story’s Com. on the Const., pp. 185, 186, 194, 195, 198-300; Virginia Convention of 1829, 1830; Admission of Michigan (Buchanan, Benton, Strange, Brown, Niles, King, Vanderpoel, Toucey); Everett’s Address, p. 4; 4 Elliott’s Deb. 223; R. I. Declaration of Rights, Art. 2 and 3.

[You get the picture. I couldn’t resist including this stuff to give you a taste of the scope of argument.]

[Now here’s some of Defendants’ argument:

The question which the court was called upon to decide was one of sovereignty. Two legislatures were in existence at the same time. Both could not be legitimate. If legal power had not passed away from the charter government, it could not have got into Dorr’s. The position taken on the other side is that it had so passed away, and it is attempted to be proved by votes and proceedings of meetings, &c., out of doors. This court must look elsewhere,— to the Constitution and laws, and acts of the government, of the United States. How did the President of the United States treat this question? Acting under the Constitution and law of 1795, he decided that the existing government was the one which he was bound to protect. He took his stand accordingly, and we say that this is obligatory upon this court, which always follows an executive recognition of a foreign government. The proof offered below, and rejected by the court, would have led to a different result. Its object was to show that the Dorr constitution was adopted by a majority of the people. But how could a court judge of this? Can it know how many persons were present, how many of them qualified voters, and all this to be proved by testimony? Can it order to be brought before it the minutes and registers of unauthorized officers, and have them proved by parol? The decisions of the legislature and courts of Rhode Island conclude the case. Will you reverse the judgment in Dorr’s case?

It has been before stated that the government of Mr. Dorr, if it ever existed at all, only lasted for two days. Even the French revolution, rapid as it was, required three. During those two days, various officers were appointed; but did any one ever hear of their proceeding to discharge their several duties? A court was appointed. But did any process ever issue under its authority? Was any person ever sued or arrested? Or did any officer, so appointed, venture to bring his official functions into practical operation upon either men or property? There was nothing of this. The government was nothing but a shadow. It was all paper and patriotism; and went out on the 4th of May, admitting itself to be, what every one must now consider it, nothing but a contemptible sham.

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## Baker v. Carr

369 U.S. 186 (1962)

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

1

This civil action was brought under 42 U.S.C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleg[ed] that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, 'these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.'

The General Assembly of Tennessee consists of the Senate with 33 members and the House of Representatives with 99 members. The Tennessee Constitution provides in Art. II as follows:

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.

Sec 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.'

Thus, Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. In 1901 the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census and passed the Apportionment Act here in controversy. In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote.<sup>11</sup> The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901

Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, ‘made no apportionment of Representatives and Senators in accordance with the constitutional formula ... , but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference ... to any logical or reasonable formula whatever.’ It is further alleged that ‘because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901,’ the 1901 statute became ‘unconstitutional and obsolete.’ Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible. The complaint concludes that ‘these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.’ They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large. They also pray for such other and further relief as may be appropriate.

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration—what we have designated ‘nonjusticiability.’ The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not ‘arise under’ the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a ‘case or controversy’ within the meaning of that section; or the cause is not one described by any jurisdictional statute.

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green* and subsequent *per curiam* cases. The court stated: ‘From a review of these decisions there can be no doubt that the federal rule is that the federal courts will not intervene in cases of this type to compel legislative reapportionment.’ We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a ‘political question’ and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable ‘political question.’ The cited cases do not hold the contrary.

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection ‘is little more than a play upon words.’ Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove v. Green* and other decisions of this Court on which it relied. Appellants’ claim that they are being denied equal protection is justiciable, and if ‘discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.’ To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some

uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the ‘political question’ doctrine.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts. That review reveals that in the Guaranty Clause cases and in the other ‘political question’ cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’

We have said that ‘In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.’ The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the ‘political question’ label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question ‘governmental action must be regarded as of controlling importance,’ if there has been no conclusive ‘governmental action’ then a court can construe a treaty and may find it provides the answer.

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called ‘a republic of whose existence we know nothing,’ and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. Still again, though it is the executive that determines a person’s status as representative of a foreign government, the executive’s statements will be construed where necessary to determine the court’s jurisdiction. Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments.

Dates of duration of hostilities: Though it has been stated broadly that ‘the power which declared the necessity is the power to declare its cessation, and what the cessation requires,’ here too analysis reveals isolable reasons for the presence of political questions, underlying this Court’s refusal to review

the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience.' But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality— e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away: '(A) Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. (It can) inquire whether the exigency still existed upon which the continued operation of the law depended.' On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending.

Validity of enactments: In *Coleman v. Miller*, *supra*, this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. Similar considerations apply to the enacting process: 'The respect due to coequal and independent departments,' and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. But it is not true that courts will never delve into a legislature's records upon such a quest: If the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals in order to preserve the enactment. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, s 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: *Luther v. Borden*, though in form simply an action for damages for trespass was, as Daniel Webster said in opening the argument for the defense, 'an unusual case.' The defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State

was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose 'out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842,' and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or 'charter' government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

Chief Justice Taney's opinion for the Court reasoned as follows:

- (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that 'the officers who carried their decisions into operation (were) answerable as trespassers, if not in some cases as criminals.' There was, of course, no room for application of any doctrine of de facto status to uphold prior acts of an officer not authorized de jure, for such would have defeated the plaintiff's very action. A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.
- (2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that 'it rested with the political power to decide whether the charter government had been displaced or not,' and that that department had acknowledged no change.
- (3) Since '(t)he question relates, altogether, to the constitution and laws of (the) State,' the courts of the United States had to follow the state courts' decisions unless there was a federal constitutional ground for overturning them.
- (4) No provision of the Constitution could be or had been invoked for this purpose except Art. IV, § 4, the Guaranty Clause. Having already noted the absence of standards whereby the choice between governments could be made by a court acting independently, Chief Justice Taney now found further textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary:

'Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.

[you already read the rest of this language, go read it again if you need a reminder]

Clearly, several factors were thought by the Court in *Luther* to make the question there 'political': the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. See *Taylor & Marshall v. Beckham* (No. 1) (claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held nonjusticiable); *Pacific States Tel. & T. Co. v. Oregon* (claim that initiative and referendum negated republican

government held nonjusticiable); *Kiernan v. Portland*, (claim that municipal charter amendment per municipal initiative and referendum negated republican government held nonjusticiable) [etc.]

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable 'political question' bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. 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.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

## Justiciability

### The Five Justiciability Doctrines

1. **Advisory Opinion:** the federal courts will not opine on a legal question without there being an actual dispute. Congress or the President can't just call up the Chief Justice and say "we're considering doing X, is it constitutional?"
2. **Standing:** when someone files suit, it has to be about an individual injury, and there has to be some relief the courts can give them.
3. **Mootness:** if the dispute in a lawsuit goes away before the case is over, the case has to be dismissed.
4. **Ripeness:** a lawsuit cannot be brought until the parties' interests are developed enough for the court to be able to access the evidence and give relief.
5. **Political question:** some issues, particularly of Constitutional law, are committed to the complete authority of the other branches of government, and the judicial branch may not rule on them.

All of those except for the political question doctrine derive from the "cases" and "controversies" requirement of Article 3, which the Court has interpreted to mean that the judicial branch can only hear genuine disputes between two parties with real opposing interests to be resolved by the court.

In addition to that textual rationale, there are some well-accepted policy reasons for enforcing the justiciability doctrines. First, there's a worry about wasting judicial resources by resolving cases where people don't have a real stake. Second, there's a worry that if the courts handle cases where there aren't litigants with an incentive to develop the facts and law (because they have actual money or other interests on the table, the court could make garbage precedent, based in inadequate facts and legal argument. The adversary system depends on parties with genuine motives to litigate the cases themselves to the fullest. Third, there are basic issues both of democracy and individual liberty: federal court rulings are a big hammer, and we don't want our judges either ordering private citizens around or striking down democratically enacted laws and such unless someone's rights are actually violated in a meaningful way.

### Standing

A person must have standing in order to bring suit in federal court. Standing doctrine is composed of two types of rules. First, there are *constitutional* rules, derived from Article III's limitation of the federal judicial power to cases and controversies. Congress cannot confer jurisdiction on federal courts to hear cases that violate a constitutional rule. Second, there are *prudential* rules, judge-made standing rules meant to avoid undue litigation, ensure that the parties who bring cases to the courts are in the best position to develop the issues, etc. Congress has the power to legislatively override prudential standing rules.

The constitutional rules for standing are expressed in *Lujan* in roughly the following formula:

1. "the plaintiff must have suffered an 'injury in fact'" That's "an invasion of a legally protected interest,"
2. "there must be a causal connection between the injury and the conduct complained of... of the defendant" "not the result of the independent action of some third party not before the court," and
3. "it must be likely... that the injury will be redressed by a favorable decision," not "speculative."

In addition, the Court makes clear that:

1. An injury in fact has to be “concrete,” “particularized” (“must affect the plaintiff in a personal and individual way”), and “actual or imminent, not conjectural or hypothetical,” and
2. The plaintiff has the burden to establish standing.

There are roughly three prudential standing rules:

1. The plaintiff’s injury must be in the “zone of interest” that the statute or constitutional provision was intended to protect. This mostly comes up in the context of statutory claims, and the basic idea is that if the plaintiff pleads an injury arising out of a violation of a statute, then the injury the plaintiff suffered must be the kind of injury that Congress intended to protect against (for those of you who remember torts, compare it to the test for negligence per se).<sup>15</sup>
2. “Generalized grievances” do not suffice. The key kind of case where this comes up is in taxpayer standing, where someone challenges government expenditure and the injury they claim is that their tax dollars are being spent on some illegal program. With very few exceptions, these claims are rejected.
3. Third-party lawsuits (suits to vindicate the rights of someone else) are disfavored. However, where the third party has his or her own interest at stake too, sometimes they’ll be allowed. [A classic case: *Craig v. Boren*, 429 U.S. 190 (1976), alcohol seller challenging sexist drinking age, the plaintiff has an economic interest in having the ability to sell to the people who are forbidden from buying.]

A difficult question is the extent to which Congress may confer “injury” for the purposes of standing on a plaintiff by giving them a cause of action.

Consider the *qui tam* lawsuit. That is where a private plaintiff brings suit against another private party, but on behalf of the government as a whistleblower, typically in order to recover money fraudulently taken from the government—and if they win, the plaintiff gets a cut. With *qui tam* suits, Congress has essentially recruited private plaintiffs as bounty hunters for government fraud. See casebook discussion of *Vermont Agency of Natural Resources v. United States*, in which the Court approved standing in such cases.

A good exercise is to get very clear on how the *qui tam* is distinguished from *Lujan*. At the very least, 1, the plaintiff has a concrete financial stake, and 2, there is another party with an individualized injury—the government—who can basically assign the claim to the plaintiff. Assigning claims is a traditional tool with a long common-law history (insurance companies, etc.).

The Supreme Court has recently clarified the congressionally-created standing issue, and taken a restrictive view. See the 2021 5-4 decision in *Transunion, LLC v. Ramirez*, considering class-action plaintiffs who had been erroneously flagged as potential terrorists by a credit reporting company (*seriously*). Even though plaintiffs had alleged violations of the Fair Credit Reporting Act (which requires much less sloppy procedures for getting information into a credit report) they didn’t have standing *unless* Transunion had provided a credit report to a buyer (employer, landlord, lender, etc.) containing the erroneous information as to the specific plaintiff seeking to be included in the class. In the Court’s words:

For standing purposes, therefore, an important difference exists between (i) a plaintiff’s statutory cause of action to sue a defendant over the defendant’s violation of federal law, and (ii) a plaintiff’s suffering concrete harm because of the defendant’s violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions

<sup>15</sup>A key case: *Air Courier Conference of America v. American Postal Workers Union*, 498 US 517 (1991) (Postal employee union lacked standing to challenge regulations waiving U.S. Post Office monopoly statute, because the statute was meant to protect the Post Office, not its employees.)



or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.<sup>16</sup>

As I write these notes, the Court is considering a notorious Texas law which may lead to the overturning of the constitutional right to abortion. The law in question gives any private plaintiff a right to sue anyone who "aids or abets" an abortion for statutory damages. This, of course, is exactly the idea that horrified the Court in the *Transunion* case. Consider the following language from *Transunion*:

As those examples illustrate, if the law of Article III did not require plaintiffs to demonstrate a "concrete harm," Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent. In our view, the public interest that private entities comply with the law cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Lujan*, 504 U. S., at 576–577.2

A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority. We accept the "displacement of the democratically elected branches when necessary to decide an actual case." But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.<sup>17</sup>

Quick pop quiz: why won't the Supreme Court just strike down Texas's abortion law on *Transunion* grounds? The answer is the next footnote, but don't link until you have a rationale in your head.<sup>18</sup>

## Mootness

Hypo: Chicago enacts an ordinance licensing a 48-hour "suspicion detention" in the city jail: if a police officer thinks you look suspicious, s/he can lock you up for two days to investigate you. Needless to say, this policy is flamingly unconstitutional.

Plaintiff, a victim of a suspicion detention, files suit seeking an injunction against the practice. Before the case can be heard, the 48-hour period expires, and s/he's released from jail. Is the case justiciable?

In that hypo, the defendant city is likely to argue that plaintiff's claim for injunctive relief is *moot*, because there is no longer any relief that the Court can grant. The plaintiff is already out of jail, and while s/he might have a claim for damages, that isn't the lawsuit that's been filed—the lawsuit that's been filed is for an injunction!

The plaintiff is likely to claim that the injury is "capable of repetition, yet evading review." That is, because the harm is so short, it's difficult for a court to review it before it stops, and so there's unlikely to be any way for a court to hear it. The complexities of this argument are beyond the scope of our coverage in this course, but suffice it to say that the defendant city will argue that it is unlikely that

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<sup>16</sup>Slip op. at 11

<sup>17</sup>Slip op. at 13-14, internal citations omitted

<sup>18</sup>The Texas law authorizes suit in state courts. But the cases and controversies requirement is a rule of federal constitutional law limiting the power of the federal judiciary. Texas presumably has some version of its own standing doctrine, but it need not interpret that doctrine quite the same way as the Supreme Court interprets the federal doctrine. It is worth considering, however, that the federal courts probably couldn't hear a Texas abortion damages suit (under, for example, diversity jurisdiction).

this particular plaintiff will be subject to the same illegal behavior again.<sup>19</sup> The result of this hypo is fairly debatable.

Mootness is the doctrine we invoke when a plaintiff has standing at the onset of litigation for a particular claim, but, in a sense, “loses” standing midway through because there’s no longer any relief for the court to grant. By contrast, a case is threatened on *standing* grounds when there’s no standing at the *beginning* of litigation.<sup>20</sup>

Mootness is usually only a problem for claims for injunctive relief. Obviously, a damages claim cannot be mooted (unless the defendant outright settles the case by paying the claim), because that’s purely retrospective relief—there’s always something for the court to grant. It is because injunctions are prospective relief that there’s the risk that the world might swoop in and grant the relief that plaintiff is asking the court to grant, mooting the case.

One important rule is that *voluntary cessation of unlawful conduct* is not sufficient to moot a case, for obvious reasons—otherwise the defendant might just turn around and do it again when the case is dismissed. However, there are some subtleties here: sometimes we will say a case is moot when the defendant really conclusively ends the conduct, like by repealing a statute alleged to be unconstitutional.

### Ripeness

Ripeness is kind of the opposite of mootness; the claim is not “you used to have a concrete claim, but you don’t anymore,” but, rather, “you might have a claim in the future, but not yet.”

I am of the (controversial) opinion that ripeness in most real cases is just another way of getting at the absence of standing, i.e., the lack of a concrete or (especially) imminent injury.<sup>21</sup>

### Political question

In an odd way, the political question doctrine is kind of the opposite of the sorts of ideas that we saw in *Marbury v. Madison*. Remember that Chief Justice Marshall’s whole argument in *Marbury* was that the other branches had to obey the Constitution, and the Court’s job was to say what the Constitution means, full stop. Now we learn that this isn’t completely true, that if, for example, the Constitution says that the Senate shall try all impeachments, the Supreme Court has no business saying what “try,” as written in the Constitution, means—that’s actually the sole determination of the Senate.

*Baker v. Carr* has the core test for political questions. The key passage states a test that runs as follows.

An issue is a nonjusticiable political question if the issue is characterized by one of the following:

1. “a textually demonstrable constitutional commitment of the issue to a coordinate political department”

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<sup>19</sup>See *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (student’s race discrimination claim against state law school admissions was moot when he had been admitted pursuant to a temporary injunction that had been stayed and was in final quarter of law school when case was heard in Supreme Court, notwithstanding possibility that similar discrimination may happen to others).

<sup>20</sup>Compare the hypo above with *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), holding that victim of illegal police chokehold lacked standing to sue for injunctive relief to prevent future chokeholds (although he did have standing to sue for damages). Lyons filed his suit months after he was choked, and, the Court held, there was no reason to think he’d get choked in the future; accordingly, the case wasn’t moot, instead, he’d never had standing in the first place. Lyons gets cited quite a lot in standing doctrine, but it’s also an incredibly problematic case. There was a massive racial bias issue that the courts did not consider: the LAPD was notorious for using dangerous chokeholds on black men like the plaintiff. As Justice Marshall pointed out in dissent, 16 people had died in the last 8 years following LAPD chokeholds; 12 of them were black men. When then LAPD-chief Daryl Gates was asked about this racial pattern, his response, infamously, was the claim that the “veins or arteries of blacks do not open up as fast as they do in normal people.” (As reported by Erwin Chemerinsky in *The Case Against the Supreme Court*.)

<sup>21</sup>For a recent example of a ripeness case, see *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803 (2003).

2. “a lack of judicially discoverable and manageable standards for resolving it,”
3. “the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion,”
4. “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,”
5. “an unusual need for unquestioning adherence to a political decision already made,” or
6. “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

These elements of the test have a few broad ideas in common:

- The separation of powers means the Court can’t decide everything—if it’s asked to rule on the internal procedures of another branch (like the Senate’s procedures for conducting impeachment in *Nixon v. U.S.*), or something within the unique competence of another branch, it should probably stay out of it.
- The functions of the judiciary limit them to handling things that actually are subject to legal determination, not things like “what’s a Republican form of government?” (*Luther v. Borden.*)
- The U.S. government has to be allowed to govern. If the Court got to set aside government decisions on things like questions of war and peace, it would cripple the government altogether. (Can you imagine the courts calling back troops deployed abroad?!)

## Justiciability hypotheses

(A)

The War Powers Resolution is an Act of Congress that purports to prohibit the President from having U.S. military forces deployed more than 2 months without Congressional authorization.

This is an open (and hotly contested) constitutional issue: the President is commander in chief, but Congress has the authority to declare war, so there's an ambiguity as to whether the power to declare war is a constraint on the President's authority to send troops into battle. (Ditto the powers to make rules for the government and regulation of the armed forces and to fund them.)

So suppose suppose the President ignores the War Powers Resolutions and sends a ton of troops into battle for a long time without authorization, and then someone sues.

1. Who has standing? Does anyone?

2: Is it a political question?

(B)

Congress passes a law: "any person offended by unconstitutional government behavior may have a cause of action for \$1,000,000 damages for that behavior against the United States." It then passes a second law, "the original jurisdiction of the Supreme Court shall include writs of mandamus for undelivered judicial appointments." A law school professor, offended by Congress's passing the second law, files suit for damages against the United States. Standing?

(C)

A plaintiff in federal prison sues, alleging that the President uses his or her pardon power in a racially discriminatory fashion—freeing a bunch of white people but no black people. Is this a political question?

## Youngstown Sheet & Tube Co. v. Sawyer

343 U.S. 579 (1952)

### **Mr. Justice BLACK delivered the opinion of the Court.**

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, C.I.O., gave notice of an intention to strike when the existing bargaining agreements expired on December 31. The Federal Mediation and Conciliation Service then intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340. The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. Twelve days later he sent a second message. Congress has taken no action.

Obedying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for preliminary injunction, the United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done— power 'supported by the Constitution, by historical precedent, and by court decisions.'

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (§ 201(b) of the Defense

Production Act) as ‘much too cumbersome, involved, and time-consuming for the crisis which was at hand.’

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers’ final settlement offer.

It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that ‘the executive Power shall be vested in a President’; that ‘he shall take Care that the Laws be faithfully executed’; and that he ‘shall be Commander in Chief of the Army and Navy of the United States.’

The order cannot properly be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States.’ After granting many powers to the Congress, Article I goes on to provide that Congress may ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’

The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'

The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The judgment of the District Court is affirmed.

**Mr. Justice FRANKFURTER, concurring.**

The question before the Court comes in this setting. Congress has frequently— at least 16 times since 1916— specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. This body of enactments demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as 'time of war or when war is imminent,' the needs of 'public safety' or of 'national security or defense,' or 'urgent and impending need.' The period of governmental operation has been limited, as, for instance, to 'sixty days after the restoration of productive efficiency.' Seizure statutes usually make executive action dependent on detailed conditions: for example, (a) failure or refusal of the owner of a plant to meet governmental supply needs or (b) failure of voluntary negotiations with the owner for the use of a plant necessary for great public ends. Congress often has specified the particular executive agency which should seize or operate the plants or whose judgment would appropriately test the need for seizure. Congress also has not left to implication that just compensation be paid: it has usually legislated in detail regarding enforcement of this litigation-breeding general requirement.

Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special congressional enactment to meet each particular need. Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by 'national emergency' strikes and lockouts. The termination of wartime seizure powers on December 31, 1946, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the 'health or safety' of the nation was endangered, was thoroughly canvassed by Congress and rejected.

In any event, nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this

power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into §§ 206–210 of the Labor Management Relations Act of 1947.

**Mr. Justice DOUGLAS, concurring.**

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. The Congress, as well as the President, is trustee of the national welfare. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as with speed. All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency.

Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in *Myers v. United States*:

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'

We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution. That in turn requires an analysis of the conditions giving rise to the seizure and of the seizure itself.

The relations between labor and industry are one of the crucial problems of the era. Their solution will doubtless entail many methods—education of labor leaders and business executives; the encouragement of mediation and conciliation by the President and the use of his great office in the cause of industrial peace; and the passage of laws. Laws entail sanctions—penalties for their violation. One type of sanction is fine and imprisonment. Another is seizure of property. An industry may become so lawless, so irresponsible as to endanger the whole economy. Seizure of the industry may be the only wise and practical solution.

The method by which industrial peace is achieved is of vital importance not only to the parties but to society as well. A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies. We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

The legislative nature of the action taken by the President seems to me to be clear. When the United States takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. A permanent taking would amount to the



nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession.

The power of the Federal Government to condemn property is well established. It can condemn for any public purpose; and I have no doubt but that condemnation of a plant, factory, or industry in order to promote industrial peace would be constitutional. But there is a duty to pay for all property taken by the Government. The command of the Fifth Amendment is that no 'private property be taken for public use, without just compensation. That constitutional requirement has an important bearing on the present case.

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by Mr. Justice BLACK in the opinion of the Court in which I Join.

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency. Article II which vests the 'executive Power' in the President defines that power with particularity. Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, Section 3 provides that the President shall 'from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.' The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3, also provides that the President 'shall take Care that the Laws be faithfully executed.' But as Mr. Justice BLACK and Mr. Justice FRANKFURTER point out the power to execute the laws starts and ends with the laws Congress has enacted.

**Mr. Justice JACKSON, concurring in the judgment and opinion of the court.**

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress

can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress 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.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure.

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government, another, condemnation of facilities, including temporary use under the power of eminent domain. The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests. None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave Presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, 'The executive Power shall be vested in a President of the United States of America.' Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: 'In our view, this clause constitutes a grant of all the executive powers of which the Government is capable.' If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I

cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.

## Youngstown exercise

Here is a summary of Justice Jackson's three categories.

**Category 1:** Congress has legislatively authorized the President to do it.

**Category 2:** Congress has neither authorized nor forbidden the Presidential action (it has not spoken).

**Category 3:** Congress has legislatively forbidden the Presidential action.

Take ten minutes or so and write down one concrete example for each of the following situations:

1. Something that would be impermissible for the President even under category 1.
2. Something that would be permissible for the President under category 1, but not permissible under category 2.
3. Something that would be permissible for the President under category 2, but impermissible under category 3.
4. Something that would be permissible even under category 3.

## Zivotofsky v. Kerry

576 U.S. 1 (2015)

### **JUSTICE KENNEDY delivered the opinion of the Court.**

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation's foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel."

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of "recognition." See Statement by the President Announcing Recognition of the State of Israel, Public Papers of the Presidents, May 14, 1948, p. 258 (1964). That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." In a letter to Congress then-Secretary of State Warren Christopher expressed the Executive's concern that "[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem." He further noted the Executive's opinion that "any effort . . . to bring it to the forefront" could be "very damaging to the success of the peace process."

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem."

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel."

The subsection that lies at the heart of this case, §214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Titled "Record of Place of Birth as Israel for Passport Purposes," §214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in

the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

Pursuant to §214(d), Zivotofsky claims the right to have "Israel" recorded as his place of birth in his passport. After Zivotofsky brought suit, the District Court dismissed his case, reasoning that it presented a nonjusticiable political question and that Zivotofsky lacked standing. The Court of Appeals for the District of Columbia Circuit reversed on the standing issue, but later affirmed the District Court's political question determination. This Court granted certiorari, vacated the judgment, and remanded the case. Whether §214(d) is constitutional, the Court held, is not a question reserved for the political branches. In reference to Zivotofsky's claim the Court observed "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional"—not whether Jerusalem is, in fact, part of Israel.

On remand the Court of Appeals held the statute unconstitutional. It determined that "the President exclusively holds the power to determine whether to recognize a foreign sovereign," and that "section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power."

This Court again granted certiorari.

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."

Second, "in absence of either a congressional grant or denial of authority" there is a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" invite the exercise of executive power.

Finally, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."

To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue.

In this case the Secretary contends that §214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." In so doing the Secretary acknowledges the President's power is "at its lowest ebb."

Because the President's refusal to implement §214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." It may also involve the determination of a state's territorial bounds. Recognition is often effected by an express "written or oral declaration." It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents.

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, and may benefit from sovereign immunity when they are sued. The actions of a recognized sovereign

committed within its own territory also receive deference in domestic courts under the act of state doctrine. Recognition at international law, furthermore, is a precondition of regular diplomatic relations. Recognition is thus “useful, even necessary,” to the existence of a state.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” Art. II, §3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.”

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, *The Law of Nations* §78 (“[E]very state, truly possessed of sovereignty, has a right to send ambassadors” and “to contest their right in this instance” is equivalent to “contesting their sovereign dignity”). It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation’s history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, *Pacificus* No. 1, in *The Letters of Pacificus and Helvidius* 5, 13–14 (1845) (President “acknowledged the republic of France, by the reception of its minister”). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not.” As a result, the Reception Clause provides support, although not the sole authority, for the President’s power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” In addition, “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.”

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on “the conclusion of a bilateral treaty,” or the “formal initiation of diplomatic relations,” including the dispatch of an ambassador. The President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation’s ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the “executive Power” shall be vested in the President, provides further support for the President’s action here.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have

a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "speak . . . with one voice." That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70. The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice.

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government.

In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51.



[a lot of caselaw...]

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

The briefs of the parties and amici, which have been of considerable assistance to the Court, give a more complete account of the relevant history, as do the works of scholars in this field. But even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress.

The first debate over the recognition power arose in 1793, after France had been torn by revolution. Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. Members of the President's Cabinet agreed that receiving Genet would be a binding and public act of recognition. They decided, however, both that Genet should be received and that consultation with Congress was not necessary. Congress expressed no disagreement with this position, and Genet's reception marked the Nation's first act of recognition—one made by the President alone.

The recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he "intended moving the recognition of Buenos Ayres and probably of Chile." Clay thus sought to appropriate money " [f]or one year's salary " for " 'a Minister' " to present-day Argentina. President Monroe, however, did not share that view. Although Clay gave "one of the most remarkable speeches of his career," his proposed bill was defeated. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. Four years later, after the President had decided to recognize the South American republics, Congress did pass a resolution, on his request, appropriating funds for "such missions to the independent nations on the American continent, as the President of the United States may deem proper."

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. But the President feared that recognizing the new government could ignite a war. After Congress urged him to recognize Texas, the President delivered a message to the Legislature. He concluded there had not been a "deliberate inquiry" into whether the President or Congress possessed the recognition power. He stated, however, "on the ground of expediency, I am disposed to concur" with Congress' preference regarding Texas. In response Congress appropriated funds for a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister." Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

[more examples]

The weight of historical evidence indicates Congress has accepted that the power to recognize foreign

states and governments and their territorial bounds is exclusive to the Presidency.

As the power to recognize foreign states resides in the President alone, the question becomes whether §214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem.

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." That is, §214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem."

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by "written or oral declaration of the recognizing state." In addition an act of recognition must "leave no doubt as to the intention to grant it." Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from acting upon the subject." Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. The Court does not question the power of Congress to enact passport legislation of wide scope. In *Kent v. Dulles*, for example, the Court held that if a person's "liberty" to travel "is to be regulated" through a passport, "it must be pursuant to the lawmaking functions of the Congress." Later cases, such as *Zemel v. Rusk* and *Haig v. Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs. The problem with §214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

## INS v. Chadha

462 U.S. 919 (1983)

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

[This case] presents a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having “remained in the United States for a longer time than permitted.” [A] deportation hearing was held before an immigration judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act. Section 244(a)(1) provides:

- (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
- (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974. On the basis of evidence adduced at the hearing, affidavits submitted with the application, and the results of a character investigation conducted by the INS, the immigration judge, on June 25, 1974, ordered that Chadha’s deportation be suspended. The immigration judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer “extreme hardship” if deported.

Pursuant to § 244(c)(1) of the Act, the immigration judge suspended Chadha’s deportation and a report of the suspension was transmitted to Congress. Once the Attorney General’s recommendation for suspension of Chadha’s deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act to veto the Attorney General’s determination that Chadha should not be deported. Section 244(c)(2) provides:

- (2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—  
if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien’s voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither

the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.”

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing “the granting of permanent residence in the United States to [six] aliens”, including Chadha. The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Article I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General’s decision to allow Chadha to remain in the United States, the immigration judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional.

[some relevant legislative history]

The Immigration Act of 1924 required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. The only means by which a deportable alien could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses and presented to the President pursuant to the procedures set out in Art. I, § 7 of the Constitution. These private bills were found intolerable by Congress. In the debate on a 1937 bill introduced by Representative Dies to authorize the Secretary to grant permanent residence in “meritorious” cases, Dies stated:

It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before the House. The House consumed 51/2 hours considering four bills and made no disposition of any of these bills.”

Congress first authorized the Attorney General to suspend the deportation of certain aliens in the Alien Registration Act of 1940. That Act provided that an alien was to be deported, despite the Attorney General’s decision to the contrary, if both Houses, by concurrent resolution, disapproved the suspension.

In 1948, Congress amended the Act to broaden the category of aliens eligible for suspension of deportation. In addition, however, Congress limited the authority of the Attorney General to suspend deportations by providing that the Attorney General could not cancel a deportation unless both Houses affirmatively voted by concurrent resolution to *approve* the Attorney General’s action. The provision for approval by concurrent resolution in the 1948 Act proved almost as burdensome as private bills.

The proposal to permit one House of Congress to veto the Attorney General’s suspension of an alien’s deportation was incorporated in the Immigration and Nationality Act of 1952. Plainly, Congress’ desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress’ irritation with the burden of private immigration bills.

[...]

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.

Justice WHITE undertakes to make a case for the proposition that the one-House veto is a useful “political invention,” and we need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this “invention” is arguable. But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of this case, we set them out verbatim. Art. I provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* a House of Representatives.” Art. I, § 1. (Emphasis added).

“Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a Law, be presented to the President of the United States; . . .” Art. I, § 7, cl. 2. (Emphasis added).

“ *Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) *shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” Art. I, § 7, cl. 3. (Emphasis added).

These provisions of Art. I are integral parts of the constitutional design for the separation of powers.

[some stuff from the framers]

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President’s unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

[W]e must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon “whether they contain matter which is properly to be regarded as legislative in its character and effect.”

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4 to “establish an uniform Rule of Naturalization,” the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under § 244. The oneHouse veto operated in this case to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has altered Chadha’s status.

The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority,<sup>16</sup> had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. Similarly, a veto by one House of Congress under § 244(c)(2) cannot be justified as an attempt at amending the standards set out in § 244(a)(1), or as a repeal of § 244 as applied to Chadha. Amendment and repeal of statutes, no less than enactment, must conform with Art. I.

The nature of the decision implemented by the one-House veto in this case further manifests its legislative character. After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:

- (a) The House of Representatives alone was given the power to initiate impeachments.
- (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial.
- (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments.
- (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I.

**Justice WHITE, dissenting.**

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower

grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

The legislative veto developed initially in response to the problems of reorganizing the sprawling government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the government in 1929, he coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review. He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Congress followed President Hoover's suggestion and authorized reorganization subject to legislative review. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt Administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 reorganization plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions.

Shortly after adoption of the Reorganization Act of 1939, Congress and the President applied the legislative veto procedure to resolve the delegation problem for national security and foreign affairs. World War II occasioned the need to transfer greater authority to the President in these areas. The legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role. During World War II, Congress enacted over thirty statutes conferring powers on the Executive with legislative veto provisions. President Roosevelt accepted the veto as the necessary price for obtaining exceptional authority.

[more examples]

Even this brief review suffices to demonstrate that the legislative veto is more than "efficient, convenient, and useful." It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional committees, the Executive has more often agreed to legislative review as the price for a

broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

There is no question that a bill does not become a law until it is approved by both the House and the Senate, and presented to the President. Similarly, I would not hesitate to strike an action of Congress in the form of a concurrent resolution which constituted an exercise of original lawmaking authority. I agree with the Court that the President's qualified veto power is a critical element in the distribution of powers under the Constitution, widely endorsed among the Framers, and intended to serve the President as a defense against legislative encroachment and to check the "passing of bad laws through haste, inadvertence, or design." I also agree that the bicameral approval required by Art. I, §§ 1, 7 "was of scarcely less concern to the Framers than was the Presidential veto," and that the need to divide and disperse legislative power figures significantly in our scheme of Government. All of this, the Third Part of the Court's opinion, is entirely unexceptionable.

It does not, however, answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the presidential veto confer such power upon the President.

The terms of the Presentment Clauses suggest only that bills and their equivalent are subject to the requirements of bicameral passage and presentment to the President. Article I, § 7, cl. 2, stipulates only that "Every Bill which shall have passed the House of Representatives and the Senate, shall before it becomes a Law, be presented to the President" for approval or disapproval, his disapproval then subject to being overridden by a two-thirds vote of both houses.

Although [Section 7, Clause 3] does not specify the actions for which the concurrence of both houses is "necessary," the proceedings at the Philadelphia Convention suggest its purpose was to prevent Congress from circumventing the presentation requirement in the making of new legislation. The chosen language, Madison's comment, and the brevity of the Convention's consideration, all suggest a modest role was intended for the Clause and no broad restraint on Congressional authority was contemplated. This reading is consistent with the historical background of the Presentation Clause itself which reveals only that the Framers were concerned with limiting the methods for enacting new legislation. The Framers were aware of the experience in Pennsylvania where the legislature had evaded the requirements attached to the passing of legislation by the use of "resolves," and the criticisms directed at this practice by the Council of Censors. There is no record that the Convention contemplated, let alone intended, that these Article I requirements would someday be invoked to restrain the scope of Congressional authority pursuant to duly-enacted law.

When the Convention did turn its attention to the scope of Congress' lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests Congress with the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the enumerated powers of § 8], and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof." It is long-settled that Congress may "exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government," and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

The Court heeded this counsel in approving the modern administrative state. The Court's holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups.

This Court's decisions sanctioning such delegations make clear that Article I does not require all action



with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to “fill up the details,” and the rule was that “Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard.” In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. In only two instances did the Court find an unconstitutional delegation. *Panama Refining Co. v. Ryan*, (1935); *Schechter Poultry Corp. v. United States* (1935). In other cases, the “intelligible principle” through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as “just and reasonable,” “public interest,” “public convenience, interest, or necessity,” and “unfair methods of competition.”

The wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest. But for present purposes, these cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President’s signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Article I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the executive branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court’s scrutiny. In *Currin v. Wallace*, the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. *United States v. Rock Royal Co-operative* upheld an act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming *Currin* and *Rock Royal Co-operative* remain sound law, the Court’s decision today suggests that Congress may place a “veto” power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden from reserving such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court’s view of the Article I presentment and bicameralism commands.

[E]ven if the Court correctly characterizes the Attorney General’s authority under § 244 as an Article II Executive power, the Court concedes that certain administrative agency action, such as rulemaking, “may resemble lawmaking” and recognizes that “[t]his Court has referred to agency activity as being ‘quasi-legislative’ in character. Such rules and adjudications by the agencies meet the Court’s own definition of legislative action for they alter[ ] the legal rights, duties, and relations of persons . . . outside the legislative branch,” and involve “determinations of policy,” at 954. Under the Court’s analysis, the Executive Branch and the independent agencies may make rules with the effect of law while Congress, in whom the Framers confided the legislative power, may not exercise a veto which precludes such rules from having operative force. If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or “quasilegislative” in character, I cannot accept that Article I—which is, after all, the source of the non-delegation doctrine—should forbid Congress from qualifying that grant with a legislative veto.

I regret that I am in disagreement with my colleagues on the fundamental questions that this case presents. But even more I regret the destructive scope of the Court's holding. It reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state. Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult "to insure that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people," I must dissent.

## Free Enterprise Fund v. Public Company Accounting Oversight Board

561 U.S. 477 (2010)

### **Chief Justice Roberts delivered the opinion of the Court.**

Article II vests “[t]he executive Power... in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334.

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable — by removing them from office, if necessary. This Court has determined, however, that this authority is not without limit. In *Humphrey’s Executor v. United States*, we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins* and *Morrison v. Olson*, the Court sustained similar restrictions on the power of principal executive officers— themselves responsible to the President — to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

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

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

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

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

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceed-

ings. The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1933 — a federal crime punishable by up to 20 years' imprisonment or \$25 million in fines. And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of \$15 million. Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, and that its members are "'Officers of the United States'" who "exercise significant authority pursuant to the laws of the United States."

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

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

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

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

Removal of a Board member requires a formal Commission order and is subject to judicial review. Similar procedures govern the Commission's removal of officers and directors of the private self-regulatory organizations. The parties agree that the Commissioners cannot themselves be removed by the President except under the Humphrey's Executor standard of "inefficiency, neglect of duty, or malfeasance in office," and we decide the case with that understanding. B Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.

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

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President."

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

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for "'inefficiency, neglect of duty, or malfeasance in office.'" The Court

distinguished Myers on the ground that Myers concerned “an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is.” By contrast, the Court characterized the FTC as “quasi-legislative and quasi-judicial” rather than “purely executive,” and held that Congress could require it “to act. . . independently of executive control.” Because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will,” the Court held that Congress had power to “fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime.”

Humphrey’s Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. This Court has upheld for-cause limitations on that power as well.

In Perkins, a naval cadet-engineer was honorably discharged from the Navy because his services were no longer required. He brought a claim for his salary under statutes barring his peacetime discharge except by a court-martial or by the Secretary of the Navy “for misconduct.” This Court adopted verbatim the reasoning of the Court of Claims, which had held that when Congress “vests the appointment of inferior officers in the heads of Departments [,] it may limit and restrict the power of removal as it deems best for the public interest.” Because Perkins had not been “dismissed for misconduct . . . [or upon] the sentence of a court-martial,” the Court agreed that he was “‘still in office and . . . entitled to [his] pay.’”

We again considered the status of inferior officers in Morrison. That case concerned the Ethics in Government Act, which provided for an independent counsel to investigate allegations of crime by high executive officers. The counsel was appointed by a special court, wielded the full powers of a prosecutor, and was removable by the Attorney General only “for good cause.” We recognized that the independent counsel was undoubtedly an executive officer, rather than “‘quasi-legislative’” or “‘quasi-judicial,’” but we stated as “our present considered view” that Congress had power to impose good-cause restrictions on her removal. The Court noted that the statute “g[a]ve the Attorney-General,” an officer directly responsible to the President and “through [whom]” the President could act, “several means of supervising or controlling” the independent counsel — “[m]ost importantly . . . the power to remove the counsel for good cause.” Under those circumstances, the Court sustained the statute. Morrison did not, however, address the consequences of more than one level of good-cause tenure — leaving the issue, as both the court and dissent below recognized, “a question of first impression” in this Court.

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

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers — the Commissioners — none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

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

A second level of tenure protection changes the nature of the President’s review. Now the Commission

cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene — unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office."

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

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

## United States v. Nixon

418 U.S. 683 (1974)

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

1 This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States, in the case of United States v. Mitchell et al. to quash a thirdparty subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed.Rule Crim.Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena duces tecum was issued pursuant to Rule 17(c) to the President by the United States District Court and made returnable on May 2, 1974.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. 377 F.Supp. 1326. It further ordered 'the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed,' id., at 1331 to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence 'intra-executive' in character; it also rejected the contention that the Judiciary was without authority to review an assertion of executive privilege by the President.

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that under the circumstances of this case the presumptive privilege was overcome by the Special Prosecutor's prima facie 'demonstration of need sufficiently compelling to warrant judicial examination in chambers . . .'

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a 'case' or 'controversy' which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a 'jurisdictional' dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not 'waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer.' The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under Baker v. Carr, since it involves a 'textually demonstrable' grant of power under Art. II.

Our starting point is the nature of the proceeding for which the evidence is sought—here a pending

criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.

So long as this regulation is extant it has the force of law. In *United States ex rel. Accardi v. Shaughnessy*, regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations.

Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress.

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.' The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'. *Baker v. Carr*. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. *Id.*, at 198, 82 S.Ct. 691.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

[W]e turn to the claim that the subpoena should be quashed because it demands 'confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.' The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.



In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, *Humphrey's Executor v. United States*, insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of

powers under the Constitution.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that ‘the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.’ We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man ‘shall be compelled in any criminal case to be a witness against himself.’ And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman S.S. Corp.*, dealing with Presidential authority involving foreign policy considerations, the Court said:

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.

In *United States v. Reynolds*, dealing with a claimant’s demand for evidence in a Tort Claims Act case against the Government, the Court said:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.’

No case of the Court, however, has extended this high degree of deference to a President’s generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right ‘to be confronted with the witnesses against him’ and ‘to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

## Interlude: nonacquiescence

At various points in recent history, the Social Security Administration has had a “nonacquiescence” policy. On that policy, if a Circuit Court made a ruling interpreting social security law (such as the standards for who is disabled) that the SSA disagreed with, it obeyed it in the specific case—for example, it paid the benefits it was been ordered to pay—but did not apply it in subsequent cases, even within the same circuit. Under immense political pressure, plus the threat of contempt sanctions, the SSA backed down from that policy. But should it have had? Or was the policy permissible?

## Separation of powers and executive power

The core separation of powers issues are between the President and Congress. It's reasonable to think, from things like the Necessary and Proper Clause (which we will more closely examine in the next section when we get to McCulloch), that Congress was really intended to be the sort of main driving force of government when the Constitution got put together. But over the centuries, the President has steadily grown in power, for at least two reasons:

1. As the economy and technology have progressed, it's gotten a lot more complicated to regulate economic activity, so Congress has delegated a lot of authority to specialist administrative agencies within the Executive Branch.
2. As the U.S. has become a superpower and gotten involved in more stuff (and also as the threats against U.S. security have gotten more sophisticated), the military, intelligence services, law enforcement, and such, all under the President, have taken on a broader scope of activity to meet those needs.

One way to think about the core questions in this part of the course is: "how should constitutional law respond to those changes in the world?" Should the law/does the law quietly let the President grow in power, relative to Congress, or should it reign the executive branch in?

There are three settings where these questions tend to come up:

1. Congress delegates power to the President, authorizes the President to decide something. There, the question typically is "is this something Congress may permissibly delegate to the President, or does it have to do it itself?"
2. President acts without explicit Congressional permission. There, the question typically is, "is this something that the President can do on his own authority, or does it require a statute authorizing it?"
3. President acts against Congressional command, on the claim that the matter is within authority constitutionally delegated to the President not to Congress. (In some cases, this is obviously true—e.g., the pardon power, but in many cases it's less clear, e.g., the division of authority for military action.) There, obviously, the question is "is this an Article I or an Article II power?"

(Compare this to Justice Jackson's concurrence in *Youngstown Sheet and Tube v. Sawyer*.)

### Foundation: The Vesting Clause Question

There's an interesting linguistic difference between Article I and Article II. Here's the relevant part of Article I:

All legislative powers herein granted shall be vested in a Congress of the United States...

Here's the relevant part of Article II:

The executive power shall be vested in a President of the United States of America...

Do you notice a difference? Congress gets the legislative powers "herein granted." The President just gets the executive power, full stop.

Some people have read the absence of a "herein granted" in Article II to suggest that the President, unlike Congress, has *unenumerated* powers—that there was a background idea of the scope of executive power in the heads of the framers (maybe something to do with the kinds of powers traditionally exercised by the British Crown, only minus the bad tyrannical stuff), and the President gets to exercise all that stuff. People who think that way tend to think that the specific grants of power in Article II

are merely by example, or stuff that the Framers wanted to be absolutely sure the President got, not an exclusive list.

There's also the "take care clause," providing that the president shall "take care that the laws are faithfully executed." This too is textually ambiguous: is it a restraint, just commanding that the president shall do his/her job and enforce the laws Congress passes? Or is it a broader power to take necessary action to hold the system together (like, for example, by seizing steel mills during a war...)?

The textual argument on the other side is that the rest of Article II grants specific powers to the president. Typically when general language is followed by specific language, we interpret specific language as constraining the general; more concretely, if the president has all the executive power, why would we need to specifically say that he has the pardon power, the commander in chief role, the power to make appointments, etc.?

Other people give more weight to the Necessary and Proper Clause, which gives Congress, not the President, the power to carry into effect the powers of the whole federal government, including the executive branch:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

While scholars (bizarrely, in my opinion) disagree about whether the President is an "officer" of the United States, it's manifestly the case that executive agencies and personnel are such departments and officers, and so given that the President acts through those agencies, it seems pretty fairly implied by that text that Congress has the power to decide how a bunch of executive tasks get carried out. Thus, if you give a lot of importance to the stuff after the comma in the N&P clause, you'll probably be inclined to think that even if the President does have a bunch of unenumerated powers, Congress gets to decide how they get carried out, gets to make rules about their exercise, etc.

## Major Areas of Controversy

As we get started, I'd like to give you a quick overview of the major substantive areas where controversies often arise about the balance of power between Article I and Article II.

- Foreign relations. Who has the power to recognize foreign countries?<sup>22</sup> How much stuff can the president agree to do, and actually commit the U.S. to doing, in an "executive agreement" rather than a treaty ratified by the Senate? (And how much stuff can the President and Senate together get done by treaty without going through the full lawmaking process and involving the House?)
- Military action. Congress has the power to declare war, but the President is the Commander in Chief of the army. Can the President use troops, e.g., to invade somewhere else, without Congressional consent?
- How much policy change can the President achieve by an "executive order" issuing commands to the agencies within the executive branch? More generally, how much power does the President have to order around officials within the executive branch? Do we have what's called a "unitary executive," where, e.g., the entire state department, EPA, Patent and Trademark Office, etc. etc. are merely extensions of the President's will subject to very granular orders at all times ("you shall approve this patent," "you shall grant this procurement contract to X Corp., not Y Corp."), or does the bureaucracy have independent decision-making power?

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<sup>22</sup>Here, "recognize" means "grant formal diplomatic status to." This *really matters a lot*. For example, China might well declare war if the U.S. granted formal diplomatic recognition to Taiwan. Israel has a big stake in what the U.S. says about Palestine. etc. etc.

- Related to the last one, can the President fire executive branch officials at will? Can Congress pass laws insulating executive branch officials from firing (e.g., saying that some official can only be fired for cause)?
- How much legislative power may Congress delegate to the President? Under what circumstances may Congress authorize agencies under the supervision of the White House to enact “regulations” that have the force of law? How much discretion may Congress give such agencies? May Congress give the President other powers over the legislative process by law, like the infamous “line-item veto” they tried in the 90’s, where the President could veto individual parts of budget bills?<sup>23</sup>

A lot of these questions also come up in administrative law, which you really should take.

### A Bit of History

To understand the debates over executive power and separation of powers, it helps to have a little history under your belt.

There have been two great controversies in the territory of the first half of constitutional law. The first is the scope of Congress’s power over the economy (our next module). The second is the President’s power to use the officials of the executive branch to carry out his or her preferred policies, or, on a more modest version of the argument, to act in times of national emergency. This is often called “inherent power,” because it’s claimed that it’s inherent to the executive function, not a result of a specific grant like the veto power or the pardon power or the commander in chief power or the like. For example, when Congress couldn’t agree to raise the government debt ceiling in 2011 and there was a real risk of default, law professors Eric Posner and Adrian Vermeule<sup>24</sup> claimed that President Obama had the power to raise the debt ceiling by personal fiat to prevent economic crisis.<sup>25</sup>

Simplifying a little, the key question is whether the President is a mere functionary—whose job it is to simply carry out the instructions of Congress, run the day-to-day business of administration in accordance with those instructions, plus to execute a very small handful of independent powers, like the pardon power and the veto power. Or is the president a mighty source of independent power, able to carry out a policy agenda independent of Congress? Or, most likely, something in between?

A lot of what we’ll see in this section is originalist argument on the question. But what we’ll see is that the views of the framers—and for that reason, we might also imagine the framing generation—are quite unclear, and even move back and forth. There’s a point where Madison and Hamilton swap positions on executive power, for example.

As for more straightforwardly normative and structural arguments, here there are also good arguments on both sides. On the side of more presidential power, people point out first that the president is the only person actually elected by the entire country, and also that the president has the capacity for swift action in times of national emergency, particularly when matters of war and peace are involved. Against, the fear is the centralized power can lead to tyrannical government with too much power—especially since the president’s control over the military establishment and its capacity and need for secret action mean that often things the president does are imperfectly at best subject to democratic checks, as we’ve seen for example with the surveillance scandals of the last few years. Requiring statutory authorization for everything the president does, and constraining executive discretion, can be seen as a bulwark against this kind of power, and against developing the kind of executive prerogative that the framers sometimes say they saw in the British crown before the revolution.

<sup>23</sup>The Supreme Court said “no” to that one. *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>24</sup>[http://www.nytimes.com/2011/07/22/opinion/22posner.html?\\_r=0](http://www.nytimes.com/2011/07/22/opinion/22posner.html?_r=0)

<sup>25</sup>Note: I think this is an incredibly stupid idea. But respectable people—or, at least, what amounts to the same idea, professors at fancy law schools—made it, and that fact alone is interesting.

That word, *prerogative*, is really important. One position that was kicked around for a few centuries in England was that the King had a reservoir of power above and beyond Parliament, that could be used to, for example, impose forced loans (that is, taxes) and imprison people who didn't pay. This was the occasion for an immense amount of conflict between Crown and Parliament, and even contributed to a brief revolution in the 17th century; actually, by the time of *our* revolution the royal prerogative was mostly gone, but people were still scared of it—and are still scared of it today.<sup>26</sup> The power to, for example, imprison U.S. citizens without trial on national security grounds, claimed in the war on terror, smells a lot like prerogative.

Almost immediately after the founding, the question arose whether or not the President has the power to fire executive officials.<sup>27</sup> The First Congress was considering the creation of a Department of Foreign Affairs, and had a month-long debate about where the power to remove the head of that department should be, and whether the Constitution vested that power in the president. The result, known as the “decision of 1789,” is often cited for the proposition that the First Congress, and particularly Madison as a leader of that debate, had endorsed the theory that the President has the power to fire executive officials. Yet it was not all clear what the founders believed. Hamilton, for example, had not that long beforehand written Federalist 77, which claimed that the Senate's power to consent to appointments came with the Senate's power to consent to firings, and that this was an important feature of the Constitutional order, promoting stability of government.

A few years later, Hamilton and Madison switched sides on the abstract issue of how powerful the President should be, in a sense: George Washington had issued a proclamation of neutrality in a war that had been recently started with France; in a famous serial debate known as the letters of Pacificus (Hamilton) and Helvidius (Madison), Hamilton argued that the President had inherent power to issue this declaration. Madison, by contrast, argued that he did not. So those two most important of our Founding Fathers(tm) clearly disagreed on basic questions of executive power, not only with one another but also with themselves...

Fast-forward to the second great removal debate. After the death of Lincoln, Andrew Johnson, a southern Democrat (read: bad guy), became president and started to roll back Reconstruction.<sup>28</sup> The Radical Republicans who dominated Congress, aiming to forestall Johnson's betrayal of Lincoln's legacy, enacted the Tenure in Office Act, which forbade the firing of officials (that is, Lincoln's appointees) without the Senate's approval. It passed over Johnson's veto, and Johnson promptly violated it, firing the reconstructionist Secretary of War, Edwin Stanton. The House of Representatives impeached Johnson by an overwhelming majority, and he was spared removal in the Senate by a single vote. The act was repealed a couple of presidents later. The debate about the President's power to remove continues to this day.

The potential for abusing the power to sack officials has also been seen more recently than Andrew Johnson's use of it to undermine reconstruction. The infamous “Saturday Night Massacre” is the most important example. In fall 1973, Richard Nixon was under investigation for his many crimes, and Archibald Cox, the special prosecutor in charge of the investigation, was getting on Nixon's nerves.<sup>29</sup>

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<sup>26</sup>In the last footnote, I threw some mud at Eric Posner and Adrian Vermeule, who have ludicrously excessive views of the breadth of executive power. For the polar opposite problem, you might read the work of Phillip Hamburger, yet another professor at a fancy school. He has argued, essentially, that ordinary administrative law notice and comment rulemaking is equivalent to the royal prerogative to imprison people without trial exercised by the Stuart kings. This view is also stupid, and it says something about the decline of the Constitutional Law professoriat that some of our most famous constitutional law scholars take such ludicrously unreasonable positions on both sides of the executive power debate.

<sup>27</sup>For background: there are three kinds of executive officials: those who are appointed by the president with the advice and consent of the Senate (who are typically high officials like cabinet members); subordinate officials who are usually hired within the bureaucracy or appointed by cabinet members (either as an administrative responsibility, or because Congress has vested the appointment power in them pursuant to its power noted in Article II sec. II.), and officials for whom Congress has vested the appointment power outside the executive branch.

<sup>28</sup>Quick history reminder: Reconstruction was the set of programs that the Radical Republicans in Congress enacted in order to help out the freed slaves and bring the South to heel.

<sup>29</sup>Incidentally, my crim law professor back in the day<sup>30</sup> was Cox's deputy.



So Nixon ordered the attorney general to fire Cox. The attorney general refused, and resigned. Then Nixon ordered the deputy attorney general to fire Cox. He too refused and resigned. Finally, the solicitor general, Robert Bork, took Nixon's orders and fired Cox. A district court judge ultimately ruled that the firing was illegal, on the basis of DoJ regulations. Nixon eventually, of course, got hounded out of office. (See above, re: many crimes.)

Modern controversies over executive power continue. For decades, presidents and Congress have disagreed over the constitutionality of the War Powers Act, which attempts to limit the amount of time the President can have troops deployed abroad without Congressional authorization.

More recently, the Obama Administration was embroiled in political controversy as well as litigation over DACA, the Deferred Action for Childhood Arrivals program—that's where Obama declined to enforce immigration laws against people who came to the country in violation of those laws as children—the famous dreamers. Challengers alleged, among other things, (a) that Congress, not the President, has the authority to determine who gets to stay in the country, and (b) that the President has a duty in Article II under the "take care" clause to actually enforce the laws. The basic Constitutional argument on behalf of Obama was that the executive always has prosecutorial discretion on what laws to enforce—just like the local cop has the discretion not to write you a ticket for speeding, to let you off with a warning, and just like the local District Attorney has the discretion to decide not to prosecute victimless drug crimes, the President has the discretion to say that the nation's immigration enforcement resources are better spent on higher-priority matters, and to systematically refuse to prosecute certain categories of immigrants. The Supreme Court heard a case about this program<sup>31</sup> in 2016, but got stuck on a 4-4 tie.

More recently, still, of course, immense controversies embroiled Trump's use of executive power, for example by attempting to declare a state of emergency (under relevant legislation) to divert federal funds<sup>32</sup> for work on his border wall.<sup>33</sup>

### What's the point?

The framers were, yet again, concerned with preventing what they saw as tyranny—as the government getting too big for its britches and bossing people around in unacceptable ways.<sup>34</sup>

Both federalism (divided sovereignty between state and federal levels) and separation of powers (divided federal powers between branches) are directed at preventing tyranny by forcing anyone who actually wants to do anything to get other people's consent, and, in particular, other people's consent where those other people are elected by different constituencies and have different institutional incentives. For example, the Senate was originally elected by state legislatures, as opposed to the House, which has always been elected by the people; the idea was (roughly) that elites in the Senate would have a veto over populist stuff initiated in the House, and populists in the House would have a veto over elitist stuff initiated in the Senate. (They got a lot of these ideas from Rome.)

Here's Federalist 51 on the subject of separation of powers in particular:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The

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<sup>31</sup><http://www.scotusblog.com/case-files/cases/united-states-v-texas/>

<sup>32</sup><https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>

<sup>33</sup>In the other direction, it may be of interest to you that many presidents have claimed a power of "impoundment" to decline to spend funds appropriated by Congress. Jefferson kicked it off by declining to spend some money appropriated for the navy. See *Train v. City of New York*, 420 U.S. 35 (1975) for Congress's power to restrict this alleged power of impoundment.

<sup>34</sup>By the way, what exactly is tyranny? Well, for the framers, it was, roughly speaking, some combination of infringements on individual rights and narrow interests ("factions") bossing everyone else around. Though matters get much more complicated quickly when we try to peel this onion.

provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

### Foreign affairs are messy

Foreign affairs rules are difficult. If I had to distill some rules out of it for purposes of exams and such, it would probably look like this:

1. Justice Jackson's typology. Do it.
2. Preexisting practice matters a lot. Many of these cases revolve around discussions of what presidents going back to George Washington thought they could do.
3. When Presidents act with plausible Congressional authorization, the courts will rarely get in the way (absent violation of federalism or individual rights principles).
4. The President has broad power to make "executive agreements" with foreign countries, with effects similar to treaties, and they've never been struck down; on the other hand, the President has never tried to make an "executive agreement" that conflicts with a statute, and it seems much less likely that such a thing would be upheld.
5. When there is a conflict between a treaty and a federal statute, they're treated as of equivalent precedence, i.e., the last one wins. This is why Congress can abrogate a treaty at will, and why, presumably, it can also control the alleged "executive agreement" power.

### Administrative law

Much of the material about executive power starts to shade into administrative law. As I keep saying, you really need to take that course; this material will help you see why. I can't really teach you any significant part of adlaw at the same time as constitutional law, but I can at least give you a basic introduction to the key terms and concepts so that you can understand this week's reading.

So here's something you might not know. Huge amounts of law, especially but not exclusively in the domain of economic regulation, is written by executive branch agencies under the control of the President, pursuant to a delegation of authority from Congress.

Just to give you an idea of the scope of the regulatory state, here are some particularly huge examples:

- Title 26 of the Code of Federal regulations is filled with Treasury Department regulations interpreting and filling out the Internal Revenue Code. That is, these are sources of law that directly apply to you and dictate how you file your taxes, how the various provisions in the tax code will be read to pick your pocket, etc.
- The DEA gets to ban drugs under the Controlled Substances Act. You can see the list of the DEA actions to add to the list here: <https://www.deadiversion.usdoj.gov/schedules/>
- Of course, commercial life is comprehensively regulated. Financial regulation, for example, shows up in regulations by the SEC, FDIC, etc. etc. etc.
- Title 40 of the CFR is run by the EPA, which regulates all kinds of activities that affect the environment.

I could go on for a very long time.

Here's something else you might not know. Huge amounts of adjudication of these rules of law is carried out in the first instance by people called "Administrative Law Judges," who rule on cases within executive agencies. Here are some more examples:

- If you file a claim for Social Security benefits, and it's denied, your first appeal is to an ALJ within the SSA.
- Many labor law claims, including union disputes, whistleblower protections, etc. can be decided by ALJs.
- The Securities and Exchange Commission initiates enforcement actions against people alleged to have violated securities laws through its ALJs.

There are serious questions about the constitutionality of the ALJ system—see this blog post for more<sup>35</sup> and also this<sup>36</sup>. There are particular worries when these agencies adjudicate cases that look quasi-criminal, such as SEC enforcement actions that can involve substantial monetary penalties against individuals.

There are also serious questions about the constitutionality of the regulatory system. In particular, a doctrine known as *Chevron* deference says that courts have to defer to agency interpretations of the statutes they enforce—but this has been quite widely questioned as an inappropriate surrender of the Judicial Branch's duty to, as Chief Justice Marshall put it, "say what the law is."

Indeed, the whole system of issuing regulations has been questioned as a violation of the oft-referenced but rarely used nondelegation doctrine. The intuition here, in simple forms, is this: the Framers required that laws be subject to the approval of both Houses of Congress and the President or a veto override for a reason, namely, in order to prevent abuse of power that might come with the unchecked power to make rules. But allowing administrative agencies to make rules without that kind of process leads to too much concentration of power—especially when they also get to adjudicate those same rules.<sup>37</sup>

Note that Justice Gorsuch in particular (but to a lesser degree others too) is known to be opposed to *Chevron* deference. This may change the direction the Court takes with respect to these questions in the long run.

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<sup>35</sup><https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/28/are-the-secs-administrative-law-judges-unconstitutional/>

<sup>36</sup><http://blogs.orrick.com/securities-litigation/2016/03/30/breaking-news-supreme-court-declines-to-address-the-constitutionality-of-securities-and-exchange-administrative-forum/>

<sup>37</sup>The Administrative Procedures Act does impose many constraints on the rulemaking and adjudicative process of agencies, however. You'll learn about this when you take administrative law.

## McCulloch v. Maryland

17 U.S. 316 (1819)

[From the reporter's summary]

It is admitted by the parties in this cause, by their counsel, that there was passed, on the 10th day of April 1816, by the congress of the United States, an act, entitled, 'an act to incorporate the subscribers to the Bank of the United States;' and that there was passed on the 11th day of February 1818, by the general assembly of Maryland, an act, entitled, 'an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature.' It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of congress aforesaid, did organize themselves, and go into full operation, in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did establish a branch of the said bank in the city of Baltimore, in the state of Maryland, which has until the first day of May 1818, ever since transacted and carried on business as a branch of the said Bank of the United States. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch, or office of discount and deposit, at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union.

It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank-notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective banknotes were not, nor was either of them, so issued, on stamped paper, in the manner prescribed by the act of assembly aforesaid [*i.e., they didn't pay the required Maryland tax to get the stamp*]. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch, or office of discount and deposit, have not, nor has either of them, paid in advance, or otherwise, the sum of \$15,000, to the treasurer of the Western Shore, for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the governor and council of the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the court for their decision in this case, is, as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of congress aforesaid, or to one of them.

**MARSHALL, Ch. J., delivered the opinion of the court.**

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is—has congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the peo-

ple. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution,

would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the

powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity, for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' The counsel for the state of Maryland have urged various arguments, to prove that this clause, though, in terms, a grant of power, is not so, in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from that peculiar language of this clause.



Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in a their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction, that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies

may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases.

Congress is empowered ‘to provide for the punishment of counterfeiting the securities and current coin of the United States,’ and ‘to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.’ The several powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power ‘to establish post-offices and post-roads.’ This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the postroad, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the postoffice, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word ‘necessary’ must be abandoned, in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution, by means not vindictive in their nature? If the word ‘necessary’ means ‘needful,’ ‘requisite,’ ‘essential,’ ‘conducive to,’ in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive, when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?

In ascertaining the sense in which the word ‘necessary’ is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power ‘to make all laws which shall be necessary and proper to carry into execution’ the powers of the government. If the word ‘necessary’ was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not

strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' &c., 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power, as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying

into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged, by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' is not more comprehensive, than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be

fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire

2. Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution

leaves them this right, in the confidence that they will not abuse it. Before we proceed to examine this argument, and to subject it to test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised

by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.

If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle, is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend, that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is, 'that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws

of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might, at any time, abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus, all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments.'

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, 'to the exclusion and destruction of the state governments.' The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the rights of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.



## Wickard v. Filburn

317 U.S. 111 (1942)

**Mr. Justice JACKSON delivered the opinion of the Court.**

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby* sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of 'market' and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of 'by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.' Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as 'available for marketing' as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes

a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most 'indirect.' In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause exemplified by this statement has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.' The present Chief Justice has said in summary of the present state of the law: 'The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.'

Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production

and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed in part at least to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel as compared with the world market price of 40 cents a bushel.

The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the selfinterest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

## U.S. v. Lopez

514 U.S. 549 (1995)

### **Chief Justice REHNQUIST delivered the opinion of the Court.**

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress “[t]o regulate Commerce . . . among the several States.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress’ power to legislate under the Commerce Clause.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, § 8. As James Madison wrote, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The Federalist No. 45. This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

In *United States v. Darby* (1941), the Court upheld the Fair Labor Standards Act, stating:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’

*Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect

and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, e.g., *Southern R. Co. v. United States*, (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce). Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn’s activity:

“One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be

reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.”

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms.<sup>3</sup> Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass* (1971) the Court interpreted former 18 U.S.C. § 1202(a), which made it a crime for a felon to “receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm.” The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” The *Bass* Court set aside the conviction because although the Government had demonstrated that Bass had possessed a firearm, it had failed “to show the requisite nexus with interstate commerce.” The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the “mere possession” of firearms. See also *United States v. Five Gambling Devices* 346 (“The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative”). Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here because the “prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.”

The Government’s essential contention is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. As a result,

the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Justice BREYER focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

## Gonzales v. Raich

545 U.S. 1 (2005)

### **Justice Stevens delivered the opinion of the Court.**

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that “seriously ill” residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. A “primary caregiver” is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents’ conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors’ recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich’s physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as “John Does,” to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson’s home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants. Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

The question before us is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress’ power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.

Shortly after taking office in 1969, President Nixon declared a national “war on drugs.” As the first



campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

This was not, however, Congress' first attempt to regulate the national market in drugs. Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce. Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer. For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914. The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act. Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands. Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements. Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law. Thus, while the Marihuana Tax Act did not declare the drug illegal per se, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. [P]rompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act. Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping.

In enacting the CSA, Congress classified marijuana as a Schedule I drug. This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example,

Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation. For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible. Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887, and the Sherman Antitrust Act in 1890.

Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Only the third category is implicated in the case at hand.

In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Nonetheless, respondents suggest that Wickard differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) Wickard involved a “quintessential economic activity” — a commercial farm — whereas respondents do not sell marijuana; and (3) the Wickard record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court’s reasoning.

The fact that Filburn’s own impact on the market was “trivial by itself” was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court’s analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in — the cultivation of wheat for home consumption — was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the Wickard case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. The submissions of the parties and the numerous amici all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute. Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech. While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress’ authority to legislate.

In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in Wickard, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce . . . among the several States.” That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents’ creation, they read those cases far too broadly.

Those two cases, of course, are Lopez and Morrison. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both Lopez and Morrison, the parties asserted that a particular statute or provision fell outside Congress’ commerce power in its entirety. This distinction is pivotal for we have

often reiterated that “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”

At issue in *Lopez* was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of “controlled substances.” Most of those substances — those listed in Schedules II through V — “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.” The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. Marijuana was listed as the 10th item in the 3d subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many “essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court’s holding in *Morrison*. The Violence Against Women Act of 1994 created a federal civil remedy for the victims of gender-motivated crimes of violence. The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that “the noneconomic, criminal nature of the conduct at issue was central to our decision” in *Lopez*, and that our prior cases had identified a clear pattern of analysis: “‘Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.’”

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from

the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

**Justice Scalia, concurring in the judgment.** I agree with the Court’s holding that the Controlled Substances Act (CSA) may validly be applied to respondents’ cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States*, our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs* (1838), Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of “activities that substantially affect interstate commerce” is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce.

This principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the “substantially affects” test to “obliterate the distinction between what is national and what is local,” — rejected the argument that Congress may regulate noneconomic activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. “[I]f we were to accept [such] arguments,” the Court reasoned in *Lopez*, “we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” Thus, although Congress’s authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to “pile inference upon inference” in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” This statement referred to those cases permitting the regulation of intrastate activities “which in a substantial way interfere with or obstruct the exercise of the granted power.” As the Court put it in *Wrightwood Dairy*, where Congress has the authority to enact a regulation of interstate commerce, “it possesses every power needed to make that regulation effective.”

Although this power “to make . . . regulation effective” commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself “substantially affect” interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power.

In *Darby*, for instance, the Court explained that “Congress, having . . . adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards,” could not only require employers engaged in the production of goods for interstate commerce to conform to wage and hour standards, *id.*, but could also require those employers to keep employment records in order to demonstrate compliance with the regulatory scheme. While the Court sustained the former regulation on the alternative ground that the activity it regulated could have a “great effect” on interstate commerce, it affirmed the latter on the sole ground that “[t]he requirement for records even of the intrastate transaction is an appropriate means to the legitimate end,”

Today’s principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to little “more than a drafting guide.” I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so “could . . . undercut” its regulation of interstate commerce. This is not a power that threatens to obliterate the line between “what is truly national and what is truly local.”

*Lopez* and *Morrison* affirm that Congress may not regulate certain “purely local” activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, and *Morrison* did not even discuss the possibility that it was.

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be “appropriate” and “plainly adapted” to that end. Moreover, they may not be otherwise “prohibited” and must be “consistent with the letter and spirit of the constitution.” *Ibid.* These phrases are not merely hortatory. For example, cases such as *Printz v. United States* and *New York v. United States* affirm that a law is not “\*proper for carrying into Execution the Commerce Clause” “[w]hen [it] violates [a constitutional] principle of state sovereignty.”

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce “extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.” To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances — both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a non-economic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of

eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish “controlled substances manufactured and distributed intrastate” from “controlled substances manufactured and distributed interstate,” but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market — and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. . Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for “medical” marijuana and the more general marijuana market. “To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.” *McCulloch*.

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market “could be undercut” if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents. *Wickard v. Filburn* presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress’s price regulation by driving down prices in the market. This potential disruption of Congress’s interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress’s regulation of that conduct.

The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *United States v. Lopez*. See post, at 52 (arguing that “we could have surmised in *Lopez* that guns in school zones are ‘never more than an instant from the interstate market’ in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act”). This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was “not an essential part of a larger regulation of economic activity.” On the dissent’s view of things, that statement is inexplicable. Of course it is in addition difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1,000 feet of schools (and nowhere else). The dissent points to a federal law barring licensed dealers from selling guns to minors, but the relationship between the regulatory scheme of which § 922(b)(1) is a part (requiring all dealers in firearms that have traveled in interstate commerce to be licensed) and the statute at issue in *Lopez* approaches the nonexistent—which is doubtless why the Government did not attempt to justify the statute on the basis of that relationship.

**Justice O’Connor, with whom The Chief Justice and Justice Thomas join as to all but Part III, dissenting.**

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general. The Court’s decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. Today’s decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing

Congress to set the terms of the constitutional debate in this way, i. e., by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones; Furthermore, today's decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a new interstate scheme exclusively for the sake of reaching intrastate activity.

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious — that their personal activities do not have a substantial effect on interstate commerce. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation — including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation — recognize that medical and nonmedical (i. e., recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and



social policy, where “States lay claim by right of history and expertise.” California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress’ encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one’s own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court’s definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court’s opinion — the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see *Lopez*, *supra*, at 565 (“depending on the level of generality, any activity can be looked upon as commercial”) — the Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between “what is national and what is local.” It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow — a federal police power. *Lopez*.

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.

The Court suggests that *Wickard*, which we have identified as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. The AAA itself confirmed that Congress made an explicit choice not to reach—and thus the Court could not possibly have approved of federal control over—small-scale, noncommercial wheat farming. In contrast to the CSA’s limitless assertion of power, Congress provided an exemption within the AAA for small producers. When *Filburn* planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook’s herb garden. This is not to say that Congress may never regulate small quantities of

commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that Wickard did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (i. e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. As Justice Scalia recognizes, Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market — or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from *Wickard*. To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. With real numbers at hand, the *Wickard* Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide.

The Court recognizes that "the record in the *Wickard* case itself established the causal connection between the production for local use and the national market" and argues that "we have before us findings by Congress to the same effect" The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes "swelling" in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents "is essential to the effective control" over interstate drug trafficking. These bare declarations cannot be compared to the record before the Court in *Wickard*.

They amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence—descriptive, statistical, or otherwise. “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” Indeed, if declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. But, recognizing that “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question,” we found Congress’ detailed findings inadequate.

## New York v. U.S.

505 U.S. 144 (1992)

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

This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In this case, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the LowLevel Radioactive Waste Policy Act. Relying largely on a report submitted by the National Governors' Association, Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently . . . on a regional basis." The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States. The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal. The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The 1985 Act was again based largely on a proposal submitted by the National Governors' Association. In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate. The Act directs: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State." The Act authorizes States to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." For an additional seven years beyond the period contemplated by the 1980 Act, from the beginning of 1986 through the end of 1992, the three existing disposal sites "shall make disposal capacity available for low-level radioactive waste generated by any source." But the three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact. After the seven-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region.

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

1. Monetary incentives. One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy. The Secretary then makes payments from this account to each State that has complied with a series of deadlines. By July 1, 1986, each State was to

have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State. [description of similar steps and deadlines]

2. Access incentives. The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter. [etc.

3. The take title provision. The third type of incentive is the most severe. The Act provides:

If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.”

These three incentives are the focus of petitioners’ constitutional challenge.

Petitioners—the State of New York and the two counties—filed this suit against the United States in 1990. They sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution. Petitioners have abandoned their Due Process and Eleventh Amendment claims on their way up the appellate ladder; as the case stands before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause.

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: “The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties.” The Federalist No. 82. Hamilton’s prediction has proved quite accurate. While no one disputes the proposition that “[t]he Constitution created a Federal Government of limited powers”; and while the Tenth Amendment makes explicit that “[t]he 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”; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.

These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

It is in this sense that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” As Justice Story put it, “[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.” This has been the Court’s consistent understanding: “The States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

As an initial matter, Congress may not simply "commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress "could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such."

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra-distinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15. As Hamilton saw it, "we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government."

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State's convention: "This Constitution does not attempt to coerce

sovereign bodies, states, in their political capacity. . . . But this legal coercion singles out the . . . individual.”

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State’s policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress’ spending power, “Congress may attach conditions on the receipt of federal funds.” *South Dakota v. Dole*, . Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution’s other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State’s legislative choices.

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed “a program of cooperative federalism,” is replicated in numerous federal statutory schemes. These include the Clean Water Act, the Occupational Safety and Health Act of 1970 [and others].

By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The parties in this case advance two quite different views of the Act. As petitioners see it, the Act

imposes a requirement directly upon the States that they regulate in the field of radioactive waste disposal in order to meet Congress' mandate that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." Petitioners understand this provision as a direct command from Congress, enforceable independent of the three sets of incentives provided by the Act. Respondents, on the other hand, read this provision together with the incentives, and see the Act as affording the States three sets of choices. According to respondents, the Act permits a State to choose first between regulating pursuant to federal standards and losing the right to a share of the Secretary of Energy's escrow account; to choose second between regulating pursuant to federal standards and progressively losing access to disposal sites in other States; and to choose third between regulating pursuant to federal standards and taking title to the waste generated within the State. Respondents thus interpret § 2021c(a)(1)(A), despite the statute's use of the word "shall," to provide no more than an option which a State may elect or eschew.

The Act could plausibly be understood either as a mandate to regulate or as a series of incentives. Under petitioners' view, however, § 2021c(a)(1)(A) of the Act would clearly "commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." We must reject this interpretation of the provision for two reasons. First, such an outcome would, to say the least, "upset the usual constitutional balance of federal and state powers." "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance," but the Act's amenability to an equally plausible alternative construction prevents us from possessing such certainty. Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." This rule of statutory construction pushes us away from petitioners' understanding of § 2021c(a)(1)(A) of the Act, under which it compels the States to regulate according to Congress' instructions.

We therefore decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act. Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, that limit may be lifted, as it has been here, by an expression of the "unambiguous intent" of Congress. Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress' approval, the States can clearly do so with Congress' approval, which is what the Act gives them.

The second step, the Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power.

The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. The expenditure is for the general welfare; the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. The conditions imposed are unambiguous; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related



to the purpose of the expenditure; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition.

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional selfsufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments

to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, “the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

Respondents emphasize the latitude given to the States to implement Congress’ plan. The Act enables the States to regulate pursuant to Congress’ instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

## Printz v. United States

521 U.S. 898 (1997)

### **Justice SCALIA delivered the opinion of the Court.**

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

The Gun Control Act of 1968 (GCA) establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms. It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence.

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background check system, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form) containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers; (2) verify the identity of the transferee by examining an identification document; and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form. With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal.

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check. In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. Moreover, if the CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form. Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for no more than 1 year, or both."

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions.

From the description set forth above, it is apparent that the Brady Act purports to direct state law

enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

The petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions." Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, and to register aliens seeking naturalization and issue certificates of registry. It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, and ordering the deportation of alien enemies in times of war.

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, §1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. The Constitution itself, in the Full Faith and Credit Clause, Art. IV, §1, generally required such enforcement with respect to obligations arising in other States.

For these reasons, we do not think the early statutes imposing obligations on state courts imply a

power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerosness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power. The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. That was in direct implementation, however, of the Extradition Clause of the Constitution itself, see Art. IV, §2.3

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789—the day before its proposal of the Bill of Rights—the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.

[some stuff on the Federalist Papers]

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," a principle that controls the present cases.

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See *The Federalist* No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees). The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

The dissent of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause. It reasons that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” conclusively establishes the Brady Act’s constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers “not delegated to the United States.” What destroys the dissent’s Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at \_\_\_, it is not a “La[w] . . . *proper* for carrying into Execution the Commerce Clause,” and is thus, in the words of *The Federalist*, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.” *The Federalist* No. 33.

## South Dakota v. Dole

483 U.S. 203 (1987)

**Chief Justice REHNQUIST delivered the opinion of the Court.**

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. In 1984 Congress enacted 23 U.S.C. § 158, which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States “in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power.

The Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” The breadth of this power was made clear in *United States v. Butler* (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative fields” may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of “the general welfare.” In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States’ receipt of federal funds, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated “to the federal interest in particular national projects or programs.” See also *Ivanhoe Irrigation Dist. v. McCracken* (“[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that “the concept of welfare or the opposite is shaped by Congress. . . .” Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it “has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.” Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation’s highways concluded that the lack of uniformity in the States’ drinking ages created “an incentive to drink and drive” because “young persons

commut[e] to border States where the drinking age is lower.” By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of § 158—and the basic point of disagreement between the parties—is whether the Twenty-first Amendment constitutes an “independent constitutional bar” to the conditional grant of federal funds. Petitioner, relying on its view that the Twenty-first Amendment prohibits direct regulation of drinking ages by Congress, asserts that “Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.” But our cases show that this “independent constitutional bar” limitation on the spending power is not of the kind petitioner suggests. *United States v. Butler*, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. In *Oklahoma v. Civil Service Comm’n*, the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that “the United States is not concerned with, and has no power to regulate, local political activities as such of state officials,” the Court nevertheless held that the Federal Government “does have power to fix the terms upon which its money allotments to states shall be disbursed.” The Court found no violation of the State’s sovereignty because the State could, and did, adopt “the ‘simple expedient’ of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”

These cases establish that the “independent constitutional bar” limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State’s action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion.” Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in *Steward Machine Co. v. Davis*:

[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical



determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.

## National Federation of Independent Business v. Sebelius

567 U.S. 519 (2012)

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion.

### Roberts Majority/Plurality/etc. Opinion

**CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which JUSTICE BREYER and JUSTICE KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.**

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Our precedents read that to mean that Congress may regulate “the channels of interstate commerce,” “persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” *Morrison*, *supra*, at 609 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer’s decision to grow wheat for himself and his livestock, and a loan shark’s extortionate collections from a neighborhood butcher shop.

Congress may also “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch*.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. “Proper respect for a co-ordinate branch of the government” requires

that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.”

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act’s 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain “minimum essential” health insurance coverage. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a “[s]hared responsibility payment” to the Federal Government. That payment, which the Act describes as a “penalty,” is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual’s household income, but no less than \$695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual’s taxes, and “shall be assessed and collected in the same manner” as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes.

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs—who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress’s powers under Article I of the Constitution.

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States’ total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States’ costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an amicus curiae to defend that aspect of the judgment below. And because there is a reasonable argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an amicus curiae to advance it.

Before turning to the merits, we need to be sure we have the authority to do so. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.

The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty's future collection. Amicus contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.

The text of the pertinent statutes suggests otherwise. The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any tax." Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty." There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."

Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. . Amicus argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act because it functions like a tax. It is true that Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." See *Bailey v. Drexel Furniture Co.* (1922).

The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. We have thus applied the Anti-Injunction Act to statutorily described "taxes" even where that label was inaccurate.

Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act. For example, §6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" subchapter 68B of the Internal Revenue Code. Penalties in subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act. The individual mandate, however, is not in subchapter 68B of the Code. Nor does any other provision state that references to taxes in Title 26 shall also be "deemed" to apply to the individual mandate.

Amicus attempts to show that Congress did render the Anti-Injunction Act applicable to the individual mandate, albeit by a more circuitous route. Section 5000A(g)(1) specifies that the penalty for not complying with the mandate "shall be assessed and collected in the same manner as an assessable

penalty under subchapter B of chapter 68.” Assessable penalties in subchapter 68B, in turn, “shall be assessed and collected in the same manner as taxes.” §6671(a). According to amicus, by directing that the penalty be “assessed and collected in the same manner as taxes,” §5000A(g)(1) made the Anti-Injunction Act applicable to this penalty. The Government disagrees. It argues that §5000A(g)(1) does not direct courts to apply the Anti-Injunction Act, because §5000A(g) is a directive only to the Secretary of the Treasury to use the same “methodology and procedures” to collect the penalty that he uses to collect taxes.

We think the Government has the better reading. As it observes, “Assessment” and “Collection” are chapters of the Internal Revenue Code providing the Secretary authority to assess and collect taxes, and generally specifying the means by which he shall do so. Section 5000A(g)(1)’s command that the penalty be “assessed and collected in the same manner” as taxes is best read as referring to those chapters and giving the Secretary the same authority and guidance with respect to the penalty. That interpretation is consistent with the remainder of §5000A(g), which instructs the Secretary on the tools he may use to collect the penalty. The Anti-Injunction Act, by contrast, says nothing about the procedures to be used in assessing and collecting taxes.

The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.

### III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act’s other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress’s power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

#### Commerce Clause Argument

##### III.A

The Government’s first argument is that the individual mandate is a valid exercise of Congress’s power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act’s “guaranteed-issue” and “communityrating” provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy

individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage.

The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action. At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power.

The Constitution grants Congress the power to "regulate Commerce." The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat.

*Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. See, e.g., Finkelstein, Trogon, Cohen, & Dietz, Annual Medical Spending Attributable to Obesity: Payer and Service-Specific Estimates. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." *The Federalist* No. 45. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48. Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. As we have explained, "the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting

into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.”

The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now. The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, “the uninsured as a class are active in the market for health care, which they regularly seek and obtain.” The individual mandate “merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others.”<sup>38</sup>

The Government repeats the phrase “active in the market for health care” throughout its brief, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not “active in the car market” in any pertinent sense. The phrase “active in the market” cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government’s effort to “regulate the uninsured as a class.” Our precedents recognize Congress’s power to regulate “class[es] of activities,” not classes of individuals, apart from any activity in which they are engaged.

The individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress’s authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that “[t]here is no temporal limitation in the Commerce Clause,” the Government argues that because “[e]veryone subject to this regulation is in or will be in the health care market,” they can be “regulated in advance.”

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by JUSTICE GINSBURG, involved preexisting economic activity.

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, “[h]ealth insurance is not purchased for its own sake like a car or broccoli;

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<sup>38</sup>In an attempt to recast the individual mandate as a regulation of commercial activity, JUSTICE GINSBURG suggests that “[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.” But “self-insurance” is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more “activ[e] in the self-insurance market” when they fail to purchase insurance, *ibid.*, than they are active in the “rest” market when doing nothing.



it is a means of financing health-care consumption and covering universal risks.” But cars and broccoli are no more purchased for their “own sake” than health insurance. They are purchased to cover the need for transportation and food.

The Government says that health insurance and health care financing are “inherently integrated.” But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how “inherently integrated” health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation”—the guaranteed-issue and community-rating insurance reforms. Under this argument, it is not necessary to consider the effect that an individual’s inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise,” *McCulloch*. Although the Clause gives Congress authority to “legislate on that vast mass of incidental powers which must be involved in the constitution,” it does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated. Instead, the Clause is “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.”

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.” We have thus upheld laws that are “ ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’ ” But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” *McCulloch*, are not “proper [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, “in the words of *The Federalist*, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’ ” *Printz*.

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those already in federal custody when they could not be safely released; criminalizing bribes involving organizations receiving federal funds; and tolling state statutes of limitations while cases are pending in federal court. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is “narrow in scope,” or “incidental” to the exercise of the commerce power. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory

scope those who otherwise would be outside of it. Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered “comprehensive legislation to regulate the interstate market” in marijuana. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress’s attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. Accordingly, we recognized that “Congress was acting well within its authority” under the Necessary and Proper Clause even though its “regulation ensnare[d] some purely intrastate activity.” *Raich* thus did not involve the exercise of any “great substantive and independent power” of the sort at issue here. Instead, it concerned only the constitutionality of “individual applications of a concededly valid statutory scheme.”

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at 4–16 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

#### Tax Power Argument

##### III.B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government’s second argument: that the mandate may be upheld as within Congress’s enumerated power to “lay and collect Taxes.”

The Government’s tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads “no vehicles in the park” might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: “No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.” Justice Holmes made the same point a century later: “[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals “shall” maintain health insurance. Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government’s alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the

Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a “fairly possible” one. As we have explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

### III.C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it “in the same manner as taxes.” This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about \$4 billion per year by 2017. Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act*.

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

Our precedent reflects this: In 1922, we decided two challenges to the “Child Labor Tax” on the same day. In the first, we held that a suit to enjoin collection of the so-called tax was barred by the Anti-Injunction Act. Congress knew that suits to obstruct taxes had to await payment under the Anti-Injunction Act; Congress called the child labor tax a tax; Congress therefore intended the Anti-Injunction Act to apply. In the second case, however, we held that the same exaction, although labeled a tax, was not in fact authorized by Congress’s taxing power. That constitutional question was not controlled by Congress’s choice of label.

We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress’s power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power. And in *New York v. United States* we upheld as a tax a “surcharge” on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. We thus ask whether the shared responsibility payment falls within Congress’s taxing power, “[d]isregarding the designation of the exaction, and viewing its substance and application.”

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the

payment is collected solely by the IRS through the normal means of taxation—except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was called a “tax” there was a penalty support the conclusion that what is called a “penalty” here may be viewed as a tax.

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. Indeed, “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The plaintiffs contend that Congress’s choice of language—stating that individuals “shall” obtain insurance or pay a “penalty”—requires reading §5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional. We have rejected a similar argument before. In *New York v. United States* we examined a statute providing that “[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste.” A State that shipped its waste to another State was exposed to surcharges by the receiving State, a portion of which would be paid over to the Federal Government. And a State that did not adhere to the statutory scheme faced “[p]enalties for failure to comply,” including increases in the surcharge. *New York*, 505 U. S., at 152–153. *New York* urged us to read the statute as a federal command that the state legislature enact legislation to dispose of its waste, which would have violated the Constitution. To avoid that outcome, we interpreted the statute to impose only “a series of incentives” for the State to take responsibility for its waste. We then sustained the charge paid to the Federal Government as an exercise of the taxing power. We see no insurmountable obstacle to a similar approach here.

The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not “frame” it as such. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay \$50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer’s income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a “tax,” a “penalty,” or anything else. No one would doubt that this law imposed a tax, and was within Congress’s power to tax. That conclusion should

not change simply because Congress used the word “penalty” to describe the payment. Interpreting such a law to be a tax would hardly “[i]mpos[e] a tax through judicial legislation.” Rather, it would give practical effect to the Legislature’s enactment.

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, §9, clause 4. That clause provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” This requirement means that any “direct Tax” must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a “head tax” or a “poll tax”), might be a direct tax. Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison’s objection that it was an unapportioned direct tax. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. That narrow view of what a direct tax might be persisted for a century. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or any other circumstance.” The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under §5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) (“Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes”).

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be

the novel course of directing individuals to purchase insurance. Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. Sustaining the mandate as a tax depends only on whether Congress has properly exercised its taxing power to encourage purchasing health insurance, not whether it can. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. We have nonetheless maintained that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the "power to tax is not the power to destroy while this Court sits."

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.<sup>39</sup>

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

#### Spending Clause Argument

#### IV

#### A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening

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<sup>39</sup>Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U.S.C. §5000A(g)(2)). But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate. The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." Such measures "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York*, *supra*, at 166. The conditions imposed by Congress ensure that the funds are used by the States to "provide for the . . . general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract.'" The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion" the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the

States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York and Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine*. That case involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly “driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government.” We acknowledged the danger that the Federal Government might employ its taxing power to exert a “power akin to undue influence” upon the States. But we observed that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State’s adoption of a particular type of unemployment legislation was therefore a means to “safeguard [the Federal Government’s] own treasury.” We held that “[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power.”

In rejecting the argument that the federal law was a “weapon of coercion, destroying or impairing the autonomy of the states,” the Court noted that there was no reason to suppose that the State in that case acted other than through “her unfettered will.” Indeed, the State itself did “not offer a suggestion that in passing the unemployment law she was affected by duress.”

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has “crossed the line distinguishing encouragement from coercion” in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State’s federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.” At the same time, the condition was not a restriction on how



the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.

We accordingly asked whether “the financial inducement offered by Congress” was “so coercive as to pass the point at which ‘pressure turns into compulsion.’” By “financial inducement” the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only “relatively mild encouragement to the States.” We observed that “all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%” of her highway funds. In fact, the federal funds at stake constituted less than half of one percent of South Dakota’s budget at the time. In consequence, “we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power.” Whether to accept the drinking age change “remain[ed] the prerogative of the States not merely in theory but in fact.”

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State’s Medicaid plan does not comply with the Act’s requirements, the Secretary of Health and Human Services may declare that “further payments will not be made to the State.” A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but all of it. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs. The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of pre-expansion Medicaid. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the Dole Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a “prerogative” to reject Congress’s desired policy, “not merely in theory but in fact.” The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

JUSTICE GINSBURG claims that Dole is distinguishable because here “Congress has not threatened to withhold funds earmarked for any other program.” But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because “Congress styled” them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress’s decision to so title it is irrelevant.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving “[t]he right to alter, amend, or repeal any provision” of that statute. So it does. But “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” A State confronted with statutory language reserving the right to “alter” or “amend” the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. See, e.g., Social Security Amendments of 1972 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid

eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.<sup>40</sup>

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons. The conditions on use of the different funds are also distinct. Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.

As we have explained, “[t]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or ‘retroactive’ conditions.” A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically.

JUSTICE GINSBURG claims that in fact this expansion is no different from the previous changes to Medicaid, such that “a State would be hard put to complain that it lacked fair notice.” But the prior change she discusses—presumably the most dramatic alteration she could find—does not come close to working the transformation the expansion accomplishes. She highlights an amendment requiring States to cover pregnant women and increasing the number of eligible children. But this modification can hardly be described as a major change in a program that—from its inception—provided health care for “families with dependent children.” Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to “fix the outermost line” where persuasion gives way to coercion. The Court found it “[e]nough for present purposes that wherever the line may be, this statute is within it.” We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply “conscript state [agencies] into the national bureaucratic army,” and that is what it is attempting to do with the Medicaid expansion.

#### Severability Argument

#### IV.B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold all “further [Medicaid] payments . . . to the State” if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. In light of the Court’s holding, the Secretary cannot apply §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains §1396c includes a severability

<sup>40</sup> JUSTICE GINSBURG suggests that the States can have no objection to the Medicaid expansion, because “Congress could have repealed Medicaid [and.] [t]hereafter, . . . could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA.” But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be “ritualistic.” The same is true of JUSTICE GINSBURG’s suggestion that Congress could establish Medicaid as an exclusively federal program.

clause confirming that we need go no further. That clause specifies that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” §1303. Today’s holding does not affect the continued application of §1396c to the existing Medicaid program. Nor does it affect the Secretary’s ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

The question remains whether today’s holding affects other provisions of the Affordable Care Act. In considering that question, “[w]e seek to determine what Congress would have intended in light of the Court’s constitutional holding.” Our “touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.” The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is “evident” that the answer is no, we must leave the rest of the Act intact.

We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain “fully operative as a law” and will still function in a way “consistent with Congress’ basic objectives in enacting the statute.” Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress’s power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

Ginsburg/Liberal Justices Concurrence/Dissent

**JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.**

I agree with THE CHIEF JUSTICE that the Anti-Injunction Act does not bar the Court's consideration of this case, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III–C of THE CHIEF JUSTICE's opinion. Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. Within the next decade, it is anticipated, spending on health care will nearly double.

The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U. S. Adults: National Health Interview Survey 2009 (Over 99.5% of adults above 65 have visited a health-care professional.). Most people will do so repeatedly. See (In 2009 alone, 64% of adults made two or more visits to a doctor's office.).

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over \$7,000 in health-care expenses. Over a lifetime, costs mount to hundreds of thousands of dollars. When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of \$10,000. Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum. Brief for Economic Scholars as Amici Curiae (citing a study indicating that, in 1998, the cost of treating a heart attack for the first 90 days exceeded \$20,000, while the annual cost of treating certain cancers was more than \$50,000).

Although every U. S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are all at peril of needing medical care without a moment's notice.

To manage the risks associated with medical care— its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U. S. residents.

Not all U. S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. As a group, uninsured individuals annually consume more than \$100 billion in healthcare services, nearly 5% of the Nation's total. Over 60% of those without insurance visit a doctor's office or emergency room in a given year.

## B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay.

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for \$43 billion worth of the \$116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over \$1,000 a year." Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting.

And it is hardly just the currently sick or injured among the uninsured who prompt elevation of the price of health care and health insurance. Insurance companies and health-care providers know that some percentage of healthy, uninsured people will suffer sickness or injury each year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance.

## C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

## D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly

referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U. S. residents. The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty.

The minimum coverage provision serves a further purpose vital to Congress' plan to reduce the number of uninsured. Congress knew that encouraging individuals to purchase insurance would not suffice to solve the problem, because most of the uninsured are not uninsured by choice. Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness. See Dept. of Health and Human Services, *Coverage Denied: How the Current Health Insurance System Leaves Millions Behind* 1 (2009) (Over the past three years, 12.6 million nonelderly adults were denied insurance coverage or charged higher premiums due to a preexisting condition.).

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a threepart solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. Second, Congress required insurers to use "community rating" to price their insurance policies. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance.

In the 1990's, several States—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and communityrating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers."

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care—i.e., those who cost insurers the most—become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and communityrating requirements without a minimum coverage provision, that is precisely what insurance companies did.

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States

had failed. In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U. S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community—rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

## II

### A

The Commerce Clause, it is widely acknowledged, “was the Framers’ response to the central problem that gave rise to the Constitution itself.” Under the Articles of Confederation, the Constitution’s precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.

What was needed was a “national Government . . . armed with a positive & complete authority in all cases where uniform measures are necessary.” The Framers’ solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation “in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.”

The Framers understood that the “general Interests of the Union” would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a “great outlin[e],” not a detailed blueprint, and that its provisions included broad concepts, to be “explained by the context or by the facts of the case.”

### B

Consistent with the Framers’ intent, we have repeatedly emphasized that Congress’ authority under the Commerce Clause is dependent upon “practical” considerations, including “actual experience.” We afford Congress the leeway “to undertake to solve national problems directly and realistically.”

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected and the asserted ends.”

In answering these questions, we presume the statute under review is constitutional and may strike it down only on a “plain showing” that Congress acted irrationally.

### C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical

emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing”; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

The minimum coverage provision, furthermore, bears a “reasonable connection” to Congress’ goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community rating regulations were in place, close up shop.

“[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.” Congress’ enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, THE CHIEF JUSTICE relies on a newly minted constitutional doctrine. The commerce power does not, THE CHIEF JUSTICE announces, permit Congress to “compel[] individuals to become active in commerce by purchasing a product.”

1.a

THE CHIEF JUSTICE’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to “compel individuals not engaged in commerce to purchase an unwanted product,” such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if THE CHIEF JUSTICE is correct that an insurance-purchase requirement can be applied only to those who “actively” consume health care, the minimum coverage provision fits the bill.

THE CHIEF JUSTICE does not dispute that all U. S. residents participate in the market for health services over the course of their lives. But, THE CHIEF JUSTICE insists, the uninsured cannot be considered active in the market for health care, because “[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking.”

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor’s office each year. Nearly 90% will within five years. An uninsured’s consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emer-



gency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide. See *Perez v. United States*, (“[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.”)<sup>41</sup>

Second, it is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate. THE CHIEF JUSTICE defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.

Third, contrary to THE CHIEF JUSTICE’s contention, our precedent does indeed support “[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.” In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. The Court rejected this argument. Wheat intended for home consumption, the Court noted, “overhangs the market, and if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA].”

Similar reasoning supported the Court’s judgment in *Raich*, which upheld Congress’ authority to regulate marijuana grown for personal use. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for “the high demand in the interstate market will [likely] draw such marijuana into that market.”

Our decisions thus acknowledge Congress’ authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress’ actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

Maintaining that the uninsured are not active in the health-care market, THE CHIEF JUSTICE draws an analogy to the car market. An individual “is not ‘active in the car market,’” THE CHIEF JUSTICE observes, simply because he or she may someday buy a car. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual might buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

Nor is it accurate to say that the minimum coverage provision “compel[s] individuals . . . to purchase an unwanted product.” If unwanted today, medical service secured by insurance may be desperately

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<sup>41</sup>Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who “have no intention of purchasing [medical care]” and are too far “removed from the [health-care] market.” This criticism ignores the reality that a healthy young person may be a day away from needing health care. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain.

THE CHIEF JUSTICE also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. Those who have insurance bear the cost of this guarantee. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

b

In any event, THE CHIEF JUSTICE's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions. Article I, §8, of the Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D. C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action."

Arguing to the contrary, THE CHIEF JUSTICE notes that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,'" and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.'" In separating the power to regulate from the power to bring the subject of the regulation into existence, THE CHIEF JUSTICE asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate "activity" from those that regulate "inactivity." As Judge Easterbrook noted, "it is possible to restate most actions as corresponding inactions with the same effect." Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. The minimum coverage provision could therefore be described as regulating activists in the self-insurance market. Wickard is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter.

Underlying THE CHIEF JUSTICE's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. This concern is unfounded.

First, THE CHIEF JUSTICE could certainly uphold the individual mandate without giving Congress carte blanche to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent THE CHIEF JUSTICE's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See Lopez; Morrison.

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, THE CHIEF JUSTICE cites a Government mandate to purchase green vegetables. One could call this concern "the broccoli horrible." Congress, THE CHIEF JUSTICE posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others.

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such "pil[ing of] inference upon inference" is just what the Court refused to do in Lopez and Morrison.<sup>42</sup>

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the "hypothetical and unreal possibilit[y]" of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. THE CHIEF JUSTICE accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate.

### III

#### A

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<sup>42</sup>The failure to purchase vegetables in THE CHIEF JUSTICE's hypothetical, then, is not what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the immediate cause of the cost-shifting Congress sought to address through the ACA. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See *supra*, Part II. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer. The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] power that are not within its authority to enact in isolation." Hence, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test."

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an "essential part of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is "reasonably adapted" to the attainment of a legitimate end under the commerce power: the elimination of pricing and sales practices that take an applicant's medical history into account.

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, THE CHIEF JUSTICE focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, THE CHIEF JUSTICE urges, because the command "undermine[s] the structure of government established by the Constitution." If long on rhetoric, THE CHIEF JUSTICE's argument is short on substance.

THE CHIEF JUSTICE cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz v. United States*, and *New York v. United States*. The statutes at issue in both cases, however, compelled state officials to act on the Federal Government's behalf.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." The provision is thus entirely consistent with the Constitution's design.

Lacking case law support for his holding, THE CHIEF JUSTICE nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. THE CHIEF JUSTICE's reliance on cases in which this Court has affirmed Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause is underwhelming.

Nor does THE CHIEF JUSTICE pause to explain why the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, the power to imprison, including civil imprisonment; and the power to create a national bank. See also *Jinks* (affirming Congress' power to alter the way a state law is applied in state court, where the alteration "promotes fair and efficient operation of the federal

courts”).<sup>43</sup>

In failing to explain why the individual mandate threatens our constitutional order, THE CHIEF JUSTICE disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an “independent power,” or merely a “derivative” one. Whether the power used is “substantive,” or just “incidental?” The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it when you see it.

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on “essential attributes of state sovereignty.” First, the Affordable Care Act does not operate “in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign.” As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974 (ERISA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. The crisis created by the large number of U. S. residents who lack health insurance is one of national dimension that States are “separately incompetent” to handle. Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States.

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embrace of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress’ efforts to empower States by partnering with them in the implementation of federal programs.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation’s general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the “right to

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<sup>43</sup>Indeed, Congress regularly and uncontroversially requires individuals who are “doing nothing,” to take action. Examples include federal requirements to report for jury duty; to register for selective service; to purchase firearms and gear in anticipation of service in the Militia (Uniform Militia Act of 1792); to turn gold currency over to the Federal Government in exchange for paper currency, see *Nortz v. United States* (1935); and to file a tax return.

alter, amend, or repeal” any provision of the Medicaid Act. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. And from 1965 to the present, States have regularly conformed to Congress’ alterations of the Medicaid Act.

THE CHIEF JUSTICE acknowledges that Congress may “condition the receipt of [federal] funds on the States’ complying with restrictions on the use of those funds,” but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in THE CHIEF JUSTICE’s view, a new grant program, not an addition to the Medicaid program existing before the ACA’s enactment. Congress, THE CHIEF JUSTICE maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. THE CHIEF JUSTICE therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress’ terms. Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as THE CHIEF JUSTICE charges, threatening States with the loss of “existing” funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress’ spending power. Given that holding, I entirely agree with THE CHIEF JUSTICE as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether. Because THE CHIEF JUSTICE finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress’ extension of Medicaid remains available to any State that affirms its willingness to participate.

A

Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as passed in 1965 augmented existing federal grant programs jointly administered with the States. States were not required to participate in Medicaid. But if they did, the Federal Government paid at least half the costs. To qualify for these grants, States had to offer a minimum level of health coverage to beneficiaries of four federally funded, state-administered welfare programs: Aid to Families with Dependent Children; Old Age Assistance; Aid to the Blind; and Aid to the Permanently and Totally Disabled.

At their option, States could enroll additional “medically needy” individuals; these costs, too, were partially borne by the Federal Government at the same, at least 50%, rate.

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. These amendments added millions to the Medicaid-eligible population.

Between 1966 and 1990, annual federal Medicaid spending grew from \$631.6 million to \$42.6 billion; state spending rose to \$31 billion over the same period. And between 1990 and 2010, federal spending increased to \$269.5 billion. Enlargement of the population and services covered by Medicaid, in short, has been the trend.

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008.

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from "conscript[ing] state agencies into the national bureaucratic army," Medicaid "is designed to advance cooperative federalism." Subject to its basic requirements, the Medicaid Act empowers States to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. B

The Spending Clause authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." To ensure that federal funds granted to the States are spent "to 'provide for the . . . general Welfare' in the manner Congress intended," Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program.

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision in this area, *South Dakota v. Dole*, the Court identified four criteria. The conditions placed on federal grants to States must (a) promote the "general welfare," (b) "unambiguously" inform States what is demanded of them, (c) be germane "to the federal interest in particular national projects or programs," and (d) not "induce the States to engage in activities that would themselves be unconstitutional."

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.'" Prior to

today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

This case does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age— did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty-First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

C

THE CHIEF JUSTICE asserts that the Medicaid expansion creates a "new health care program." Moreover, States could "hardly anticipate" that Congress would "transform [the program] so dramatically." Therefore, THE CHIEF JUSTICE maintains, Congress' threat to withhold "old" Medicaid funds based on a State's refusal to participate in the "new" program is a "threa[t] to terminate [an]other . . . independent gran[t]." And because the threat to withhold a large amount of funds from one program "leaves the States with no real option but to acquiesce [in a newly created program]," THE CHIEF JUSTICE concludes, the Medicaid expansion is unconstitutionally coercive.

1

The starting premise on which THE CHIEF JUSTICE's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to co-exist with the old. THE CHIEF JUSTICE calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.

Medicaid was created to enable States to provide medical assistance to "needy persons." By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

The Medicaid Act contains hundreds of provisions governing operation of the program, setting conditions ranging from "Limitation on payments to States for expenditures attributable to taxes," to "Medical assistance to aliens not lawfully admitted for permanent residence." The Medicaid expansion leaves unchanged the vast majority of these provisions; it adds beneficiaries to the existing program and specifies the rate at which States will be reimbursed for services provided to the added beneficiaries. The ACA does not describe operational aspects of the program for these newly eligible persons; for that information, one must read the existing Medicaid Act.

Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program. To the four categories of beneficiaries for whom coverage became mandatory in 1965, and the three mandatory classes added in the late 1980's, the ACA adds an eighth: individuals under 65 with incomes not exceeding 133% of the federal poverty level. The expansion is effectuated by §2001 of the ACA, aptly titled: "Medicaid Coverage for the Lowest Income Populations."



That section amends Title 42, Chapter 7, Subchapter XIX: Grants to States for Medical Assistance Programs. Commonly known as the Medicaid Act, Subchapter XIX filled some 278 pages in 2006. Section 2001 of the ACA would add approximately three pages.

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of “the general Welfare.” Courts owe a large measure of respect to Congress’ characterization of the grant programs it establishes. Even if courts were inclined to second-guess Congress’ conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it “transforms” the basic law?

Endeavoring to show that Congress created a new program, THE CHIEF JUSTICE cites three aspects of the expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not “care for the neediest among us.” What makes that so? Single adults earning no more than \$14,856 per year—133% of the current federal poverty level—surely rank among the Nation’s poor.

Second, according to THE CHIEF JUSTICE, “Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.” That less comprehensive benefit package, however, is not an innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries. The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

Third, THE CHIEF JUSTICE correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. *Ibid.* But the rate differs only in its generosity to participating States. Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees; under the ACA, the federal contribution starts at 100% and will eventually settle at 90%. Even if one agreed that a change of as little as 7 percentage points carries constitutional significance, is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States less money to carry out the same obligations?

Consider also that Congress could have repealed Medicaid. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA. By what right does a court stop Congress from building up without first tearing down?

2

THE CHIEF JUSTICE finds the Medicaid expansion vulnerable because it took participating States by surprise. “A State could hardly anticipate that Congress[s]” would endeavor to “transform [the Medicaid program] so dramatically,” he states. For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, THE CHIEF JUSTICE cites only one case: *Pennhurst State School and Hospital v. Halderman*.

In *Pennhurst*, residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act. We held that the State was not answerable in damages for violating conditions it did not “voluntarily and knowingly accep[t].” Inspecting the statutory language and legislative history, we found that the Act did not “unambiguously” impose the requirement on which the plaintiffs relied: that they receive appropriate treatment in the least restrictive environment. Satisfied that Congress had not clearly conditioned the States’ receipt of federal funds on the States’ provision of such treatment, we declined to read such a requirement into the Act. Congress’ spending power, we concluded, “does not include surprising participating States with postacceptance or ‘retroactive’ conditions.”

*Pennhurst* thus instructs that “if Congress intends to impose a condition on the grant of federal moneys,

it must do so unambiguously.” That requirement is met in this case. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line.

THE CHIEF JUSTICE appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement. When amendment of an existing grant program has no retroactive effect, however, we have upheld Congress’ instruction. [analysis of cases omitted]

As these decisions show, *Pennhurst*’s rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program.

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: “The right to alter, amend, or repeal any provision of [Medicaid],” the statute has read since 1965, “is hereby reserved to the Congress.” The “effect of these few simple words” has long been settled. By reserving the right to “alter, amend, [or] repeal” a spending program, Congress “has given special notice of its intention to retain . . . full and complete power to make such alterations and amendments . . . as come within the just scope of legislative power.”

THE CHIEF JUSTICE insists that the most recent expansion, in contrast to its predecessors, “accomplishes a shift in kind, not merely degree.” But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? Congress did not “merely alte[r] and expan[d] the boundaries of” the Aid to Families with Dependent Children program. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. In short, given §1304, this Court’s construction of §1304’s language in *Bowen*, and the enlargement of Medicaid in the years since 1965, a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation’s poor.

3

When future Spending Clause challenges arrive, as they likely will in the wake of today’s decision, how will litigants and judges assess whether “a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds”? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State’s budget at stake? And which State’s—or States’—budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr*. Even commentators sympathetic to robust enforcement of Dole’s limitations have concluded that conceptions of “impermissible coercion” premised on States’ perceived inability to decline federal funds “are just too amorphous to be judicially administrable.”

At bottom, my colleagues’ position is that the States’ reliance on federal funds limits Congress’ authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds

that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. In fact, there are no such funds. There is only money States anticipate receiving from future Congresses.

### So-Called ``Joint Dissent''

\*\* JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.\*\*

## II

### The Taxing Power

The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is also a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty could have been imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action could have been a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive. Thus, what the Government's caption should have read was "ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITHPENALTY BUT A TAX." It is important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so. In answering that question we must, if "fairly possible," construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional (*ut res magis valeat quam pereat*). But we cannot rewrite the statute to be what it is not. " "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it." In this case, there is simply no way, "without doing violence to the fair meaning of the words used," to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: " '[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.' " In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—never—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax.

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in §5000A, entitled "Requirement to maintain minimum essential coverage." It commands that every "applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage." *Ibid.* (emphasis added). And the immediately following provision states that, "[i]f . . . an applicable individual . . . fails to meet the requirement of subsection (a) . . . there is hereby imposed . . . a penalty." And several of Congress' legislative "findings" with regard to §5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See §18091(2)(A) ("The requirement regulates activity . . ."); §18091(2)(C) ("The requirement . . . will add millions of new consumers to the health insurance market . . ."); §18091(2)(D) ("The requirement achieves near-

universal coverage”); §18091(2)(H) (“The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market”); §18091(3) (“[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation”).

The Government and those who support its view on the tax point rely on *New York v. United States*, to justify reading “shall” to mean “may.” The “shall” in that case was contained in an introductory provision—a recital that provided for no legal consequences—which said that “[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste.” The Court did not hold that “shall” could be construed to mean “may,” but rather that this preliminary provision could not impose upon the operative provisions of the Act a mandate that they did not contain: “We . . . decline petitioners’ invitation to construe §2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act.” Our opinion then proceeded to “consider each [of the three operative provisions] in turn.” Here the mandate—the “shall”—is contained not in an inoperative preliminary recital, but in the dispositive operative provision itself. *New York* provides no support for reading it to be permissive.

Quite separately, the fact that Congress (in its own words) “imposed . . . a penalty” for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: “[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act.” *Powhatan Steamboat Co. v. Appomattox R. Co.* (1861).

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty—such as “license” (*License Tax Cases* (1867)) or “surcharge” (*New York v. United States*). But we have never—never—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a “penalty.” Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a “penalty.”

That §5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of “applicable individual” subject to the minimum coverage requirement: Those with religious objections or who participate in a “health care sharing ministry”; those who are “not lawfully present” in the United States); and those who are incarcerated. Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: Those who cannot afford coverage; who earn too little income to require filing a tax return; who are members of an Indian tribe; who experience only short gaps in coverage; and who, in the judgment of the Secretary of Health and Human Services, “have suffered a hardship with respect to the capability to obtain coverage.” If §5000A were a tax, these two classes of exemption would make no sense; there being no requirement, all the exemptions would attach to the penalty (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that “neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,” and that “[i]f [those subject to the Act] pay the tax penalty, they’re in compliance with the law,” These self-serving litigating positions are entitled to no weight. What counts is what the statute says, and that is entirely clear.

Against the mountain of evidence that the minimum coverage requirement is what the statute calls

it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty—the Government brings forward the flimsiest of indications to the contrary. It notes that “[t]he minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual . . . will owe a monetary penalty, in addition to the income tax itself,” and that “[t]he [Internal Revenue Service (IRS)] will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code.”

The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard-of or rare. It is not. See, e.g., 26 U.S.C. §527(j) (2006 ed.) (IRS-collectible penalty for failure to make campaign-finance disclosures); §5761(c) (IRS-collectible penalty for domestic sales of tobacco products labeled for export); §9707 (IRS-collectible penalty for failure to make required health-insurance premium payments on behalf of mining employees). In *Reorganized CF&I; Fabricators of Utah, Inc.*, we held that an exaction not only enforced by the Commissioner of Internal Revenue but even called a “tax” was in fact a penalty. “[I]f the concept of penalty means anything,” we said, “it means punishment for an unlawful act or omission.” Moreover, while the penalty is assessed and collected by the IRS, §5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veteran Affairs), which is responsible for defining its substantive scope—a feature that would be quite extraordinary for taxes.

The Government points out that “[t]he amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and [a] ca[p],” and that individuals who earn so little money that they “are not required to file income tax returns for the taxable year are not subject to the penalty” (though they are, as we discussed earlier, subject to the mandate) But varying a penalty according to ability to pay is an utterly familiar practice. [citing a bunch of examples]

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The presence of such a requirement suggests a penalty—though one can imagine a tax imposed only on willful action; but the absence of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. And where a statute is silent as to scienter, we traditionally presume a mens rea requirement if the statute imposes a “severe penalty.” Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act’s “Revenue Provisions.” In sum, “the terms of [the] act rende[r] it unavoidable,” that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The *Federalist* No. 58 “defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.” We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be ap-

portioned among the States according to their population. Art. I, §9, Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.

#### IV

#### The Medicaid Expansion

#### F

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes—in two cursory sentences at the very end of its brief—preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design "would be to make a new law, not to enforce an old one. This is no part of our duty."

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there.

The Government cites a severability clause codified with Medicaid in Chapter 7 of the United States Code stating that if "any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." But that clause tells us only that other provisions in Chapter 7 should not be invalidated if §1396c, the authorization for the cut-off of all Medicaid funds, is unconstitutional. It does not tell us that §1396c can be judicially revised, to say what it does not say. Such a judicial power would not be called the doctrine of severability but perhaps the doctrine of amendatory invalidation—similar to the amendatory veto that permits the Governors of some States to reduce the amounts appropriated in legislation. The proof that such a power does not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent no more than x percent of the State's budget. The Court severs nothing, but simply revises §1396c to read as the Court would desire.

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but

under the Constitution, that power and authority do not rest with this Court.

V

### Severability

The Affordable Care Act seeks to achieve “near-universal” health insurance coverage. The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the Act is, and this is all the more reason why it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding which is one of many examples of how rewriting the Act alters its dynamics.

A

When an unconstitutional provision is but a part of a more comprehensive statute, the question arises as to the validity of the remaining provisions. The Court’s authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, when the Court severed an unconstitutional provision from the Judiciary Act of 1789.

An automatic or too cursory severance of statutory provisions risks “rewrit[ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole.” The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court’s decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

The Court has applied a two-part guide as the framework for severability analysis. First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. In *Alaska Airlines*, the Court clarified that this first inquiry requires more than asking whether “the balance of the legislation is incapable of functioning independently.” Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The question is whether the provisions will work as Congress intended.

Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated.

The two inquiries—whether the remaining provisions will operate as Congress designed them, and whether Congress would have enacted the remaining provisions standing alone—often are interrelated. In the ordinary course, if the remaining provisions cannot operate according to the congressional design (the first inquiry), it almost necessarily follows that Congress would not have enacted them (the second inquiry). This close interaction may explain why the Court has not always been precise in distinguishing between the two. There are, however, occasions in which the severability standard’s first inquiry (statutory functionality) is not a proxy for the second inquiry (whether the Legislature intended the remaining provisions to stand alone).

B

The Act was passed to enable affordable, “near-universal” health insurance coverage. The resulting, complex statute consists of mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others. Under the severability test set out above, it must be determined if those provisions function in a coherent

way and as Congress would have intended, even when the major provisions establishing the Individual Mandate and Medicaid Expansion are themselves invalid.

Congress did not intend to establish the goal of near-universal coverage without regard to fiscal consequences. See, e.g., ACA §1563 (“[T]his Act will reduce the Federal deficit between 2010 and 2019”). And it did not intend to impose the inevitable costs on any one industry or group of individuals. The whole design of the Act is to balance the costs and benefits affecting each set of regulated parties. Thus, individuals are required to obtain health insurance. Insurance companies are required to sell them insurance regardless of patients’ pre-existing conditions and to comply with a host of other regulations. And the companies must pay new taxes. States are expected to expand Medicaid eligibility and to create regulated marketplaces called exchanges where individuals can purchase insurance. Some persons who cannot afford insurance are provided it through the Medicaid Expansion, and others are aided in their purchase of insurance through federal subsidies available on health-insurance exchanges. The Federal Government’s increased spending is offset by new taxes and cuts in other federal expenditures, including reductions in Medicare and in federal payments to hospitals. Employers with at least 50 employees must either provide employees with adequate health benefits or pay a financial exaction if an employee who qualifies for federal subsidies purchases insurance through an exchange.

In short, the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group. For example, the Federal Government bears the burden of paying billions for the new entitlements mandated by the Medicaid Expansion and federal subsidies for insurance purchases on the exchanges; but it benefits from reductions in the reimbursements it pays to hospitals. Hospitals lose those reimbursements; but they benefit from the decrease in uncompensated care, for under the insurance regulations it is easier for individuals with pre-existing conditions to purchase coverage that increases payments to hospitals. Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including “guaranteed issue” and “community rating” requirements to give coverage regardless of the insured’s pre-existing conditions; but the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers’ product and from the new low-income Medicaid recipients who will enroll in insurance companies’ Medicaid-funded managed care programs. In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending. So, the Act’s major provisions are interdependent.

The Act then refers to these interdependencies as “shared responsibility.” In at least six places, the Act describes the Individual Mandate as working “together with the other provisions of this Act.” The Act calls the Individual Mandate “an essential part” of federal regulation of health insurance and warns that “the absence of the requirement would undercut Federal regulation of the health insurance market.”

Major provisions of the Affordable Care Act—i.e., the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer responsibility assessment—cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion. Absent the invalid portions, the other major provisions could impose enormous risks of unexpected burdens on patients, the health-care community, and the federal budget. That consequence would be in absolute conflict with the ACA’s design of “shared responsibility,” and would pose a threat to the Nation that Congress did not intend.

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act’s insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure. Those risks would undermine Congress’ scheme of “shared responsibility.”



The Court has been informed by distinguished economists that the Act's Individual Mandate and Medicaid Expansion would each increase revenues to the insurance industry by about \$350 billion over 10 years; that this combined figure of \$700 billion is necessary to offset the approximately \$700 billion in new costs to the insurance industry imposed by the Act's insurance regulations and taxes; and that the new \$700-billion burden would otherwise dwarf the industry's current profit margin.

If that analysis is correct, the regulations and taxes will mean higher costs for insurance companies. Higher costs may mean higher premiums for consumers, despite the Act's goal of "lower[ing] health insurance premiums."

The Affordable Care Act reduces payments by the Federal Government to hospitals by more than \$200 billion over 10 years.

The concept is straightforward: Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals. Responsibility will be shared, as burdens and benefits balance each other. This is typical of the whole dynamic of the Act.

Invalidating the key mechanisms for expanding insurance coverage, such as community rating and the Medicaid Expansion, without invalidating the reductions in Medicare and Medicaid, distorts the ACA's design of "shared responsibility." Some hospitals may be forced to raise the cost of care in order to offset the reductions in reimbursements, which could raise the cost of insurance premiums, in contravention of the Act's goal of "lower[ing] health insurance premiums." [Anyway, you get the picture: the dissenters flesh out this argument at somewhat greater length.]

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union.

Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

## Summary of Federalism Doctrine

As we've discussed, the federal government has limited power. In the context of federalism, the key implication is that that Congress can only pass laws that the Constitution specifically says it can pass. Everything else is left for the states.

Why did the framers do this? Well, one reason is as a necessary compromise: the people at the time of the founding felt some loyalty to their states, and states demanded it. An additional complication, of course, was the effect of slavery, and the desire of states to retain their autonomy either permitting or forbidding it.

But there were perhaps less brutally pragmatic reasons too. In a diverse country, people of different states have different interests—agricultural states might have different interests from industrial states, for example, and might need different laws in order to accommodate them.<sup>44</sup> They also just have different values—conservative states might want to have fewer public benefits than liberal states, for example. There's also a democratic benefit in having governments representing smaller population groups making more decisions—it means individuals have more influence on who gets elected, which also means they have more of an incentive to actually learn something about the issues and vote sensibly.

The federal system also fits into the general idea of the framers trying to protect against government tyranny. If the federal government requires help from the states to implement its policies, then state governments can resist overreaching federal policies. For example, even though marijuana is still a controlled substance under federal law, those states that have legalized it under state law can more-or-less make it possible for their citizens to have it—not because they have the power to override federal law (they don't), but because the federal government on its own doesn't have the resources to enforce its drug prohibitions—it needs the help of state police officers and courts to effectuate marijuana prohibition, and those states that have made it legal under state law are obviously going to be inclined to withhold that assistance. Federal law enforcement often depends on voluntary cooperation from state and local police. (See also the debate about immigration “sanctuary cities” and even “sanctuary states.”)

Of course, the anti-oppression assistance can go the other way too, especially after the civil war, when the three Reconstruction amendments gave Congress the power to enforce racial equality against the states. We'll talk about this some weeks down the road.

There are also a number of situations where we might think that state power is a bad idea. For example, suppose states could impose import duties against one another? Or suppose they could craft their own foreign policies? The framers realized that a number of things are best done on the national level, and allocated those powers to the federal government.

Now you're probably thinking “wait a minute, the Constitution is only a few pages long, and the federal government does a huge amount of stuff. What gives, Gowder? Where are those limited powers of yours?” Well, what gives is that there are two gigantic holes that Congress has been driving the legislative truck through for a long time: the Necessary and Proper Clause and the Commerce Clause.

### Necessary and Proper

Congress can enact legislation that is “necessary” and “proper” to carry out its enumerated powers.

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<sup>44</sup>Here's a classic example. States have different laws about damage caused by wandering (i.e. trespassing) livestock. In rancher-heavy states, the law tends to be that you have to fence off your land or the livestock owner isn't liable (“fence-out” states). In farmer-heavy states, the law tends to be that owners of livestock have to keep the livestock penned in or they're liable for damage they do to other people's land (“fence-in” states).

### What's Necessary?

Chief Justice Marshall, in *McCulloch*, establishes the principle that “necessary” doesn’t mean “essential,” instead, it roughly means “useful.”

Moreover, separation of powers considerations suggest that Congress, not the Court, should be the judge of what is useful to carry out its enumerated powers. In Marshall’s words:

If a certain means to carry into effect of any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

Note how this presupposes that Congress is pursuing one of its enumerated powers. Thus, we might read the quoted statement from Marshall above as a two-part test:

1. Is Congress carrying out one of its enumerated powers?
2. If so, is the means Congress has chosen rationally related to that end (and not otherwise prohibited, but that goes without saying)?

The second part of the test is a constitutional idea that is often known as “rational basis”—we’ll see *lots and lots and lots* of this idea in constitutional law.

Justice Breyer’s opinion in *United States v. Comstock*, 560 U.S. 126 (2010) (which we would read if we had more time) gives a somewhat more complicated formulation that seems more like a balancing test:

1. Rational relationship to implementation of a constitutionally enumerated power.
2. Modest addition to existing statutes (with a longstanding history).
3. Extension/natural consequence of an existing (constitutional) system and reasonably adapted to the powers that system exercises.
4. Properly accounts for state interests.
5. Links between act and Article I enumerated power not so attenuated that it’s a general police power.

### What about Proper?

The clause says necessary and proper. In principle, it’s possible for there to be some statute that is necessary (in the sense of “useful”) to some enumerated power, but not “proper,” and hence unconstitutional.

Justice Marshall seemed to treat “proper” as roughly equivalent to “not banned by some other provision of the constitution.” In his words:

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

Lately, we’ve seen an attempt to make “proper” do some independent work, most importantly in Chief Justice Roberts’s opinion in *NFIB v. Sebelius*.

That opinion suggested that the individual mandate wasn’t a “proper” way of carrying out Congress’s power over commerce because it’s not “narrow in scope,” but instead would be “a substantial expansion of federal authority” into an area traditionally left to the states. The key idea is that a law is not proper

when it “undermine[s] the structure of government established by the Constitution,” by trampling too far on state policy territory. We’ll have to see if this goes anywhere in future cases.

## Commerce Clause

The very short version: Congress’s power to regulate interstate commerce became, in the latter 2/3 of the 20th century, the foundation for a truly staggering amount of federal regulation. Far more of our economic life is under the authority of the federal government than the Framers (with the possible exception of Alexander Hamilton) could have ever imagined. Moreover, the federal government has used the commerce clause to reach a substantial amount of what some people might call non-economic activity as well as purely intra-state activity too.

In recent decades there have been substantial challenges to this broad power, some of which have been successful. Accordingly, useful to have some familiarity with the history, because it might be that the Supreme Court will further roll back the commerce power. For that reason, many constitutional law classes read a bunch of obsolete commerce clause cases, on the theory that lawyers involved in Commerce Clause litigation will need to understand the variety of possible positions on the extent of the power that have been taken in the past, so that they may advocate for their clients in selecting among them. For the sake of time, we’re not doing that here, but I’ll provide a brief summary below.

## Historical Periods

There are several distinct periods of commerce clause doctrine:

1. The end of the 19th and beginning of the 20th century featured a Court that took a fairly restrictive view of the commerce power.
2. The mid-20th century Court, from roughly *Wickard v. Filburn* to *United States v. Lopez*, took a very expansive view of the commerce power; essentially anything Congress wanted to do was acceptable. The Court struck down no laws as exceeding Congress’s commerce power between 1937 and 1994.
3. The late 20th century and contemporary court, from *Lopez* onward, has been rolling back the earlier commerce clause expansion. In consequence, the doctrine is currently unsettled: it’s unclear where the limits lie, or to what extent we might anticipate a return to some of the ideas from the earlier period.

## Key Questions

Congress has power to regulate (1) “commerce” (2) “among the several states.” Observe that there are at least two textual elements necessary in order to be a valid exercise of the commerce clause power.<sup>45</sup>

The cases focus on four key questions:

1. What’s commerce?
2. What’s “among the several states”?
3. How much deference do we give Congress about what substantially affects interstate commerce?
4. To what extent can Congress use the commerce power to get at noneconomic or intrastate policy ends?

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<sup>45</sup>Chief Justice Roberts’s opinion in *NFIB v. Sebelius* suggests a third element as well: the Congressional enactment must be a *regulation*, where that means a rule governing existing commercial activity as opposed to commanding new commercial activity.

### What's Commerce?

From *Gibbons v. Ogden*, we learn that commerce isn't just limited to buying and selling of goods—at the very least, commercial interstate transportation (aka: the buying and selling of services) is covered.

Once you have transportation as well as buying and selling, the rest follows pretty easily: “commerce” means interstate economic activity in general, and also sweeps in some noneconomic activity using facilities (like the roads) that are also used in interstate commerce. Often we summarize this last idea by saying that Congress may regulate the **channels** and **instrumentalities** of interstate commerce. This means things like transportation networks are subject to Congressional regulation too.

### What's interstate?

The Court in *E.C. Knight* interpreted an antitrust law as not applying to manufacturing in order to make it constitutional.<sup>46</sup> The theory was that manufacturing is not interstate commerce. This is no longer good law, but it's a good case to highlight the question: how is a regulation of manufacturing a regulation of interstate commerce? Possible arguments include:

1. Manufacturing happens with materials that have travelled in interstate commerce.
2. Manufacturing affects interstate commerce because if you make something, you don't have to buy it, and it affects the interstate market (this was a key idea in *Wickard v. Filburn*, albeit about agriculture rather than manufacturing).
3. Manufacturing affects interstate commerce because manufacturers compete with one another across state lines, so what a manufacturer in one state can get away with changes what a manufacturer in another state can get away with (this was a key idea in *United States v. Darby*).

### Interlude: The Substantial Effects Test

Ultimately, the first and second issues were resolved with the **substantial effects test**. *NLRB v. Jones* and *United States v. Darby* capture the development of this doctrine, with *Wickard v. Filburn* being its high point. If some activity has a substantial effect on interstate commerce, Congress can regulate it.

The substantial effects test is really a necessary and proper kind of idea: much like Congress's power over currency and such gives it the power to make a national bank in order to achieve its currency (etc.) policy, Congress's power over commerce gives it power over some intrastate/non-commercial activity in order to effectuate its commerce policy. Therefore, for example, Congress can reach activities that aren't clearly commerce or aren't clearly interstate if its regulation of interstate trade would be less effective without also regulating that activity.

Another important element of the substantial effects test is that the effects can be **aggregate**. In *Wickard* and in *Heart of Atlanta* (which we will read, but later on in the course), it wasn't relevant that one farmer's wheat production or one hotel owner's racial discrimination wouldn't affect the overall market for wheat or hotels; because discrimination in public accommodations in general affected the ability of African-Americans to participate in interstate commerce, and because wheat-growing in general affected the stability of the system of price controls Congress was imposing, Congress could regulate individual activity in those areas.

The substantial effects test was dominant through most of the 20th century, and is still good law today, although, in cases like *Lopez* and *Morrison*, the Court has reined it in somewhat.

<sup>46</sup>This is an important general principle of constitutional adjudication: if the Court can find a limiting interpretation of a statute that makes it constitutional, they'll choose it.

### How Much Deference?

Now that we have a substantial effects test, we have to answer the question: who gets to decide what counts as a substantial effect?

The mid-20th-century cases show a substantial amount of deference, that resembles something like a **rational basis test**, i.e., if Congress could have rationally thought that some activity had a substantial effect on interstate commerce, it can regulate it. *Lopez* and *Morrison* are somewhat less deferential.<sup>47</sup>

### Indirect Regulation?

Here's a not-really-a-hypo hypo: assuming that wages and hours aren't themselves regulable under the commerce clause (i.e., because employment is intrastate), can Congress regulate them by prohibiting the transport of goods in interstate commerce where those goods have been made under working conditions that violate the Congressional policy?

The early 20th century Court struggled to answer this question. Sometimes we saw the argument that Congress either has to have a commercial *motive*, as opposed to something like a motive to carry out morals regulation (e.g., as the dissent argued in *Champion v. Ames*). Sometimes we saw the argument that the law had to have commercial or economic *effects* (*Hammer v. Dagenhart*).

However, the mid-20th-century cases abandoned these ideas. *Heart of Atlanta* is a good example, where it's clear that the point and effect of the regulation weren't to create more interstate travel but to promote racial equality.

Today, it's generally accepted that Congress may regulate noneconomic activity by prohibiting the use of interstate commerce to carry it out. For example, the Mann Act (enacted 1910) forbade the transport of women across state lines for immoral purposes.<sup>48</sup> It's clearly within the commerce power. Because it's a regulation of the channels of interstate commerce, it doesn't matter that Congress was actually trying to outlaw kinds of sex it disapproves of. (Cf. *Hoke v. United States*, 227 U.S. 308 (1913).)

### The Demand for a Limiting Principle

In *Lopez* and *NFIB* we also see an extremely important strategy of constitutional argument that comes up a lot in the commerce clause and necessary and proper cases (and which also appeared in some of the earlier obsolete cases, particularly *Hammer*): the demand for a limiting principle. Here's how this goes, step by step:

1. We know that the Federal government has limited powers. In particular, it does not have a general police power.
2. Sometimes, the government claims a power under the commerce clause and/or the necessary and proper clause, to do something that looks pretty far from its enumerated powers. Examples: forbid child labor in manufacturing, civilly commit sex offenders, forbid guns in schools, require people to buy health insurance.
3. When the government claims that power, it needs a *theory* of how the regulated activity affects commerce, or how the regulation is necessary and proper to effectuate its enumerated powers. For example, in *Lopez*, (part of) the government's theory could be summarized as follows: "gun

<sup>47</sup>In particular, there's now some talk about whether Congress must have evidence and/or formal Congressional findings to support the notion that some activity substantially effects interstate commerce. It's not clear yet how far the Court will go in this direction.

<sup>48</sup>I think it was later amended to be slightly less blatantly sexist, and is now mostly used as an anti-prostitution/anti underage sex transport provision... but check with a criminal person to make sure that's right.

violence in schools makes it harder for people to get an education, which creates a less educated workforce, which lowers national economic productivity, substantially affecting interstate commerce.”

4. The government’s theory typically can be generalized and applied to other cases. For example, a general statement of that *Lopez* theory might be “Congress can regulate any behavior that might, in the aggregate, make the workforce less productive.”
5. Then the government is faced with a demand: what principle limits that general theory The *Lopez* theory sounds like it might entitle the government to regulate anything: command people to get 8 hours of sleep a night, to go to the gym every day, to study math in school, etc. But we know, from (1), that the government doesn’t have a general police power. Therefore, the government must be able to state a plausible **limiting principle** that yields concrete cases to which their theory from (4) would not extend. If it can do so, then it has shown that its theory doesn’t “prove too much.”<sup>49</sup>

The demand for a limiting principle really comes home to roost in *Lopez*: if you listen to the oral argument<sup>50</sup> you’ll hear the solicitor general<sup>51</sup> get slaughtered in oral argument by multiple justices repeatedly demanding he give them a limiting principle; he was unable to do so, and the majority opinion beats the government up like crazy for that.

Justice Ginsburg is very careful, in her sorta-concurrence sorta-dissent in *NFIB v. Sebelius*, to explain the limiting principle on the power to compel participation in commerce, against Chief Justice Roberts’s and the Joint Dissent’s claim that accepting the individual mandate gives Congress unlimited power to, for example, command the consumption of broccoli.

The demand for a limiting principle is still controversial: those in the liberal wing of the court typically argue that the commerce and necessary and proper powers should be interpreted with a rational basis test, and with the chief constraint being the democratic process, not some fixed Congressional no-go zone... but they’ve lost the last few cases.

Where are we going?

In general, the *Lopez-Morrison-NFIB* rollback of commerce clause power and of the substantial effects test (which, to repeat, is still good law... it’s just less clear how far it goes) seems to hinge on four ideas:

1. The demand for a limiting principle.
2. Less deference toward Congressional judgments of what has a substantial effect.
3. More caution about Congressional intrusion into areas like education, family life, and the control of violent crime that have been the traditional province of the states.
4. More caution about Congressional regulation of activities that do not seem conceptually “economic.” This is particularly important in *Morrison*, where we see the suggestion that intrastate activity that Congress regulates under the commerce power must be “economic in nature,” and the assertion that the substantial effects test does not apply to non-economic violent crimes.<sup>52</sup>

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<sup>49</sup>For those of you with a philosophy or a rhetoric background, this is a style of argument analagous to the *modus tollens* or *reductio ad absurdum*.

<sup>50</sup><https://www.oyez.org/cases/1994/93-1260>

<sup>51</sup>*Solicitor general*: a high-ranking lawyer in the Justice Department who does the government’s major oral arguments in the Supreme Court. Often the President puts someone in this position as the job before a Supreme Court nomination.

<sup>52</sup>We’re not reading *Morrison*. But: *United States v. Morrison*, 529 US 598 (2000), invalidating a federal cause of action for gender-based violence on essentially the same argument as *Lopez*.

Let's also remember that the extent of the rollback is highly uncertain. *Gonzalez v. Raich*, for example, looks like a resurgence of the old mid-20th-century commerce clause doctrine in 2005. As I've been emphasizing, this doctrine is in flux, and it's hard to predict where the law will go in the coming years.

#### Summary of ``black-letter principles''

If you're confronting a commerce clause question on the multistate bar exam, where you're expected to give some kind of mechanical answer, here's what you'd rely on:

1. Commerce is essentially all interstate economic activity. It's not limited to "buying and selling" rather than "manufacture" or "transport."
2. Congress clearly has the power to regulate the "channels and instrumentalities" of interstate commerce.
3. Congress has the power to regulate intrastate economic activity if that activity, taken in the aggregate, has a "substantial effect" on interstate commerce. However, it is no longer clear that Congress has the power to regulate intrastate noneconomic activity on the same grounds (*Lopez*, *Morrison*).
4. Congress may use its power over the "channels and instrumentalities of interstate commerce" to get at intrastate and/or noneconomic activity that it doesn't like, by prohibiting, e.g., the use of interstate commerce to transport the products of forbidden goods.
5. Congress may regulate intrastate activity incidental and necessary to an interstate economic regulatory regime (*Raich*).
6. Congress does not have the power to compel participation in interstate commerce (*NFIB*).

#### The Dormant Commerce Clause (what?)

There's also a "dormant commerce clause," which is about restricting state regulation in the area. We're not really covering it in this course, because there's really not time, but you should know that it limits the extent to which states can discriminate against interstate commerce. See a hornbook for more.



## Lopez hypo

Act of Congress: THE GUNS IN SCHOOL ZONES TAX

Each person in the United shall pay a tax of \$10,000 into the United States treasury each time she or he brings a gun into a school zone [as defined in the statute underlying Lopez].

This tax shall be reported and paid to the IRS with a person's ordinary income taxes.

Knowing, as we do from Lopez, that Congress can't forbid guns in school zones, should Congress be allowed to do an end-run around limitations on the commerce power by taxing them? Does it matter whether Congress intends, by so taxing, to deter the activity taxed, or whether it intends to raise revenue? Does it matter whether the tax seems like a reasonable amount, or whether it's a ludicrous amount that nobody would ever voluntarily pay?

## Commandeering

The point of the anti-commandeering principle is simple: the federal government can't order about state and local governments in order to do its work.

This, **does not imply** that state and local governments are immune from regulation. It's settled law that Congress can impose ordinary laws on the activities of state and local governments on similar terms as it does private persons, for requiring states to pay their employees the federal minimum wage.<sup>53</sup>

What it can't do, however, is order the states to carry out governmental functions. For example, it can't command local police officers to enforce federal law, or command state legislatures to legislate.<sup>54</sup>

### Anti-Commandeering and Sanctuary Cities

The anti-commandeering principle is politically important right now. It's the principle that permits so-called "Sanctuary Cities"—where local law enforcement will not cooperate with federal immigration enforcement efforts—to exist. Of course, their existence is controversial.

One key statute is 8 U.S.C. §1373, which reads, in relevant part, as follows:

- (a) *In general* Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
- (b) *Additional authority of government entities* Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
  - (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
  - (2) Maintaining such information.
  - (3) Exchanging such information with any other Federal, State, or local government entity.<sup>55</sup>

Consider the constitutionality of this law. May the federal government forbid a state from forbidding its officials from cooperating with the ICE? The statute purports to say to, for example, the state of California "you may not prohibit your police departments from keeping information about people's immigration statuses. Is that consistent with *Printz v. United States*?

### Questions on the Tenth Amendment:

1. Is the 10th Amendment an independent constraint on federal power, or just a redundancy?
2. 20th century pattern: similar to that of the Commerce Clause, used as independent constraint on areas of Congressional regulation of citizens until post-new-deal period, where Court changed course.

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<sup>53</sup>*Garcia v. San Antonio Transit Authority*, 469 US 528 (1985).

<sup>54</sup>*Reno v. Condon*, 528 U.S. 141 (2000), addresses the distinction between these two kinds of regulation. This can be conceptually problematic, but doesn't pose a lot of real-world problems in day-to-day practice.

<sup>55</sup>Note: the language about the "Immigration and Naturalization Service" is a bit obsolete since the agencies were shuffled around in 2003, but it means ICE today.

## Notes on the major cases

### New York v. United States

Consider the following **Hypo**

Congress passes a law requiring that producers of radioactive waste dispose of all their waste within their own state, in a facility guaranteed by the state to meet certain federal standards. If there's no such facility available for a producer, it may not engage in the activity that produces the waste.

If the answer is yes, how is that different from the issue before the Court?

What else could Congress do to regulate in this area? Are there any alternate routes to achieving its policy ends?

What's the democratic argument the Court offers as normative support for its conclusion? Is it plausible?

Did the law in New York v. United States actually order the states to regulate? If not, what was the real problem?

### Prinz v. United States

Ask yourself: can state courts refuse to apply federal law? Is that different from the question in this case? Why?

## Commandeering hypos

(A)

Congress passes a law: no person may use the highways to transport any federal currency in denominations greater than \$1000 across state lines. Further, any state police officer who observes such an amount in a vehicle on the highways must attempt to ascertain its origin and, if there is probable cause to think it was transported over state lines, arrest the person and turn them over to the police. Constitutional?

(B)

Congress passes a law: the “Radioactive Transit Passage Act of 2016,” forbidding any person or entity who operates any roadway that is used in interstate commerce from discriminating against federally licensed nuclear waste carriers, and authorizing a private party to bring an administrative action before the interstate commerce commission to enforce it with both damages and injunctive relief. The state of Iowa prohibits the transport of nuclear waste on its highways, and Neds Nukes and Nail Cleaning, a federally licensed nuclear waste transport, files suit against the state for damages and an injunction.

(C)

Congress passes the following law:

“Any state official who arrests any person for a state drug offense must inform the United States Attorney of the arrest, so that the United States Attorney may prosecute such person for any relevant federal drug offenses.”

Further suppose that the federal government fully funds this (e.g., by establishing toll-free numbers to call), and that the state officials aren’t obliged in any way to tell citizens that they’re calling the feds.

## Spending Clause

You'll notice that one of the powers of Congress is to tax and spend for the general welfare. And unlike the commerce power, this isn't bounded by subject area.

What this immediately suggests is that Congress can—and, you'll be totally unsurprised to learn, routinely does—spend money on lots of things that aren't otherwise within its powers. For an obvious example, the Department of Education spends tons of money on grants to local school districts to support various federal priorities.

The immediate question the spending clause raises, given that many of these grants are given to state and local governments, is whether they can be used to coerce local officials to carry out federal law in ways that would otherwise be forbidden by the anti-commandeering principle.

This, of course, is another politically fraught question, as one strategy that Donald Trump was considering against sanctuary cities was to take away their federal funding—in order to give them a strong incentive to cooperate with federal law enforcement. Here is a relevant excerpt from an executive order of January 25, 2017:

In furtherance of this policy, the Attorney General and the Secretary [of Homeland Security], in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

A careful reading will suggest that this part of the order might not have very much in the way of teeth to it (how much federal money do the AG and secretary of homeland security have control over which aren't either distributed by law or deemed necessary for law enforcement purposes?), but let's suppose that it does.

Suppose, for example, that a sanctuary city receives \$10,000,000 in discretionary federal funds administered by the Attorney General. Further suppose that this represents 2/3 of the city's law enforcement budget, but that the AG concludes that it isn't "necessary" (obviously not using Justice Marshall's definition of "necessary"). Can the AG say, pursuant to this executive order, "order your police to turn over information about undocumented people who have been picked up to ICE, or we take away the money?" Does it matter what the money is for?

## Notes on NFIB v. Sebelius

Obviously this is a really big case for us. It actually ties together 100% of the federalism material we've seen thus far—the commerce clause, the necessary and proper clause, the taxing power, and the spending power used to commandeer.

It will help to have a basic idea of the underlying statutory structure and the policy reasons behind it. So here's the broad outline.

### Basics of the ACA

The Affordable Care Act (a.k.a. "Obamacare") was a systemic effort at reforming the health insurance system in the United States. Its key features were as follows:

1. An “individual mandate” requiring everyone to get insurance on pain of a payment (to be characterized below).
2. A variety of restrictions on the kinds of terms insurers can impose in policies.
3. The establishment of “exchanges” in the states, either by the states or by the federal government itself, to allow people to buy health insurance (sometimes subsidized).
4. The expansion of Medicaid, a federal+state funded, state administered program for providing insurance to the needy, and federal funding to go along with the expansion. A state that declined this expansion would lose existing Medicaid funding.

The overall project was to expand access to health insurance, expand the coverage of existing plans and reduce restrictions in them, and lower costs.

Of those four key ideas, the first requires the most explanation. Why would the government want to require everyone to buy insurance, even if they don’t want or need it?

The answer requires detouring into a little bit of insurance economics.

Imagine an insurance market with three people in it, call them, in order of healthiness, Sick, Normal, and Crossfit. Each of them is going to have a different average yearly health care cost. Let’s suppose that the average cost of Sick’s health care each year is \$7,000; Normal’s average yearly cost is \$4,000, and Crossfit’s average yearly cost is \$1,000, mostly from having weights dropped on his/her feet.

Let’s suppose that all the people in the market know how healthy they are. The insurance company knows *approximately* how healthy the people are, and does its best to charge people a little bit more than their average yearly cost. After all, that’s how insurance works: you pay roughly your average cost, and in exchange, if you get hit by a bus and have to get millions of dollars of care, the insurance company has your back.

However, the insurance company doesn’t know quite as well as the individuals do how costly their lifestyles are. So its estimates are going to be a little biased toward the average. Moreover, the law already prohibits some things that insurance companies could use to more accurately price people: it can’t force you to get a genetic screening and the raise your price if you have predispositions to any diseases, it can’t fly drones outside your window to monitor your diet...

So the insurance company knows its average cost is \$4,000. It knows that Normal is about average, and it charges Normal \$4,000. It knows that Sick is a bit sicker than average, so it charges Sick, say, \$6,500, and it knows that Crossfit is a bit healthier than average, so it charges Crossfit, say, \$1,500. (Plus a small amount of profit in each case.)

So far so good. Except that Crossfit drops weights on his/her *foot* but not on his/her *head*. So Crossfit is paying \$1,500, and only getting about \$1,000 in benefits. That’s stupid. Crossfit cancels their insurance.

All of a sudden, Insurance Company’s costs go up to \$5,500 on average. Since Crossfit was (effectively) subsidizing health insurance for Sick and Normal, their rates have to go up in order to keep Insurance Company in business. Suddenly Normal is getting charged more for the same insurance, and it’s in Normal’s interest to quit too. And so on.

This problem is known to insurance economists as “adverse selection”—in an insurance market when the insured have better information than the insurers, the less risky (health insurance: less sick) tend to be paying more than they’re getting back, and that tends to give them a reason to get out of the market. But this is a process that can repeat itself (google “adverse selection death spiral”), and, in unfavorable markets, this can mean that ultimately the people left in the insurance market are the very risky, who are paying a lot.

The point of the individual mandate is to put a stop to adverse selection. I'll be blunt: this is a form of economic redistribution. It directly subjects the healthy to charges that aren't in their economic best interests, in order to lower costs for the less healthy.

There are also some secondary reasons for an individual mandate. One big problem is that people without insurance still get sick. And then many folks end up in emergency rooms (which are required to at least stabilize all comers without regard to ability to pay—this has been the law since 1986's Emergency Medical Treatment & Labor Act—see 42 U.S.C. §1395dd). The individual mandate is also meant to relieve this burden on emergency departments.

### **The Challenge in NFIB**

The plaintiffs in NFIB challenged the individual mandate and the medicaid expansion.

With respect to the individual mandate, three theories were raised in defense of the provision:

1. It's just an exercise of straight-up interstate commerce regulation. (After all, the health insurance market is national, and it's definitely economic activity.)
2. It's necessary and proper to the rest of the insurance regulation, as a means to the end of lowering rates for the poorest and sickest.
3. The penalty that you pay if you don't get insurance is really just a tax. (If you're interested, it might benefit you to google "pigouvian tax.")

With respect to the medicaid expansion, the defense was straight-up spending clause, the claim of the challengers was that it was sufficiently coercive to amount to unconstitutional commandeering.

## 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. Ferguson*. Under 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. Ferguson*, involving 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 County* and *Gong Lum v. Rice* the validity of the doctrine itself was not challenged. 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. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, the 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. 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*, 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*, 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.

*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).

*From Brown II, 349 U.S. 294 (1955)*

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, 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. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, 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, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that, in the Delaware case, are accordingly reversed, and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case – ordering the immediate admission of the plaintiffs to schools previously attended only by white children – is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

## 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.

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. 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. Bollinger* and *Gratz v. Bollinger*. In *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. 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. 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.” The University concluded that its admissions policy was not providing these benefits.

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.” 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.

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. The Admissions Office also undertakes regular “reliability analyses” to “measure the frequency of readers scoring within one point of each other.” 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. 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.”) 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.

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. This Court granted certiorari for a second time, 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, race may not be considered [by a university] unless the admissions process can withstand strict scrutiny." 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."

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. 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." 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 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." 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.

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. 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.” 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.” Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”

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.” 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.” 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. 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.” 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.” 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. 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,” 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. 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. 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.

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. 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. 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.” 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. 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. 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. 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 Uni-

versity'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.

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”). 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.”

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. 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." 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.

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**Justice Alito, with whom The Chief Justice and Justice Thomas join, dissenting.** Something strange has happened since our prior decision in this case. 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. It pointed to a study showing that African-American, Hispanic, and Asian-American students were underrepresented in many classes. 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 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. 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.”

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”). 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.”

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.

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.

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. 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.

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. 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." And in 2003, UT proclaimed that it had "effectively compensated for the loss of affirmative action." 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. 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 diversity 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." UT purports to have later engaged in "almost a year of deliberations," 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*" The Proposal stated that UT needed race-conscious admissions because it had not yet achieved a "critical mass of racial diversity." 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." Second, the Proposal "relied in substantial part," on a study of a subset of undergraduate classes containing at least five students. 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. Based on this study, the Proposal concluded that UT "has not reached a critical mass at the classroom level." 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.” “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.” Even though UT’s classroom study showed that more classes lacked Asian-American students than lacked Hispanic students, UT deemed Asian-Americans “overrepresented” based on state demographics.

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.” “Because an applicant’s race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation.” 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.” According to UT, it has no way of making these determinations. UT says that it does not tell its admissions officers how much weight to give to race. 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.

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.” 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.”

UT has insisted that critical mass is not an absolute number. 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.” 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.”

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” 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.”

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 ante, at 12-13 (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. 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.” 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.”

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," 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. 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%)?

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." 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." UT's extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian-Americans, 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]." 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."

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."

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. 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," 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, 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.

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." 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. 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. 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.”

UT now equivocates, disclaiming any discrete interest in classroom diversity. 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.” 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. 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. 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.” And unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian-Americans) it 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, 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. 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.”

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." 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. 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 students, who "have not made [UT's] list" of favored groups.

Perhaps the majority finds discrimination against Asian-American students benign, since Asian-Americans are "overrepresented" at UT. But "[h]istory should teach greater humility." '[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." 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.'"

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. Because "[c]rude measures of this sort threaten to reduce [students] to racial chits," UT's reliance on such measures further undermines any claim based on classroom diversity..

For example, students labeled "Asian American" seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population." 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." 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." And UT evidently labels each student as falling into only a single racial or ethnic group, 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." 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. 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," 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." 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. 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.

Remarkably, UT now contends that petitioner has "fabricat[ed]" the argument that it is seeking affluent minorities. 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." 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."

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." 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. These are "the very stereotypical assumptions [that] the Equal Protection Clause forbids." UT cannot satisfy its burden by attempting to "substitute racial stereotype for evidence, and racial prejudice for reason."

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. 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. 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. 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," 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. 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. 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 disproportionately 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." 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. ("[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." 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. The same is true for Hispanic students. 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. 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. 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." 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. 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. 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 37.0% African-American) than if it is located in Montana (which is 0.4% African-American). 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." 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." "If a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race." 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. 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, 3.6% of non-Top Ten Percent Texas enrollees were African-American and 11.6% were Hispanic. 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 0.2% and 0.3%, respectively, of the total enrolled first-time freshmen from Texas high schools).

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,” they should be employed only “as a last resort.” Where, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result. As Justice Kennedy once aptly put it, “the small number of [students] affected suggests that the school could have achieved [its] stated ends through different means.” 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. 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,” particularly where, as here, the summary judgment posture obligates the Court to view the facts in the light most favorable to petitioner.

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.” 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. 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. 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 effort[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. 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.

UT officials involved in this covert process intentionally kept few records and destroyed those that did exist. See, e.g., Kroll Report (“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. (Dec. 9, 2015) (“University of Texas does not do legacy, Your Honor”), with Kroll Report (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.” 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. And it undoubtedly has a record of all of the classes in which these students enrolled. 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. 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.” As a result, it “remand[ed] the case to the lower courts for further consideration in light of the principles [it had] announced.” 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. 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,” 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.

## Bolling v. Sharpe

347 U.S. 497 (1954)

### **Mr. Chief Justice Warren delivered the opinion of the Court.**

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race.

We have this day [Brown] held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared 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 by the States, against any citizen because of his race.” And in *Buchanan v. Warley* the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define “liberty” with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

## 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 asserting 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."

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 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 summary 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.” The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court.

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.

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. Sharpe*. But 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 Virginia* (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* (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. Rockefeller* upheld 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.” 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.” “The differentiating factor between *de jure* segregation and so-called *de facto* segregation is purpose or intent to segregate.” 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* (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. Hopkins*. It 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.” 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* (1942), or with racially non-neutral selection procedures. With 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 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. Thompson*, the 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 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. 1, where 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 indicate 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.”

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate 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 applicable 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.

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**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. Lightfoot* or *Yick Wo v. Hopkins* it 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" as that term is used in constitutional adjudication.

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## Alexander v. Louisiana

405 U.S. 625 (1972) (short excerpt to contextualize discussion by the Court in *Washington v. Davis*\*)

According to 1960 U.S. census figures admitted into evidence below, Lafayette Parish contained 44,986 persons over 21 years of age and therefore presumptively eligible for grand jury service; of this total, 9,473 persons (21.06%) were Negro. At the hearing on petitioner's motions to quash the indictment, the evidence revealed that the Lafayette Parish jury commission consisted of five members, all of whom were white, who had been appointed by the court. The commission compiled a list of names from various sources (telephone directory, city directory, voter registration rolls, lists prepared by the school board, and by the jury commissioners themselves) and sent questionnaires to the persons on this list to determine those qualified for grand jury service. The questionnaire included a space to indicate the race of the recipient. Through this process, 7,374 questionnaires were returned, 1,015 of which (13.76%) were from Negroes, and the jury commissioners attached to each questionnaire an information card designating, among other things, the race of the person, and a white slip indicating simply the name and address of the person. The commissioners then culled out about 5,000 questionnaires, ostensibly on the ground that these persons were not qualified for grand jury service or were exempted under state law. The remaining 2,000 sets of papers were placed on a table, and the papers of 400 persons were selected, purportedly at random, and placed in a box from which the grand jury panels of 20 for Lafayette Parish were drawn. Twenty-seven of the persons thus selected were Negro (6.75%). On petitioner's grand jury venire, one of the 20 persons drawn was Negro (5%), but none of the 12 persons on the grand jury that indicted him, drawn from this 20, was Negro.

In Lafayette Parish, 21% of the population was Negro and 21 or over, therefore presumptively eligible for grand jury service. Use of questionnaires by the jury commissioners created a pool of possible grand jurors which was 14% Negro, a reduction by one-third of possible black grand jurors. The



commissioners then twice culled this group to create a list of 400 prospective jurors, 7% of whom were Negro—a further reduction by one-half. The percentage dropped to 5% on petitioner's grand jury venire and to zero on the grand jury that actually indicted him. Against this background, petitioner argues that the substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population raises a strong inference that racial discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would, at each stage, have so consistently reduced the number of Negroes.

This Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors. The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a *prima facie* case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination. At two crucial steps in the selection process, when the number of returned questionnaires was reduced to 2,000 and when the final selection of the 400 names was made, these racial identifications were visible on the forms used by the jury commissioners, although there is no evidence that the commissioners consciously selected by race.

The situation here is thus similar to *Avery v. Georgia*, where the Court sustained a challenge to an array of petit jurors in which the names of prospective jurors had been selected from segregated tax lists. Juror cards were prepared from these lists, yellow cards being used for Negro citizens and white cards for whites. Cards were drawn by a judge, and there was no evidence of specific discrimination. The Court held that such evidence was unnecessary, however, given the fact that no Negroes had appeared on the final jury: 'Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate.' Again, in *Whitus v. Georgia*, the Court reversed the conviction of a defendant who had been tried before an all-white petit jury. Jurors had been selected from a one-volume tax digest divided into separate sections of Negroes and whites; black taxpayers also had a '(c)' after their names as required by Georgia law at the time. The jury commissioners testified that they were not aware of the '(c)' appearing after the names of the Negro taxpayers; that they had never included or excluded anyone because of race; that they had placed on the jury list only those persons whom they knew personally; and that the jury list they compiled had had no designation of race on it. The county from which jury selection was made was 42% Negro, and 27% of the county's taxpayers were Negro. Of the 33 persons drawn for the grand jury panel, three (9%) were Negro, while on the 19-member grand jury only one was Negro; on the 90-man venire from which the petit jury was selected, there were seven Negroes (8%), but no Negroes appeared on the actual jury that tried petitioner. The Court held that this combination of factors constituted a *prima facie* case of discrimination, and a similar conclusion is mandated in the present case.

Once a *prima facie* case of invidious discrimination is established, 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. The State has not carried this burden in this case; it has not adequately explained the elimination of Negroes during the process of selecting the grand jury that indicted petitioner. As in *Whitus v. Georgia*, the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of systematic exclusion.

## Equal Protection of the Laws I

The Equal Protection Clause comprises the following parts of the text of the 14th Amendment: “no state shall... deny to any person within its jurisdiction the equal protection of the laws.”

Let’s start by noticing some of the textual ambiguity here.

- Who is a “person?” But that’s the easiest question. Here are some harder ones.
- First, is there a similar principle that applies to the federal government? The text says “state.” Does that mean the feds can do things like engage in race discrimination?

There isn’t an equal protection clause for the feds written into the constitution, but in *Bolling v. Sharpe* the Court basically turned around and applied equal protection principles to the federal government through the Fifth Amendment’s due process clause. Some people think this was a dubious move, and that there’s reason to think that equal protection principles apply less stringently (if at all) to the feds than to the states.

Another is what counts as “equal” law. One way to think about the idea of equal law is law that treats everyone the same. Another is law that treats people equally given their circumstances. Here’s an example: a hypothetical law “everyone must pay a poll tax of ten thousand dollars in order to vote” nominally treats everyone the same, but is it really an “equal” law, or is it a law that treats the poor unequally?

Finally, another puzzle is the use of the word “protection.” Does that limit the scope of the equal protection clause? We’ll talk about that in a moment. First, a little bit more background and context.

Let’s be originalist for a second.

If we think about the actual history of the equal protection clause, it was, of course, enacted to protect groups, and in particular one group: Black folks. After all, the Fourteenth Amendment was one of the three Reconstruction Amendments, imposed on the defeated South after the Civil War; in the context of the Thirteenth Amendment, outlawing slavery, and the Fifteenth Amendment, establishing the right to vote for black people, it is obvious that the point was to regularize the legal status of freed slaves. So, for an originalist, the Equal Protection Clause pretty clearly is about protecting against group discrimination rather than protecting against singling out individuals to demand bigger water pipe easements or some such nonsense (see below).

One way to read the idea of equal protection is as about the literal “protection” of the law. A critical way that the South oppressed black people from Reconstruction through Jim Crow is by failing to protect black citizens from white violence. The Southern states simply failed to enforce the laws against things like murder and assault and arson against white people who committed those crimes against black people, thus allowing organized racial terror groups like the Ku Klux Klan, lynch mobs, etc. to run rampant. On a literal textualist reading of the Equal Protection Clause, this is the core behavior it was intended to forbid. White people had the protection of the laws from violence, black people didn’t.

For some strong evidence of this interpretation, see the Enforcement Act of 1871 (better known as the Ku Klux Klan act), 17 Stat. 13. Most significantly, section 3 of the act reads in relevant part as follows:

That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts

shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the constitution of the United States: and in all such cases... it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States... as he may deem necessary for the suppression of such insurrection, domestic violence, or conspiracies.

Section 4 of the act goes on to address cases in which “the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations,” and authorizes the President to suspend habeas corpus. So clearly “protection” in the literal sense was very much on the minds of the framers of the 14th Amendment, and rightly so.

But we now universally think the Equal Protection Clause covers a much broader scope. It’s well established that the equal protection clause covers discrimination against people other than African-Americans, and that it prohibits discriminatory law in general, not just—or perhaps not even—the mere failure to protect people against private criminality.<sup>56</sup> At any rate, it’s well settled that the equal protection clause bars things other than race discrimination against African-Americans, and it bars discriminatory law in general, not just letting racist terrorists kill people.

### Classification vs subordination

There are two ways of interpreting the idea of discriminatory law. One is “the classification approach.” The idea here is that a law discriminates, and thus is subject to equal protection challenge, if it treats people differently. On the classification approach, it doesn’t matter whether the law that treats people differently is good or bad for some subordinated minority group. For example, a law providing favorable treatment to black people is just as subject to challenge as a law injuring black people.

The other approach is the subordination approach. The idea there is that the Equal Protection Clause isn’t about people being treated differently, it’s about unjust social hierarchy. So if laws perpetuating unjust social hierarchy are what the Clause prohibits, then there’s only a challenge when a law actually picks on, not just anyone, but someone on the bottom of the totem pole. On that conception of Equal Protection, a law picking on members of hierarchically subordinated racial groups should be treated less favorable than one aiming to promote the interests of such groups (the affirmative action debate is the obvious place where this shows up).

The choice between those two conceptions of equal protection is a subject of hot academic dispute. The defenders of the subordination approach have two main arguments: first, a historical or originalist argument: the same victorious northern abolitionist Republicans who imposed the Fourteenth Amendment on the South also passed a bunch of laws that quite explicitly provided favorable treatment to freed slaves. For example, Congress set up the Freedmen’s Bureau, which provided copious financial assistance to former slaves, and attempted to carry out outright redistribution. And this also makes more sense in context. If the purpose of the amendment at the time was to regularize the status of freed slaves, then this doesn’t mean treating the freed slaves the same as the enslavers, it means raising the condition of the freed slaves until they can stand on an equal footing. The second is a philosophical and moral argument about what equal law means... that argument is a bit more complex, but if you want the very best version of it, well, I published that article myself, it’s called *Equal Law in an Unequal World*. Feel free to read it.

By contrast, the classification approach defenders have a very strong argument of their own, which is fundamentally that the courts are not competent to adjudicate social hierarchy. Can you imagine showing up to court and having to convince a court, ok, group A is socially dominant relative to group

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<sup>56</sup>I say perhaps not even because there’s some nasty caselaw about there being no private claim for police failure to protect, although there are still arguments available—see generally *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). This has been a particular issue in domestic violence cases, about which Harvard’s Berkman center has a really interesting discussion at this link: <http://cyber.law.harvard.edu/vaw00/basics.html>.

B, so the law ought to allow discrimination in favor of B and against A? This is practically the definition of a political question, something so messy and controversial that it seems like it would be outrageous to allow the judicial branch to make rulings about it. And while it's doable in some social contexts and with respect to come pairings of groups, it might not be doable in others.

But I said "academic dispute" for a reason. As a matter of doctrine, the Supreme Court has come down pretty squarely on the side of the classification approach. This isn't necessarily permanent. Lots of academics and some activists (particularly on the political left) advocate for the Court to go to the subordination approach. So the first step in any equal protection claim is to establish that the challenged state action classifies people into some kind of group (even a group of one, about which more later) along some dimension, like race, gender, sexual orientation, or, really, any kind of classification, like neighborhood or hair color or political party or whatever.

Ok, so that's really the basis for understanding equal protection. You need to understand that stuff, because it'll help us explain the weird decisions that seem to come down from the Supreme Court on the daily. Now let's drill down some into the details.

### Actually analyzing EPC cases

So with all that groundwork laid, how do we actually analyze equal protection cases? There are two ideas we need to get out.

#### More and less suspect classifications

First is the idea of different kinds of suspicion attached to different classifications. If we're going to be originalists at all, then we can't just flat-out ignore the fact that this Amendment was put into the constitution in order to prevent race discrimination. If we know *nothing else* about the Fourteenth Amendment, we know that. So, intuitively, the courts ought to have a shorter fuse for race discrimination than for other kinds of discrimination. In fact, for an originalist, it need not be obvious that the Equal Protection Clause ought to do anything other than prevent race discrimination. In general, even if we follow the classification approach, we ought to think that some kinds of classification are more worrisome for the purposes of equal protection scrutiny than others.

"But wait!" you say. "Why do we need to do this at all? Why don't we just forbid classifications?" Well, we can't do that. Every law is a classification. The law "people under 21 can't buy booze" is an obvious example, but obviously we don't want that to be unconstitutional. "Latino people can't buy booze?" Clearly unconstitutional. One way to explain those judgments is to say that racial classifications get treated more suspiciously than age classifications. And, indeed, that's exactly what we do. Recognizing that every law classifies citizens into a group of people that are covered and a group of people that aren't, the Supreme Court has established a hierarchy of classifications ordered by their level of suspiciousness.

There are a bunch of different groups, and I'll give you a handout later on which summarizes all of this for you. But here's the secret takeaway in all of this. The subordination view has snuck back into the classification view, it has to sneak back into the classification view, because we have to have a way of telling which classifications are nasty and which are not nasty, otherwise we have to give careful equal protection scrutiny to laws that distinguish between children and adults, or people convicted of felonies and people not convicted of felonies, and all kinds of other classifications that we intuitively accept.

For right now, the minimum you need to know is this:

1. Race is a suspect classification, meaning that when the government classifies people by race it is very likely to get struck down. There are other suspect classifications, but race is the big one.

2. Gender is a semi-suspect classification, meaning that when the government classifies by gender, it's still quite likely, although not as likely, to get struck down.
3. Most other kinds of classifications are not suspect classifications, meaning that it's pretty likely for such classifications to be upheld.

One of the most persistent questions in all of equal protection law is how to decide what's a suspect classification. Race is the easy case, because, again, the amendment was written to stop race discrimination. But there are lots of other issues about how we figure out which other categories get treated as suspicious. Does it have something to do with a history of discrimination? Does it have something to do with that idea given in the Carolene products footnote (which we'll see soon) of "discrete and insular minorities," that is, people who are easy to target and too politically weak, because a minority, to defend themselves in the political process? We'll explore that in more detail.

It's also worth noting that there's a kind of Equal Protection scrutiny that covers cases where there isn't really a classification at all, just the government picking on someone. This is called "class of one" equal protection, and the classic case is *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). There, the Court held that a plaintiff could raise an equal protection challenge to a city requirement that she grant a 33 foot easement on her property as a condition of getting a connection to the city water supply. The basis of the challenge was that the plaintiff was treated differently: other citizens seeking water connections had only been required to give up 15-foot easements. Effectively, Olech claimed that the decision was illegal for unjustifiably treating her differently from everyone else. And this was addressed under "rational basis scrutiny," about which much more below.

#### Levels of scrutiny

A level of scrutiny is a way of expressing an overall balancing test, where what we're balancing is the importance of what the government is trying to achieve by the classification and necessity of the classification to the government's ends against the perniciousness of the kind of classification the government is making.

Before we actually describe the levels of scrutiny, it's best to get a handle on the concept by developing some intuition about the underlying balancing test. Suppose a serial killer is on the loose in Chicago, and all the police have to go on is that a redhead was seen buying a bunch of weapons. Can the police go and interrogate people just because they're redheads? Suppose you represent a redhead who is being followed by the police, and you file an equal protection lawsuit, what result would you expect? Stop and think about it for a minute.

It's pretty reasonable to think that the police will win this one. Why? Well, the need is pretty dire—people are going to die if they don't act, the only way they can act is by discriminating against redheads, and hair color is not a suspect classification — there's no long nasty history of discriminating against people based on hair color, etc.

Now consider a different kind of case. Suppose there's some weakish statistical evidence that men are marginally more likely to speed than women, and accordingly, the state of Illinois passes a law that charges men an extra \$500 a year for auto registration. It's obvious that this is a much weaker case for the government: gender is a semi-suspect classification, so that side of the balancing scale doesn't look so good—there is lots of historical gender-based discrimination, so the courts tend to be more suspicious of it. On the other side, reducing speeding isn't nearly as urgent a government interest as stopping a serial killer,<sup>57</sup> and there isn't that close a tie between this auto registration fee and that goal. The government probably loses this one.

So that's the underlying logic behind the analysis of all equal protection cases—or, at least, all equal protection cases that depend on classification. There's a different category of equal protection case,

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<sup>57</sup>Or is it? After all, traffic kills lots more people than Charles Manson-types...

called a fundamental rights case, which we'll get to later.

HOWEVER we don't actually do an explicit balancing test when we analyze equal protection cases. It's there under the hood, but the Court has developed a series of rules for expressing that balancing test in terms of levels of scrutiny.

We'll start with the toughest. "**Strict scrutiny**" is what the Court applies to suspect classifications. Strict scrutiny is something we'll see come up again and again in this course in various forms, and across different doctrines, but for now just think of it as how we are to evaluate race discrimination cases.<sup>58</sup>

When we apply strict scrutiny, we have to ask two questions. First, **what's the government interest at stake?** To satisfy strict scrutiny, it has to be "**compelling**."

How do we know what's a compelling interest? Well, there are some obvious ones — national security, for example. But beyond that, a compelling interest is kind of what five justices think is a compelling interest. One important subtlety is that the government doesn't get to make up a compelling interest after the fact: there has to be some reason to think that the compelling interest or interests that justify the classification were actually behind the classification in the first place.

Second, is the government action "**narrowly tailored**" to achieve that compelling interest? Sometimes narrow tailoring is also described as "the least restrictive means," but the two formulations basically mean the same thing: the government action has to be a very close match to the compelling interest. That has two implications: first, the government action can't engage in any more classification than is necessary to serve the compelling interest. If there's a way to achieve the compelling interest without classifying, or with less classification, then the government has to take it. Second, the government action has to actually serve the compelling interest. In other words, it has to be effective.

Importantly, the burden is on the government to show all of this. So typically, strict scrutiny means its very probable that the government will lose.

How does this work in terms of the balancing principle I described above? Well, note how we're still balancing the government's interests against the nastiness of the kind of classification. It's just that the nastiness of the classification comes into the balance in the choice of a level of scrutiny. For really nasty kinds of classification, like race, we choose the highest level of scrutiny, strict scrutiny, and hence choose a rule that requires a really close match to a really important government of interest to balance it. For less nasty kinds of classification, we choose a lower level of scrutiny.

#### Summary of strict scrutiny

- Government must have a **compelling interest**
- The compelling interest has to be government's **actual motivation**, not something that is made up after the fact/for purposes of litigation (there are difficult evidentiary questions here)
- The classification must be **narrowly tailored** to achieve that interest
- That means the classification must be *necessary* to achieve that interest, there can't be a way to do it without the classification, and, the classification must be effective (to what extent? It's not clear) at achieving that interest.
- The government *bears the burden of proof* to show that something meets strict scrutiny.

*Rule of thumb: in strict scrutiny cases, government has an uphill battle/is quite likely to lose (but not always!)*

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<sup>58</sup>Foreshadowing: semi-suspect classifications, like gender, get "intermediate scrutiny." Everything else gets "rational basis scrutiny."

## Exercise: Prison Segregation

You're a young lawyer in the Illinois Attorney General's office. One morning, the warden for the state's largest prison shows up and tells you that s/he has a serious problem with racial violence: the prisoners form into racist gangs and fight with one another, and several have been killed.

In order to solve the problem, the warden would like to build segregated dining and recreation areas. Each major racial grouping will have one such area, and prisoners will be required to attend the area consistent with their race. For present purposes, we can assume that every prisoner has a clear and accepted racial identity.

The warden is worried that this policy will be subject to challenge under the Equal Protection Clause. You've been asked to render your advice.

Working in a group of 3-4 people, come up with the best arguments you can, both for and against the constitutionality of the policy. If the arguments depend on unknown factual questions, please identify what those questions are and make explicit assumptions about them. Finally, please come to a conclusion about which argument is best, but be prepared to defend either position.

### Exercise: Racial School Acceptance

The City of Liberalland allows students to attend any high school in the district. However, some schools are particularly popular, because parents think they provide a particularly good education, and so they quickly fill up.

Rather than simply accept students to the popular schools by lottery, Liberalland, concerned with counteracting the lingering effect of residential segregation, decides to organize a racially based acceptance plan. When more students wish to attend a school than there are available spaces, the district checks the racial mixture of the school. If it does not match the racial mixture of the population in the whole school district, the district accepts students from the most underrepresented race, then the second most underrepresented race, and so forth.

Unsurprisingly, someone with standing files suit. What result?



### Exercise: Laundry

The city of Jerkville passes a law granting a Board of City Planners the discretion to permit or deny licenses for dry cleaners in wooden buildings. The stated justification for this law is that dry cleaners pose an increased risk of fire in those buildings.

As it turns out, one racial group predominantly owns dry cleaners in wooden buildings, and the Board of City Planners denies licenses to all of the people from that racial group, while permitting people from other racial groups to operate dry cleaners in those buildings.

Unsurprisingly, someone with standing files suit. What result?

## Exercise: Rustville

The city of Rustville is a decaying industrial town whose core industries have long ago been shipped overseas. Its economic collapse was accompanied by increasing residential racial as well as class segregation, as upper-income whites largely fled to the wealthier outskirts and lower-income minorities remained in the central city. The central city has fallen further behind economically, and has begun to experience many of the standard problems of economically declining areas: high crime, poor health, expensive public benefits burdens, lack of transit, etc. As a result, public budgets of the entire urban area have become strained, and the wealthier and whiter residents of the outskirts have found themselves paying higher taxes for services to the central city. More upsetting to them, their children are attending the same schools as academically underperforming students from impoverished backgrounds, in an underfunded citywide school district.

Accordingly, the residents of the outskirts have petitioned the state legislature to permit them to incorporate as independent municipalities, with their own tax bases and school districts. The legislature has enacted a bill permitting the incorporation.

The leader of a local civil rights group has appeared in your office. According to her organization, the anticipated result of this municipal incorporation would be that the municipalities on the outskirts would have schools that are substantially whiter and substantially better-funded than before; the remainder of the city in the middle would have schools with a substantially greater minority population and, unsurprisingly, those schools would also suffer a substantial decline in resources. Lots of other disparities would be created too, but her organization is focused on education.

Based on the cases we've read thus far, and assuming there's a plaintiff with standing, does her organization have a basis for challenging the municipal incorporation under the Equal Protection Clause?

The organization has extensive investigative resources, so if there are particular kinds of evidence that need to be developed in order to provide a factual grounding for such a challenge, she'd probably appreciate it if you told her where to look.

## Exercise: Affirmative Action

The University of Liberalland (U of L) is the state's flagship university, and has very high admissions standards. However, it has many more students who apply each year than meet its standards. Its medical school, in particular, is very prestigious and accepts far fewer students each year than it would like to, were teaching resources unlimited.

Recently, several studies have been published suggesting that medical care for patients from disadvantaged groups is significantly enhanced by having doctors who are members of those groups, and who can empathize with the difficulties experienced by those communities. As it turns out, Liberalland has several major urban areas with lower-income, racially segregated, inner cities, and with distinctive health problems rooted in the conditions of those areas (crime, lack of access to healthy food, mold/lead poisoning and other housing deficiencies, the physical consequences of stress from racial discrimination, etc.), and doctors from U of L often end up working in hospitals that serve those areas.

You're the general counsel of the U of L. The dean of the medical school comes to you to ask your advice about several potential policies to better serve these communities. These include:

- Creating a special admissions track for students who are from the economic, racial, and geographic backgrounds reflected in the above-noted areas (ERGB students).
- Funding special scholarships for ERGB students who commit to working in the relevant areas.
- Randomly selecting the class from among qualified applicants, in the hopes that this policy will increase the representation of ERGB students.
- Randomly selecting the class, but reshuffling and re-picking if a given randomly selected class does not have a sufficiently large number of ERGB students.

Advise the dean as to whether any of these policies, or any other policies which you may come up with, are constitutionally permissible.

## Shelley v. Kraemer

334 U.S. 1 (1948)

### **Mr. Chief Justice VINSON delivered the opinion of the Court.**

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.'

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct.

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color.; 'simply that and nothing more.'

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, s 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley*, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which

the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: 'The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.'

In *Harmon v. Tyler*, a unanimous court, on the authority of *Buchanan v. Warley*, declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, 'except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected.'

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases, 1883, the 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.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in *Strauder v. West Virginia*, 1880, this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. *Ex parte Virginia* held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the

domination of a mob are void. Convictions obtained by coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in *American Federation of Labor v. Swing*, 1941, enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In *Cantwell v. Connecticut*, 1940, a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion.

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur

of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares '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.' Only recently this Court has had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama v. California*, 1948. Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power. Cf. *Buchanan v. Warley*, *supra*.

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh v. Alabama*.<sup>59</sup>

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations

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<sup>59</sup>*Marsh* is a case in which First Amendment protections were extended to petitioners on private property in a "company town" on the grounds that it was effectively functioning like a publicly-owned public forum (though petitioners were also arrested by the normal government police for trespass)—PG

of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.



## State Action

Let's start with a basic point about the constitution: it only constrains the government. Your private employer can fire you for speech, your landlord could (except for the fact that we have anti-discrimination statutes) evict you because she doesn't like your religion or race, and so forth.

... or can they?

There's one fundamental question about this conventional state action requirement. Doesn't the state enable private action? After all, private rights, particularly private economic rights, tend to be enforced by state agents with guns.

So suppose there aren't laws prohibiting discrimination in commercial environments. A member of a racial minority group is in a shopping mall, and the owner decides that she or he doesn't want members of that racial group in the place. So the racist owner orders the customer to leave. If the customer says "no," the owner picks up the phone and calls the police, and it becomes the obligation of the police to enforce the owner's property rights by evicting the trespasser. Is the state thereby *implicated* in the racial discrimination? *Are the cops allowed to carry out the racist property-rights enforcement?*<sup>60</sup>

So what do we do about this? Well, for the most part, we don't do much. But occasionally we do something. The leading case in applying constitutional constraints to the private invocation of government power, of course, is *Shelley v. Kraemer*. And our key challenge with *Shelley* is: what makes the case special? Given that we don't normally apply constitutional law to bar private use of general rules of law, even to satisfy preferences that would be unconstitutional if the government did it, what is it about *Shelley* that led to a different result?

Similar ideas have appeared elsewhere in constitutional law. In the First Amendment context, we had *Marsh v. Alabama*, 326 U.S. 501 (1946), which forbade the state from enforcing criminal trespass rules to backstop the owner of a company town's prohibition on distributing literature on its sidewalks, essentially on the theory that the public forum carried with it First Amendment interests regardless of whether it was private or public property. For a while, it looked like this was going to be a much broader doctrine, especially in *Amalgamated Food Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (trespass laws could not be used to prohibit union members from picketing shopping center). However, in *Lloyd Corporation v. Tanner*, 407 US 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976) the Court killed off *Logan Valley* (distinguishing it in the former, explicitly overruling it in the latter) and made it clear that it would only apply this kind of first-amendment-on-private-property doctrine to actual company towns, that is, limited to the facts of *Marsh*.

That being said, the *Logan Valley* idea has had something of a resurgence in a handful of states, which have found a right rooted in the free speech (or sometimes petition or elections) clauses in their state constitutions to speak to others on private property like malls that has taken on some of the attributes of the traditional public forum (the idea here is kind of like a marketplace, a big gathering area where one's fellow citizens can be found). In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court upheld the California Supreme's court extensions of free speech rights to privately owned shopping centers against a challenge from the shopping center owner claiming that it was either a taking or compelled speech.

The rule of *New York Times v. Sullivan* is also an example of an loosening of the state action principle. *Sullivan* held that public figures cannot prevail on defamation claims (or similar torts) unless they can show "actual malice," which, incidentally, has nothing to do with malice but means they need to be able to show defendant knew that the statement was false or acted with reckless disregard for its truth

<sup>60</sup>Even if the owner uses private security, it's the state's laws that give those private security guards a defense against the battery claim for kicking the customer out, and there's also a concern that the owner is thereby taking on a state function. Surely, for example, a city couldn't get away with racist policing just by abolishing its own police department and letting private rich people who just happened to be racists do all the police work.

or falsity. This is the same kind of idea as in *Marsh*: we won't let certain categories of plaintiffs make use of the general principles of tort, contract, or property law, because their application would involve the government too closely in threatening important constitutional interests. Interestingly, the *NYT v. Sullivan* doctrine started out applying to public officials, which makes much more sense in terms of the state action requirement, but then ended up applying to "public figures" more broadly, *Taylor Swift* in addition to *Joe Biden*.<sup>61</sup>

The other major area where we apply constitutional rights directly to private economic arrangements is a doctrine you may remember from contracts: no specific performance of personal services contracts, because that's rather too much like slavery. Which makes specific sense in the context of the 13th amendment, which, of course, was intended to abolish a particular kind of private property and contract arrangement. There's no big salient case here, but the lower courts recite this all the time, and it's been an object of a certain amount of scholarly discussion.

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<sup>61</sup>Memo to defamation plaintiffs: shake, shake, shake it off.

### Exercise: Noncompete

A sizable local computer technology firm has a non-compete clause requiring its employees to not work for competitors for five years after they quit, but it was boilerplate written by the lawyers, and it never gets enforced.

A young employee quits the firm, and goes to work for one of its competitors. It turns out, however, that this particular competitor is also a leader in the church that the boss of the first company used to be a member of, until he got kicked out for apostasy.

The boss goes to court to enforce the noncompete, and the employee offers evidence that he's only enforcing the contract because of a religious disagreement. May the court enforce it?

### Exercise: Racist Gated Community

The owners of a gated community on private land routinely carry out racial discrimination in allowing visitors, such as solicitors, even trick-or-treaters, into the community.

The racist community generates protests, primarily but not exclusively by members of racial minority groups, unsurprisingly, and the protests trespass slightly onto the private land owned by the community.

The police are summoned to get rid of the protestors. May they?

### Exercise: Racist jeweler

The racist owner of a jewelry store routinely calls the police to chase out racial minorities on suspicion of attempted shoplifting.

They're never guilty, but the police always show up, even though they know the owner is just a racist.

Plaintiff, a member of a racial group whom the jewelry store owner profiles, goes to court enjoining the officers from enforcing the shopping center owner's evictions without actual evidence of shoplifting. Injunction granted?

### Exercise: Racist political party

The Texas Democratic Party, a privately incorporated organization, adopts a rule providing that only whites may participate in its primary elections.

The laws of Texas provide that the Democratic Republican parties are entitled to place the winners of their primary elections on the general election as a matter of right. Those laws also regulate the membership and rulemaking processes of the Democratic and Republican parties.

A plaintiff with standing challenges the Democratic Party rule under the Equal Protection Clause. Constitutional?

#### Note on this exercise

Note that “private associations” sometimes, but not always, have a constitutional right to discriminate even to the point that anti-discrimination statutes cannot constitutionally apply to them, under the 1st amendment association right. We haven’t covered this in the course, but it depends on the extent to which the association is super-intimate (“intimate association”), or about expressing a message contrary to the anti-discrimination law (“expressive association”). See generally *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which comprehensively goes over the doctrine.

## 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, VMI has remained financially supported by Virginia and "subject to the control of the [Virginia] General Assembly."

VMI today enrolls about 1,300 men as cadets. 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." 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."

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."

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. 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."

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. 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." 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* was the closest guide. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. 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."

The District Court reasoned that education in "a single gender environment, be it male or female," yields substantial benefits. 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. 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." 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." 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 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. Mary Baldwin's faculty holds "significantly fewer Ph. D.'s than the faculty at VMI," and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. 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.

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.

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, 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.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 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 ac-

knowledgeed 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. 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. 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.” 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. 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”; 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, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). 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. 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.” 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. 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.”

“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,” to “promote equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, 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.

Virginia asserts two justifications in defense of VMI’s exclusion of women. First, the Commonwealth contends, “single-sex education provides important educational benefits,” 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. 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. 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.

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.” 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; 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. 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.” 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.” Despite this recognition, no new opportunities were instantly open to women.

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 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."

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. 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." 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." 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." 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." 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. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. 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." 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.'" 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. 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. 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.” And it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that “the VMI methodology could be used to educate women.” The District Court even allowed that some women may prefer it to the methodology a women’s college might pursue. “Some women, at least, would want to attend [VMI] if they had the opportunity,” the District Court recognized, 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.” In sum, as the Court of Appeals stated, “neither the goal of producing citizen soldiers,” VMI’s *raison d’être*, “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.” 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.”

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. 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*, see *J. E. B.* (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.” (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, is a judgment hardly proved, a prediction hardly different from other “self-fulfilling prophec[ies]” 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." 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!"

Medical faculties similarly resisted men and women as partners in the study of medicine. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," deprive male partners of adequate assistance, and lead to sexual misconduct. Field studies did not confirm these fears.

Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. 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 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." 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. Virginia, in sum, "has fallen far short of establishing the" exceedingly persuasive justification" 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." 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. 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*. 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."

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. Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly addressed and related to" the violation, 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." If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? 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.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Instead, the VWIL program "deemphasize[s]" military education, and uses a "cooperative method" of education "which reinforces self-esteem."

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, 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. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." "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, 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. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, 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." 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." The Commonwealth embraced the Task Force view, as did expert witnesses who testified for Virginia.

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." 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."

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 impose[s] on men." 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, 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.”

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. The Mary Baldwin faculty holds “significantly fewer Ph.D.’s,” and receives substantially lower salaries, 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. VWIL students attend a school that “does not have a math and science focus,” they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers.

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. “[VMI] alumni are exceptionally close to the school,” and that closeness accounts, in part, for VMI’s success in attracting applicants. A VWIL graduate cannot assume that the “network of business owners, corporations, VMI graduates and non-graduate employers interested in hiring VMI graduates” will be equally responsive to her search for employment.

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.

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* (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.”

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.

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].” 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.” 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, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, a brand of review inconsistent with the more exacting standard our precedent requires. 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.” 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.” 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. 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.” Commencing in 1970, Virginia opened to women “educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions.” A federal court approved the Commonwealth’s innovation, emphasizing that the University of Virginia “offered courses of instruction not available elsewhere.” 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. 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. VMI’s story continued as our comprehension of “We the People” expanded. 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 is affirmed, the final judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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**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*, 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. 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. 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. To avoid introducing potential confusion, I would have adhered more closely to our traditional, “firmly established” standard that a gender-based classification “must bear a close and substantial relationship to important governmental objectives.”

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. 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* (1948). Likewise representing that now abandoned view was *Hoyt v. Florida* (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*, 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. Hogan*, a 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*. 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." 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)." 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, 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. 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.

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**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.” It is my position that the term “fundamental rights” should be limited to “interest[s] traditionally protected by our society,” 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.

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.” The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

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) came not by court decree, but because the people, through their elected representatives, decreed a change. 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). 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, 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.” We have denominated this standard “intermediate scrutiny” and under it have inquired whether the statutory classification is “substantially related to an important governmental objective.”

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,” 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.” 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*, 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,” 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, 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.* and *Hogan*, 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.”

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.’”

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*, 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.”



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*, 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*, overruled on other grounds, *Adarand Constructors, Inc. v. Peña* (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,” 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.” 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. 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 (intimately) 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, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Women’s Business Ownership Act of 1988, Violence Against Women Act of 1994.

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.”

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.

“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, 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.” “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,” 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.” 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.” 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.

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. 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.

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. 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. 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.” 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. 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.’” 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.” 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. 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,” that Virginia views “one special characteristic of the Virginia system [as being] its diversity,” 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.” 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, 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.

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. 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.” 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.

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.’” 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. 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, (2) citations of nonevidentiary materials such as amicus curiae briefs filed in this Court, 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.” 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.”

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.” “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.

The Court argues that VMI would not have to change very much if it were to admit women. 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.” 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. 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.” 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."

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," 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.

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. 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”? 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.

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. [district court opinion] (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.” 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) 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. 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." 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. 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.” “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. 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. 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.’” 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.” 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.” 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.

## Equal Protection part II: Gender, intermediate scrutiny

Now we're moving to our second broad Equal Protection topic, intermediate scrutiny and sex and gender classifications. This is actually going to run a lot shorter than our first topic, but not because it's less important. Rather, it will run shorter because the basic logical structure is the same, only the details of the standard differ, and there are some new questions that are hard to answer. But most of your understanding of race cases can transpose directly to sex and gender cases.

You will have noticed that I said "sex/gender" classifications in the previous paragraph. These days we recognize, consistent with the understanding of the best scholars who study the subject as well as trans rights activists, that "sex" refers to a biological classification, and "gender" to a social role, and that they come apart. The Supreme Court has, unsurprisingly, not told us which of these is the one that really gets intermediate scrutiny. One entirely plausible strategy of argument would be to contend that discrimination against transgender folks is just sex discrimination, insofar as it's discrimination on the basis of a mismatch between a person's biologically assigned sex and the gender presentation ascribed by dominant groups to people who experience that ascription. Indeed, this is essentially what the Court held in the Title VII (employment discrimination) context in *Bostock v. Clayton County* (Justice Gorsuch!!) with respect to trans plaintiffs and also gay plaintiffs.

Incidentally, intermediate scrutiny also applies to "legitimacy," that is, whether someone's parents were married. But this is pretty rare.

### Intermediate scrutiny

Like in strict scrutiny, the burden of proof in intermediate scrutiny is on the government, and like strict scrutiny, you can't use after-the-fact invented justifications.

The big difference, however, is in the actual level of scrutiny applied. Where for strict scrutiny, the government needs a **compelling** interest, in intermediate scrutiny the government merely needs an **important** interest. And where for strict scrutiny, the classification has to be **narrowly tailored** to the interest, in intermediate scrutiny the classification must only be **substantially related** to the interest.

What does that mean in practice? Well, the difference between important interests and compelling interests isn't particularly clear. It's not like we usually see pairs of cases where the same interest was proffered for both race and sex discrimination, and the government won on sex but not on race. Every compelling interest presumably is also an important interest, but not every important interest need be a compelling one. But I can't just list things that are important interests but not compelling interests.

### Compensatory remedies for women but not for people of color??

There is one possibly bizarre corner of the rule. It turns out, probably (based on some old cases that may not survive if it ever comes up in the Roberts court), that the government is allowed to be more solicitous of the subordinated when it comes to gender than when it comes to race. That is, broad social remedial purposes are permissible under intermediate scrutiny, but not strict scrutiny: the government can take the initiative to remedy social gender-based injustice. Justice O'Connor's majority opinion in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), discusses this at length, although doesn't apply it; earlier cases that did apply it, and which O'Connor cites, include *Califano v. Webster*, 430 U.S. 313 (1977), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975). It's easiest just to quote directly:

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Califano v. Webster*, 430 U.S. 313 (1977), which involved a challenge to a statutory

classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women “as such have been unfairly hindered from earning as much as men” and “work[ed] directly to remedy” the resulting economic disparity.

A similar pattern of discrimination against women influenced our decision in *Schlesinger v. Ballard*, *supra*. There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

But we know from, e.g., *Parents Involved v. Seattle School District*, that this isn’t permissible in the case of race. What gives? This seems kind of perverse: Remedying social injustice against racial minorities isn’t a compelling interest, but remedying social injustice against women is an important interest?

To be clear: the perversity follows from the fact that this outcome seems to fly in the face of the original purpose as well as key normative meaning of the Reconstruction amendments. The 14th Amendment is supposed, if we’re originalist at all, to provide the strongest protection to that racially defined class of people who have been victimized by the legacy of slavery. So if the levels of scrutiny framework means that it forbids government action to actually make up for some of the wrongs committed against that group, while permitting the government to make up for wrongs committed against another group who were not intended to be the original beneficiaries of the amendment’s protection, that seems ludicrous.

Here’s an argument to potentially justify this difference. I don’t necessarily endorse it, but it’s worth considering: the cases striking down remedial purposes tend to mostly strike down state action; the cases upholding remedial purposes tend to mostly uphold federal action. Thus, an alternative way to read these cases, although one that requires being a little aggressive in one’s interpretation of the corpus, is to say that the federal government just has broader remedial power over social injustice than the states do, because a) the enforcement clauses of the Reconstruction Amendments arguably grant Congress explicit remedial powers plus because b) after all, the whole point of them was as part and parcel of a federal effort to remedy state discrimination and regularize the status of an egregiously oppressed group of people, and c) let’s not forget that the Equal Protection Clause, technically speaking, doesn’t even apply to the federal government: it was reverse-incorporated through the 5th Amendment’s due process clause in *Bolling v. Sharpe*, but it doesn’t have to be the case that the standards are exactly the same. Anyway, one occasionally hears arguments along these lines.

What about substantial relatedness? People typically say that the classification can be a little overinclusive or underinclusive. Another way to think about substantial relatedness is that the government doesn’t have to do as little gender classification as humanly possible the way it would with race. But its gender classification does still have to be pretty important for the goals it’s pursuing.

#### Why intermediate scrutiny?

In view of the fact that there has been a massive history of discrimination against women, why not just apply strict scrutiny to sex/gender classifications? A number of possible justifications come to mind:

- Originalism: the 14th Amendment was actually aimed at race, so it ought to have the strictest standard. Potential counterargument: we apply strict scrutiny to categories other than race, most notably alienage. See generally *Bernal v. Fainter*, 467 U.S. 216 (1984).

- *Carolene Products*: although there's a history of official discrimination against women as well as lots of present social discrimination, women at least in principle are less politically vulnerable than racial minorities, since, after all, women make up a numerical majority of the population. So the need for constitutional protection is perhaps somewhat lesser.
- *Historical*: Congress tried to enact an equal rights amendment specifically providing for equal rights for women. It didn't get ratified by enough states. Arguably, that failure makes it less democratically legitimate to turn around and apply strict scrutiny to sex/gender classifications.
- *Pragmatic*: there are some actual meaningful biological differences that more-or-less track sex lines (like reproductive role, obviously); the same cannot be said for race, according to most credible scientists. So maybe that justifies being a little less cautious about sex classifications—although the answer to this justification might be “well, that doesn't preclude strict scrutiny, because consideration of biological differences could come in on the narrow tailoring prong.”

### What counts as sex/gender discrimination?

Because lots of other characteristics are linked to sex and gender, it cannot be obvious what sorts of things constitute sex/gender discrimination. In particular, here are two things that might count, but do not do so under current doctrine:

- *Sexual orientation*. You might argue that sexual orientation discrimination is just a form of discrimination based on the relationship between a person's sex/gender and the sex/gender of their preferred partner(s). See above. We have this idea available in the Title VII statutory interpretation context after *Bostock*, but not yet in the constitutional context.
- *Pregnancy*. You might think that since only women can become pregnant, and sex difference is (arguably) defined by biological reproductive role, discrimination against the pregnant constitutes discrimination against women. well... I've got some bad news for you. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that pregnancy discrimination was not the same as sex discrimination, and hence not subject to any kind of heightened scrutiny.

*Geduldig* is worth exploring a little bit further. The case arose in the context of California's disability insurance system for employees who were temporarily disabled from working. The insurance benefits excluded “disability resulting from an individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath,” as well as “normal pregnancies” (as opposed to, for example, unusually injurious pregnancies).

The Court said that this wasn't sex discrimination. Here are the relevant parts:

The program does not discriminate with respect to the persons or groups eligible for its protection, and there is no evidence that it discriminates against any definable group or class in terms of the aggregate risk protection derived from the program

The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, and *Frontiero v. Richardson*, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include

or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups – pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Indeed, the appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, “women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits.” Several amici curiae have represented to the Court that they have had a similar experience under private disability insurance programs.

Under the rational basis test, which we’ll discuss in a moment, California’s decision clearly passes muster, as the Court notes. The budget was just about balanced, and, obviously, lots of people miss work for pregnancies: to require California to cover loss of work for pregnancy would have either totally busted the budget or required a massive (and regressive) raise in premiums paid by employees for the program, and defeat the state’s goals.

Here are some things you might think about this case:

- Is the Court perhaps operating under a *Washington v. Davis* kind of intuition: this is really just a kind of disparate impact?
- But is that idea fundamentally silly? It’s not incidental that excluding pregnancy only has an impact on women, it’s built directly into the nature of exclusion: the capacity to become pregnant is part of the concept of the female sex. It’s not facially neutral. Come on.
- Suppose we changed the hypo to get rid of the actuarial benefits to non-pregnant woman which the opinion mentioned? For example, suppose the state forbids pregnant women from working certain jobs deemed dangerous to the fetus? Here, there isn’t this same kind of sex-neutral financial benefit, the burden falls all on women. Would that be sex discrimination? Or would the reasoning of *Geduldig* still apply?

#### Some more sex discrimination cases

Since we’re doing sex/gender quickly in this course, it behooves me to point you to the other important cases that people tend to assign when it gets longer treatment:

- *Nguyen v. Ins*, 533 U.S. 53 (2001): Additional proof of parentage requirements for citizenship of U.S. citizen father rather than U.S. citizen mother passes intermediate scrutiny (see also *Parham v. Hughes*, 441 U.S. 347 (1979) for similar rule upheld re: wrongful death suits).
- *Michael M. v. Superior Court*, 450 U.S. 464 (1981): statutory rape law allegedly penalizing only men (but, actually, as written, only penalizing sex with women—heteronormative much, Justice Rehnquist?) constitutional. Note: this case can also be very upsetting: the underlying facts weren’t just about “statutory rape” in the sense of consensual sex with someone underage, but also a full-on violent coercive rape.
- *Rostker v. Goldberg*, 453 U.S. 57 (1981): a really weird case: exempting women from the draft permissible because women were excluded from combat—the government’s own prior discrimination was given as the substantial interest for the government’s discrimination.



- *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979): *Washington v. Davis*, but for sex.
- *Craig v. Boren*, 429 U.S. 190 (1976): the case establishing intermediate scrutiny standard, different drinking age for men and for women unconstitutional even though there was a statistical relationship between gender and getting caught DUI—particularly important, had we more time I would have assigned it; highly recommended reading. also contains very important concurrence by Stevens giving his critique of the whole levels of scrutiny framework.
- *Frontiero v. Richardson*, 411 U.S. 677 (1973): the plurality flirts with strict scrutiny, strikes down gender-based distinction in military spousal dependent benefits—also we get to see Potter Stewart singlehandedly messing up equal protection law by concurring without an opinion rather than giving the plurality a majority—had he signed on, would we have strict scrutiny today? perhaps.
- *Reed v. Reed*, 404 U.S. 71 (1971): law preferring men to women as probate administrators unanimously struck down.

## Exercise: Senior Executive Service

The President of the United States has issued the following executive order:

In the judgment of the President, pernicious gender-based socialization processes have impaired the capacity of the executive branch to function most effectively. Men, who are typically socialized from a very young age in our culture to be more confident and outgoing, tend to be promoted beyond their actual talents over women, who are typically socialized from a young age to be more humble and modest. Moreover, women have typically been socialized to display a more empathetic leadership style, which has been shown to be the most productive in high-level executive positions.

Accordingly, all executive departments are instructed to prefer women for all roles in the Senior Executive Service [the federal classification for the highest-level civil service appointments]. In situation where the evaluation criteria for a position uses numerical scores, women are to be preferred to a degree equivalent to ten points on a scale of 100. In a situation where the evaluation criteria for a position are more subjective, where otherwise equally qualified men and women are available, selection must be made from the available women.

A man who was rejected from a position in the Senior Executive Service in favor of a woman has filed suit, challenging this order under the Equal Protection Clause. As usual, you're a clerk to the judge in whose lap this case has fallen. Your judge has asked you to evaluate this claim, and also to answer the following additional questions:

1. Does your evaluation depend on whether the position in question was based on numerical scores or subjective evaluation?
2. Does your evaluation depend on whether or not the executive order includes credible references to the sociological, psychological, and/or gender studies literature substantiating its claims about socialization?
3. If the policy is unconstitutional, what could the President do to achieve the same goals in a constitutionally permissible way?

## Exercise: Transgender Hair Discrimination

Patricia Plaintiff, a transgender individual who was born with male physical features but who holds a female gender identity, has joined the Illinois National Guard. The Guard has no gender-based regulations on hair length, however, it is customary for female recruits to wear their hair somewhat longer than male recruits, within the overall limitations provided by regulation. In boot camp, Patricia wore her hair at a customary female, rather than male, length.

Her commander, in response to this choice of hair lengths, subjected Patricia to verbal disparagement and a variety of informal sanctions, and ultimately to a less desirable unit assignment upon graduation, because “I don’t want to have to see your damn hair every day.” At the unit to which she is assigned, Patricia is ordered to live in the men’s barracks, over her objections.

Unsurprisingly, Patricia has brought suit, seeking assignment to the more desirable unit and to a woman’s barracks on an Equal Protection theory. You are the clerk to the trial judge. Assuming that the court has jurisdiction over these decisions, and that they give rise to a right of action for injunctive relief (in particular, assume that the military context does not compromise the court’s jurisdiction or remedial power), advise your judge on the standard under which Patricia’s claims are to be considered, and the result that ought to be reached.

## 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, 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.'

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. Shaw*, held 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 and the Senate Committee on Agriculture and Forestry. 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 though it has failed to strike at another.

Even in the absence of [committee reports from Congress], 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 as-

sumed 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.

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, and 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. Similarly 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 particular 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, 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. 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.

As the statute is not unconstitutional on its face, the demurrer should have been overruled and the judgment will be reversed.

#### *Footnote 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. 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. Condon*; on restraints upon the dissemination of information, see *Near v. Minnesota*; *Grosjean v. American Press Co.*; *Lovell v. Griffin*; on interferences with political organizations, see *Stromberg v. California*; *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 Sisters*, or national, *Meyer v. Nebraska*; *Bartels v. Iowa*; *Farrington v. Tokushige*, or 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.

### Equal Protection 3: Rational Basis

As we know by now, rational basis is the default rule for if we don't have some other standard of review that applies. And rational basis is *extremely deferential*. The court will uphold a law under rational basis if it's **rationally related** to a **legitimate** government interest.

Standard of review	Importance of government interest	Relationship	Core Classification
Strict Scrutiny	Compelling	Narrowly Tailored	Race (suspect classifications)
Intermediate Scrutiny	Important	Substantially Related	Sex (semi-suspect classifications)
Rational Basis	Legitimate	Rationally Related	Catch-all

### Rational basis is easy

Rational basis is easy. Basically, the government almost always wins. And, in particular, you know how things like “administrative convenience” don’t really work for strict scrutiny, and probably don’t work for intermediate scrutiny? They’ll probably work quite fine for rational basis scrutiny.

Most importantly, the burden of proof and treatment of after-acquired (cooked up for litigation) reasons shifts when we get to rational basis. As you know, with both strict scrutiny and intermediate scrutiny, the government has the burden of showing its classification meets the given interest, and it cannot rely on interests cooked up after the fact for the purposes of litigation; rather, the interests it appeals to have to be the interests that were actually under consideration (in some meaningful sense, given the well-known problems of aggregated legislative motivations and such) when the classification was enacted.

Both of those flip with rational basis. Now the party challenging the law has to prove that the government’s classification isn’t rationally related to a legitimate interest, and this can include any interest that can justify the classification, regardless of whether it had anything to do with why the classification was enacted in the first place.

So how can the government lose a rational basis case? Well, for the most part, it has to be either acting totally arbitrarily or irrationally—in a “class of one” kind of case where someone alleges that they’ve been treated differently for no reason at all. For example, the claim at issue in *Village of Willowbrook v. Olech*—remember that? We talked about it before, a plaintiff who claimed that the city, for no reason, demanded a water line easement on her property twice as large as everyone else’s. That might be the kind of claim that falls under rational basis, if there is just no reason for the double-size easement. We might also see this in cases where some individual government employee just abuses someone out of a personal dislike, either on an individual basis or on a non-suspect group basis—if the tax assessor doubles your assessed tax rate because you’re a redhead and he, like Cartman, thinks “gingers have no souls.”

### Animus, Rational basis with “bite”

This personal dislike idea is at the heart of the places where rational basis actually seems to lead to state action getting struck down in real cases: when it looks like the government is just acting out of distaste toward a particular class of people. Of course, this shows up particularly in the gay rights context, and soon we’ll read *Romer v. Evans* and think carefully about what it means to attribute this kind of animus to the government, and whether the idea is useful.

Related to the animus idea is a concept known as “rational basis with bite.” The thing about rational basis with bite is that it doesn’t exist, at least not officially. Some scholars, and occasionally a lower court, will talk about “rational basis with bite” to mean that the court nominally applies rational basis to state action taken against certain disadvantaged groups—the disabled, gays and lesbians—but really applies something stricter.

A key example is *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The city of Cleburne imposed special zoning requirements on a group home for citizens with cognitive disabilities and denied them a permit. The Supreme Court rejected the court of appeals's attempt to treat mental disability as a quasi-suspect classification, but nonetheless struck down the permit denial in question. The decision primarily focused on the fact that the city's asserted justifications for the law all depended on fears and stereotypes about the mentally disabled: that nearby property owners wouldn't want to be around them, that nearby junior high school students might harass them. What's striking about *Cleburne* is that the court was not very deferential to the city's reasoning process at all: it completely cast aside the city's notion that housing the mentally disabled would be different from other kinds of group housing that were not subject to these special demands, such as housing for the elderly. Which, let's face it, was correct in a rational sense—the city's ruling does seem to have actually been based on stereotypes about the mentally disabled, at least to hear the court tell it—but doesn't really feel like rational basis review.

A similar example is *Plyler v. Doe*, 457 U.S. 202 (1981), which struck down a Texas law denying an education to undocumented immigrant children. Here's what Justice Brennan said for the court there (I've edited it quite a bit):

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents. Of course, a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate. Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status – an asserted prerogative that carries only minimal force in the circumstances of these cases – we discern three colorable state interests that might support [the law].

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, [the law] hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.

Second... appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. As the District Court noted, the State failed to offer any credible supporting evidence that a proportionately small diminution of the funds spent on each child which might result from devoting some state funds to the education of the excluded group will have a grave impact on the quality of education. ... Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders.

Again, this decision seems right as a matter of morality and policy, but it doesn't look like the rational basis review Justice Brennan claimed it was. Notice, in particular, how he demands the state prove that its cost-saving measure will improve education. But wait a minute, wasn't the burden in rational basis supposed to be on the challenger? Brennan also went on talking about a "substantial state interest" rather than the usual "legitimate state interest."

Another example, along similar lines, is *USDA v. Moreno*, 413 U.S. 528 (1973). There, the court, again via Justice Brennan, struck down limitation of food stamp assistance to related, not unrelated, people living together. The government had claimed that it was justifiable because Congress could have thought unrelated households are more likely to be committing welfare fraud. The court barely discussed that justification, essentially dismissing it out of hand.

And then, of course, there are the gay rights cases, which we will read. So what do we make of this? On balance, it's probably fair to say that if it looks like the state is picking on some group, where it looks like that group is disadvantaged and it looks like the decision is rooted in stereotypes and prejudice—undocumented immigrants, food stamp recipients, the disabled, gays and lesbians—even though that group isn't picked out by some suspect or semi-suspect classification, there's some chance that instead of choosing to create a new semi-suspect classification, the court will just quietly apply a rougher rational basis standard than usual.

That takes us to our final point about rational basis. Because it's the default rule, people who are trying to win greater protection for some group or another often show and ask the Court to hold that a given classification ought to be added to the list of suspect or semi-suspect classifications. And they typically lose: they lost with disability, with socioeconomic class, and, to this day, the Court still hasn't held that sexual orientation is a semi-suspect class, even as it just recently struck down the limitation of marriage to opposite-sex couples on a fundamental rights theory (about which more soon). We'll read another important failed attempt soon, in the form of *San Antonio School District v. Rodriguez*. Onward.



## 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.

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*; *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 Sisters* the 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. Nebraska* the 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*, *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 *Schwartz v. Board of Bar Examiners*, 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" and was not action of a kind proving bad moral character.

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, 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* to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." We have had many controversies over these penumbral rights of "privacy and repose." 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 Constitution 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.”

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 rights 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].

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, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*. 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.”

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow “broaden[s] the powers of this Court.” 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 lib-

erties. 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.

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. Nebraska* that the right “to marry, establish a home and bring up children” was an essential part of the liberty guaranteed by the Fourteenth Amendment. 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.” 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 Govern-

ment 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,” 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.” 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,’ 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.” The law must be shown “necessary, and not merely rationally related, to the accomplishment of a permissible state policy.”

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. 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. Here, as elsewhere, where, “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” 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.”

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 extra-marital 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.” He would require a more explicit guarantee than the one which the Court derives from several constitutional 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. To the contrary, this Court, for example, in *Bolling v. Sharpe*, while 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 *Schwartz v. Board of Bar Examiners* the 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.

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. 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.

This Amendment has been referred to as “The Forgotten Ninth Amendment,” in a book with that title by Bennett B. Patterson (1955). 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.”

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**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.

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.” For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, I 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, 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.”

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.” Need one go further than to recall last Term’s reapportionment cases, *Wesberry v. Sanders* 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.



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. 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. 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,” and “the liberty to direct the upbringing and education of children,” and that these are among “the basic civil rights of man.” These decisions affirm that there is a “realm of family life which the state cannot enter” without substantial justification. 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. Cooper* (opinion 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, or indeed even of life itself. 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. 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. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.

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. The traditional due process test was well articulated, and applied, in *Schwartz v. Board of Bar Examiners*, a 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. 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. 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.

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**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. But speech is one thing; conduct and physical activities are quite another. 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 [stingy] 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 shrunk 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. 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 Harlan 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, 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*, 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*. 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*. *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.” 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, 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*, 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. 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 discovery 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 Amendment 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 Brother 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.” 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. 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* and many other opinions.

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.”

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.

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.

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**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. 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.”

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,” 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 annul 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.

## **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. Bolton* present 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 contro-

versy, 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.

Jane Roe, 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, 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.

We are 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?

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*; or among those rights reserved to the people by the Ninth Amendment. 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, and that 'it was resorted to without scruple.' 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.

(2.) 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, 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? 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,'<sup>14</sup> 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. Bolton* it 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: 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. 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.' 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 Pythagorean 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.

(3.) 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 pregnancy—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 consensus 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 at 40 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.' 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, others followed Coke in stating that abortion of a quick fetus was a 'misprision,' a term they translated to mean 'misdemeanor.' 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.

(4.) The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, came in 1803. It made abortion of a quick fetus a capital crime, but 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. It disappeared, however, together with the death penalty, in 1837, and did not reappear in the Offenses Against the Person Act of 1861 that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act 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). 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. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967. 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.'

(5.) 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.' The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. In 1828, New York enacted legislation 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, 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. 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.

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.

(6.) 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 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.

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.

(7.) 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.

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.'

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 antiseptics. 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. 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, 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, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' 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*; 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.' 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 reargument 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 Emolument Clause, Art. I, § 9, cl. 8; in the Electors 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 observation that 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. [listing cases] Indeed, our decision in *United States v. Vuitch* inferentially 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. 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 at 24 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 live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live 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. 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.

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.

- (a) 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.
- (2.) 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.

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.

## 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.

Petitioners in this case are the State of Washington and its Attorney General. Respondents 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. 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. Casey* and *Cruzan v. Director, Missouri Dept. of Health*, the District Court agreed, 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."

Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, 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.” We granted certiorari, and now reverse.

We begin, as we do in all due-process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State-indeed, in almost every western democracy-it is a crime to assist a suicide. 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 (“[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?* (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.” 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.” Thus, “[t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was introduced into English common law.” 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.” Blackstone emphasized that “the law has ranked [suicide] among the highest crimes,” 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.” Virginia also required ignominious burial for suicides, and their estates were forfeit to the crown.

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. 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.”

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. Nonetheless, although States moved away from Blackstone’s treatment of suicide, courts continued to condemn it as a grave public wrong.

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.” This was the well established common-law view. 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* (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, and many of the new States and Territories followed New York’s example. 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.” By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. 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. California, for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code’s. In this century, the Model Penal Code also prohibited “aiding” suicide, prompting many States to enact or revise their assisted-suicide bans. 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.”

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. 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). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide.

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. And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. 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.

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." Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. 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. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. 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. California* and 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 uncharted area are scarce and open-ended." 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," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

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," (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*. Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" 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.”

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.” 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,” 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,” 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, we were, in fact, more precise: we assumed that the Constitution granted competent persons a “constitutionally protected right to refuse lifesaving hydration and nutrition.” The Washington statute at issue in this case prohibits “aid[ing] another person to attempt suicide,” 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* (“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,” and as teaching that the “liberty” protected by the Due Process Clause includes “basic and intimate exercises of personal autonomy,” see *Casey* (“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.” 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 persistent 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. We began with the observation that “[a]t common law, even the touching of one person by another with-

out 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.” 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,” 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 decision 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. 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.” 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.”

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.



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. 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." 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, 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. This requirement is unquestionably met here. As the court below recognized, Washington's assisted-suicide ban implicates a number of state interests.

First, Washington has an "unqualified interest in the preservation of human life." The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. 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.

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." 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." 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 (suicide is a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force (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.

Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. See New York Task Force (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); Back, Wallace, Starks, & Pearlman, *Physician-Assisted Suicide and Euthanasia in Washington State* (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* (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then

grateful to be alive”). 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],” 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* (1992) (“[T]he societal risks of involving physicians in medical interventions to cause patients’ deaths is too great”). 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. (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.” 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,” see *Compassion in Dying* (“[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.” 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 *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady* (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.” Washington insists, however, that the impact of the court’s decision will not and cannot be so limited. If suicide is protected as a matter of constitutional right, it is argued, “every man and woman in the United States must enjoy it.” 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”; 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. 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. Washington’s ban on assisting suicide prevents such erosion.

This concern is further supported by evidence about the practice of euthanasia 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. 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. The New York Task Force, citing the Dutch experience, observed that “assisted suicide and euthanasia are closely linked,” 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.

We need not weigh exactly 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.”

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.

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**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. 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 here continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help. 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.” 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.” 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."

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," 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. 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." 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, 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. 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, 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*, 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*. 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*. 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. The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property.

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. But in *Fletcher v. Peck*, 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* 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*. 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. 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, 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*, 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.” 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.

The theory became serious, however, beginning with *Allgeyer v. Louisiana*, where the Court invalidated a Louisiana statute for excessive interference with Fourteenth Amendment liberty to contract, 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 legitimately 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 York* and 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., *Lochner* (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. Nebraska*. Without 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?”).

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. Williamson*, where 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. *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. Connecticut* and the authority of which was acknowledged in *Planned Parenthood of Southeastern Pa. v. Casey*. 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*, *Roe v. Wade*, personal control of medical treatment, *Cruzan v. Director, Mo. Dept. of Health*, 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. 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*. 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. That understanding begins with a concept of "ordered liberty," comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints."

"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.”

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. 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.” 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.

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.” See also *Palko v. Connecticut* (looking to “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

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. 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* (“[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”).

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 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), 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 (“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.

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.” 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. 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. 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. 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. See also Casey (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 counter-claims, 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. 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. They accordingly claim that a physician must have the corresponding right to provide such aid, contrary to the provisions of Wash. Rev.Code §9A. 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.

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. 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, 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. 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 eliminating 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. 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. 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* (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*. 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*. 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*, (“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.

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.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, 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 also *Griswold v. Connecticut* (“This law operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation”). 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 (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 with-

drawing 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, 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, discouraging suicide even if knowing and voluntary, and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary.

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. 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. 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.

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. There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. 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.

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. Now, 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.

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.

## Fundamental Rights

We have now left the core idea of equal protection and our structure of classifications. It's time to introduce a new idea, that of "fundamental rights."

Like so much of constitutional law, fundamental rights is a muddle. I'm going to give you the blackletter Gilberts-style version first, and then I'll talk for a minute about how that melts down the moment you look at it funny.

Nonsense textbook version: fundamental rights is an alternate route to get into strict scrutiny. Equal protection is just path #1: you get into strict scrutiny when there's a suspect classification in play. "Fundamental rights" is the second route: you also get into strict scrutiny when the government infringes a fundamental right.

### What's a fundamental right?

Usually we say the fundamental rights are the enumerated rights, all that stuff in the bill of rights about speech and religion and all that good stuff, plus a collection of unenumerated rights that the Court has, over time, found to be particularly important.

We usually say the big five unenumerated fundamental rights are "[intimate] **privacy**" (Griswold), **marriage** (which is closely connected to privacy, and the two together to sexual liberty, etc.), **access to judicial process**/the courts, **interstate travel**, and **voting**.<sup>62</sup> You could probably talk some parental stuff in there too if you really wanted, see discussion and citation of leading cases in the main opinion in *Troxel v. Granville*, 530 U.S. 57 (2000).<sup>63</sup>

A helpful way to think about this is as two separate clusters of rights, the "democratic citizen of the union" sorts of rights (voting, suing, moving from state to state) and the "personal and family" sorts of rights (marrying, intimate privacy, childrearing).

So say the government infringes the right to vote. LAW: "In order to register to vote, everyone has to first stand on one leg and sing the battle hymn of the republic to prove their patriotism."<sup>64</sup> In view of its infringement of the right to vote, the law gets strict scrutiny, and, in this case, obviously gets struck down if not actually laughed out of court.

<sup>62</sup>Although, really, in light of the 15, 19, and 26th amendments, it's a little weird to call voting unenumerated; in light of the actual due process clause it's a little weird to call access to the courts unenumerated too, but there we go.

<sup>63</sup>and see the first paragraph of Justice Scalia's dissent there for an important and very brief criticism of the whole business of enforcing unenumerated rights

<sup>64</sup>and, if you actually read the lyrics, it also raises, to say the least, really serious Establishment Clause issues, since the song is all "we're fighting for Jesus here folks, JESUS," oh, yeah, and the compelled speech doctrine of the other bit of the First Amendment too, but anyway...

### Discovering new fundamental rights

How does the court decide what's a fundamental right? Suppose you want to convince it to declare a new one? Well, there isn't a formula, but the key ideas we typically see floating around are **tradition** and **importance**.

First, tradition. If something has long been understood as a fundamental right associated with our constitutional tradition, then the Court might understand it as, in essence, a pre-constitutional right, as something that was presupposed by the constitution—in a bit, I'll talk about the 9th amendment, which is important in this vein.

Second, importance. If it looks like the right is sort of basic to living as a person in our society, to functioning as a social (and potentially also economic, but hold on for a bit and we'll talk about that too) actor, to enjoy the other rights, to participate as a democratic citizen, then the Court might understand it as a fundamental right too.

Sometimes the **existing consensus of the states** or more-or-less-relative consensus of the states is taken into account too, particularly in conjunction with development of the law over time: if 49 of 50 states have moved to protect some right, there's some chance that a lawyer will be able to convince the Court to impose it on the 50th as a fundamental right.

Unsurprisingly, however, it's very rare that the Court discovers a new fundamental right, and once again those separation of powers concerns and federalism concerns that we've been talking about all semester are paramount: to find a fundamental right is, in essence, to take an area of policy away from the states and Congress and hand it over to judges; the Court is naturally quite suspicious of that move.

The most important and full recent discussion of the method for deciding on fundamental rights is *Washington v. Glucksberg*.

### Warning on some terminological overlap

It's also worth noting that "fundamental rights" is another descriptor for the set of rights that the Court is willing to incorporate against the states via the 14th amendment's due process clause. The relationship between those two invocations of the term has always felt a little surreal to me: effectively, our whole incorporation doctrine is just unenumerated fundamental rights, i.e., the Supreme Court enforces things like the First Amendment against the states even though (by the terms of its text) it only applies to the feds *for the same reason* that it (as of this writing, may change mid semester) enforces the unenumerated right to get an abortion. We'll talk about this more later, I promise, it's ok if it makes no sense to you now.

### Breaking the traditional story down

Ok, there's the story you're going to have to be prepared to recite and apply on the bar exam, and, because we gotta test something, on my exams. Now let's talk about how much of a disaster it is. There are three big problems with this story:

1. What's the doctrinal home?
2. What's the textual home? A.K.A. "Substantive due process": a blatant oxymoron; where'd the 9th amendment go?
3. We hardly ever actually get strict scrutiny on fundamental rights



### Finding a doctrinal home?

We sometimes talk about fundamental rights jurisprudence under the Equal Protection Clause, and sometimes under the Due Process Clause (the latter under the name “substantive due process.”) People tend to talk about them interchangeably, as if it’s one big doctrine.

There’s no good solution to this puzzle. The best that I can really say is that sometimes it really looks like an equal protection case. For example, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court struck down a Tennessee law requiring a year’s residence in the state before being permitted to vote—an infringement of both the right to vote and the right to interstate travel. That has an equal protection smell, because the court is drawing a distinction between those who were resident in the state for a long time and those who were not.

Other cases have a more obvious substantive due process smell. For example, in *Roe v. Wade*, it’s not like the law is best characterized as “here’s a group of people who can have abortions, here’s a group who can’t.” The law was “no abortions.” (Well, sorta, because there was a life endangerment exception to the abortion law.)

So if you want a rule of thumb for very practical purposes (like what you write in the complaint), I’d say, probably plead both, but if you don’t want to plead both, call it “equal protection” if your client or their group was singled out for having the fundamental right infringed, and “due process” if everyone got the fundamental right infringed. But be skeptical of anyone who tells you that this reflects a real doctrinal distinction, and be prepared to apply strict scrutiny in either case, subject to the points noted below.

### Is there a textual justification for this stuff?

We know where we get the enumerated rights from: they’re enumerated. No unreasonable searches, no laws infringing free speech, all that good stuff. But what about the rest, the privacy and the interstate travel and all that stuff?

The conventional claim is that there exists a thing called “substantive due process.” Remember that “procedural due process,” which we started with, is all about figuring out whether the government followed fair procedures, “substantive due process” is about protecting unenumerated fundamental rights. But they both come from the due process clauses.

Here’s a quick capsule summary of some of the history of this stuff. According to conventional wisdom, in the Bad Old Lochner Days (TM), the Supreme Court struck down most of the New Deal on a fundamental rights theory, talking about stuff like liberty of contract. So *Lochner*, which every constitutional law class in the world *except this one* reads, as the quintessential example, says that New York violates due process when it paternalistically sets maximum hours for bakers. On the conventional story, this was a mess because, you know, it turns out that weird old ideologue judges don’t know how to run an economy or particularly care. Fortunately, FDR managed to bully them into submission. Now “substantive due process” is a dirty word, and the court recognizes that it can’t just make up rights to keep the legislature from doing public policy, except when it does. So basically, no economic fundamental rights, and now we’re really skeptical of making up rights in general, but there are still these two big groups of fundamental unenumerated rights, the privacy cluster and the democratic citizenship cluster that I wrote about above.

Ok, fine, whatever. But the court’s still making them up, you might think. Is there any textual basis for this? Well, those of you who have actually read the constitution (Go do it now, if you haven’t already. It will only take a few minutes. Seriously, I mean it. You need to have a command over the text.) will probably think of that 9th amendment. After all, the 9th amendment is all over the unenumerated rights thing. *The enumeration in the Constitution, of certain rights, shall not be construed to deny or*

*disparage others retained by the people.* It's the actual bit of the constitution where the framers were, like, "dudes, these ain't the only rights."

But nope, we don't get that. We get "substantive due process." The Court keeps insisting that unenumerated rights come from the due process clause rather than the 9th Amendment.<sup>65</sup>

Now, here's what you might think about those three words, "substantive due process": they're blatantly stupid. One of the key binary oppositions through which we understand the law is "substance" vs. "process." The rules of civil procedure are process. The rules of tort are substance. The Erie doctrine (remember that?) says that in federal court you do federal procedure and state substance. "Substantive due process" is a blatant use of words for precisely the opposite of what they mean. In fact, the real due process doctrine is "procedural due process," which most constitutional law classes—including, alas, ours—don't even talk about.<sup>66</sup>

There are people who defend this stuff. But it's a hard fight. And the general consensus still is, I think, that "substantive due process" is a made-up idea.

Nonetheless, "substantive due process" is what the Court has given us. And typically, fundamental rights cases revolving around the unenumerated rights unhelpfully elaborate to say that the right in question is part of the "liberty" protected by the 5th and 14th amendments—which, you'll note, is totally meaningless, since the part anyone who can read objects to is the "due process" part, not the "liberty" part, i.e., to the proposition that, granting the fundamental right in question belongs in the liberty bucket, the due process clause means anything other than *process*.

So we all have to pretend like we're talking about due process when we do fundamental rights jurisprudence, because those are the words the Supreme Court has told us we have to say, even if they don't make any sense. Just suspend your disbelief.

Strict Scrutiny, wouldn't it be nice

Remember how I said that you get strict scrutiny when the government infringes a fundamental right? Well, that's not true. Actually, strict scrutiny is kind of the default invocation, but lots of the time the Court applies lots of different tests. An easy example is in the First Amendment—as it turns out, depending on the kind of speech and the kind of restriction, you might get intermediate scrutiny, or strict scrutiny, or all kinds of other weird stuff. And that's so even though we say that the speech rights enumerated in the First Amendment are fundamental rights within the meaning of this area of jurisprudence. Same goes for abortion: *Roe v. Wade* articulated a complex test that was kind of derived from strict scrutiny (sorta), but then that got changed in *Planned Parenthood v. Casey* to an "undue burden" test that has nothing visible to do with strict scrutiny.

So, again, we recite this formulation, and we test it (and I reserve the right to test it in this course), "fundamental rights get strict scrutiny," but you really should only understand it as a rough rule of thumb, and be aware that within fundamental rights jurisprudence is a lot more complicated, and there are lots of little sub-doctrines. The unenumerated fundamental rights are more consistently strict scrutiny than the enumerated fundamental rights, but even there, there's a lot of wiggle. I want to recommend a very good article on this subject (and it's only a dozen pages long): Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 *Constitutional Commentary* 277 (2006) describes lots of places where we don't actually do strict scrutiny with fundamental rights. If this sort

<sup>65</sup>There's also a whole thing about the privileges and immunities clause of the 14th Amendment, which arguably at least provides a textual basis for incorporation—rather than more judicial nonsense about due process. But let that one go for now.

<sup>66</sup>There's a brief mention of procedural due process later in this reader, but most of the time you learn it in administrative law. The nutshell version, however, is that it means... well pretty much exactly what the text says. Before the government gets to lock you up or take your stuff, i.e., to coercively enforce the law against you, it has to give you legal process, i.e., notice, an opportunity to be heard before a neutral decisionmaker, all that good stuff. No kangaroo courts.

of mess interests you, it's worth a read.<sup>67</sup>

Thinking about the First Amendment helps us see the absurdity of the notion of fundamental rights equals strict scrutiny. Let Justice Black be our guide: possibly his most famous quote comes from his concurrence in *Smith v. California*, 361 U.S. 147 (1959):

Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean no law abridging. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach" of federal power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are "more important interests." The contrary notion is, in my judgment, court-made not Constitution-made.

Here's the thing. From a pure textual standpoint, isn't Justice Black actually exactly right? "No law" isn't exactly ambiguous! Even strict scrutiny seems like a weird idea in the context of things like the enumerated rights: the Constitution doesn't say "Congress shall make no law ... abridging the freedom of speech unless it's narrowly tailored to a compelling government interest." Nor, for that matter, does it say "Nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws unless it's narrowly tailored to a compelling government interest."<sup>68</sup>

When we think of that logic, which clearly poses serious problems for the application of any level of scrutiny to the enumerated rights (except for stuff like the 4th and 8th amendments which actually write ideas like "unreasonable" and "cruel and unusual" into the text), we might also want to worry that the same problem shows up for the unenumerated rights. If there really is a pre-constitutional right to something, then on what basis does Congress or a state legislature deprive an individual of it? What kind of right is it, ultimately, that can be infringed if the government has a really good reason, and why should the standard for really good reason even formally be the same in all these cases (albeit not actually)? Certainly the idea of due process, even if it includes enforcing unenumerated rights, doesn't also include some kind of strict scrutiny test. So there's a deeply unprincipled analytic strategy at the heart of this whole body of law. But it's what we got.

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<sup>67</sup>And by the way, about things you'll be tested on: you'll be expected to both know the "fundamental rights get strict scrutiny" formulation, and to know the numerous exceptions which we'll cover in class.

<sup>68</sup>Although you might be able to make an argument for equal protection, if equal protection means "treat people as equals" not "treat them the same," then maybe treating people as equals sometimes means treating them differently if there's a really good reason. See Gowder, *Equal Law in an Unequal World*...

### A little more obligatory material on *Lochner*

As I said above, there was a period of jurisprudence known as the “*Lochner* era.” The *Lochner* era did for economic rights kind of what the *Griswold-Roe* era did for personal and family rights, that is, it kind of took a variety of ideas, primarily the contracts clause and the various property rights protections, and generalized out from them to a general idea of economic liberty.<sup>69</sup>

This era was brought to an end by the New Deal. Basically, what happened is that the Court struck down all kinds of economic regulation, but political opposition was too strong. So Roosevelt started trying really harsh exercises of the political branches’ power to keep the Court in line, primarily “court-packing,” altering the number of justices on the court basically to ensure that he could win cases by appointing a bunch of allies, but he was also at various points considering “jurisdiction stripping,” depriving the Court of jurisdiction over cases that could undermine the New Deal. Note that Article III section 2 permits jurisdiction-stripping in cases that don’t arise within the Court’s original jurisdiction (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”). As for court-packing, the constitution doesn’t specify the number of justices, and Congress had made that decision by statute from the start.

So then the court backed down. The standard story is that around the time the court-packing bill was introduced, Justice Owen Roberts thought to him self “oh dear, now we’re really in trouble,” and changed his vote, making it 5-4 against overturning a salient economic regulation, and from there, case after case start coming down upholding the New Deal. And that story, obviously, is a gross oversimplification, but it probably still captures the heart of the political environment. This is really a case study in what we’ve talked about periodically in this class, about how the Court doesn’t really have ultimate power to undermine the democratic will, because its power over the political branches is only backed up by political support for it. If the political branches want, they can just ignore its rulings, or, as the New Dealers considered, gut it by statute, and they can get away with it as long as the people don’t punish them at the polls for it. The rule now is “rational basis for economic regulation.” Or, an alternative statement of the same point, “there are no unenumerated economic fundamental rights.”

The tipping point is often assigned to the actual case in which Roberts switched, a case called *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which stated a rational basis standard for economic regulation in the course of upholding a minimum wage law for women. (Unsurprisingly given the time, women were seen as in need of extra protection. Thanks to the patriarchy for getting rid of *Lochner*!).

Today *Lochner* is considered up there with *Dred Scott* and *Plessey* in the “anticanon”—although obviously not nearly as evil as those two—among those cases that we use as judicial swear words—tell a judge she or he is doing a *Lochner* thing, and those are fighting words.

#### Should there be economic fundamental rights?

Despite the fact that we’re not reading *Lochner*, I want us to take seriously the proposition that there should be economic fundamental rights, just as a thought experiment. Let’s consider two major arguments.

The first is that the method for finding fundamental rights that we’ve examined can seem a lot like something that could be used to justify economic fundamental rights. Remember that *Lochner* itself was about the regulation of the employment relationship—maximum hours for bakers. But go back

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<sup>69</sup>Footnote: the Contracts Clause? What’s that? Article 1, section 10: forbids states from “impairing the obligation of contracts.” There’s lots of debate about what it means; many have argued it just means prohibiting the states from passing bankruptcy laws on their own, leaving that power to Congress, others have argued that it prohibits the states repudiating their public contracts, particularly their public debts—that’s closest to what the Court does with it today in those rare cases it comes up. Some libertarian legal scholars still read it as a general liberty of contract provision. We’re not covering it in this class.

to the Glucksberg-esque formulation about tradition and importance and ask whether things like the freedom to work under terms that you and your employer negotiate isn't more "fundamental" in those senses in a capitalist country than something like buying a condom. This might be particularly compelling when we reflect on the fact that one of the ideological pillars of abolition and Reconstruction was an idea known as "free labor," which captured in part the idea that voluntary work relationships were particularly important.<sup>70</sup>

The second is the issue of corruption, or what economists call "rent-seeking." The case that most constitutional law professors point to in order to really highlight this worry is *Williamson v. Lee Optical*, 348 U.S. 483 (1955). This was another leading post-*Lochner* case restating and making absolutely clear that economic regulations now get rational basis review.

But the thing about the law that the Court upheld in this case is that it was blatantly corrupt. It prevented an optician from replacing the lenses in glasses without a new prescription from an optometrist. And we know why the law was enacted, or at least many people think we do: because some optometrists had cronies in the legislature, and they wanted to make a law to get more business. The district court tried to strike the law down under a rational basis standard; the court reversed. But should it have? Is it part of the proper role of the judiciary to guard against this kind of corrupt regulation?

Here's the major counterargument: as I suggested somewhat flippantly above, judges have no business making decisions about economic regulation. We have, it turns out, an incredibly complex economy and vast resources of expertise to try to keep it from going off the rails; this is why we put up with the administrative state (despite it handing far more power over to the executive than the framers would have ever imagined), and also why we defer to Congress. So in a really important way, the extent to which we're willing to let judges mess up economic regulation unifies the major debates in constitutional law—it drives the expansion of executive power relative to the other branches, the expansion of congressional power via the commerce and necessary & proper clauses (cf. the NFIB debate), and the abandonment of a kind of libertarian economic individual rights ideology. And it all comes from the fact that a technologically advanced and global economy is very different from Thomas Jefferson's imagined yeoman farmers.

### One enumerated economic right (PROPERTY)

Of course, there's one place where the bill of rights does quite clearly establish an enumerated fundamental right, and that's to property. In addition to the fact that it shows up in the due process clause, it also shows up in the takings clause of the 5th amendment, which says that the government can't just grab private property for public use without paying compensation. We don't have time to cover it in this course. Hopefully your property course covered it, but, just in case it didn't, here's a quick summary of some of the major ideas.

There are two big questions about the takings clause.

What's a public use?

The language in the Fifth Amendment about a "public use" is usually read as a limitation on the takings power: by saying "for public use," it seems to imply that the government can't just turn around and take property for private use, to rob Peter to pay Paul.

The question came to a head a few years ago in *Kelo v. New London*, 545 U.S. 469 (2005), which considered a challenge to an "economic development taking," where the city condemned a bunch of

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<sup>70</sup>But don't take this argument all that seriously, the ideology of "free labor" was much more complicated than that, and could also be read to support a government role in protecting workers. Historians have written a *lot* of deeply involved stuff about what free labor meant.

land to devote to more economically productive private uses, essentially taking some people's houses to turn over to a private developer for things like hotels and restaurants and such. And the court held that this was perfectly ok: "public use" just means "public purpose," and that includes things like economic development.

There's a lot of similarity between this debate and the *Williamson v. Lee Optical* debate, when you think about it: the question becomes, in both cases, will the Court intervene to protect the government from plundering or regulating one private party for the benefit of another? And the answer in both cases is "no," and with a broadly rational basis tint to it: as long as there's some colorable legitimate reason that could justify the law, like making sure experts approve all glasses, or increasing the local tax base of a town, the mere fact that these kinds of government acts are rife for the corrupt disregarding of private interests that don't happen to have a buddy in the legislature will not yield constitutional scrutiny. Both lines of cases, quite naturally, infuriate libertarians.

The court in *Kelo*, however, did leave some door open for future challenges: it emphasized that what was at issue was a "comprehensive redevelopment plan," not a simple one-to-one transfer, and this might be constitutionally significant—it looks much more suspicious when instead of condemning a bunch of property for a big program, the city just says "the Ritz Carlton would really like to build a hotel on your land, so we're taking it."

What's a taking?

We know that actually seizing property, like "you don't own this anymore," is a taking. But what about when the government just intrudes, or allows the public to intrude, on your property? What about when it starts demanding that you make all kinds of concessions or actual contributions to the public, like parks and parking lots, in order to get a building permit? What about when it regulates away all kinds of uses you'd like to make of your property?

There's a pretty good consensus that mandatory physical invasions are a taking, when, for example, the government insists on running power or water lines through your land or something, particularly when the invasion is permanent. (Which makes sense in property law terms, of course: that's just taking an easement; it's still an ordinary interest in land that the government seizes.) For example, *Loretto v. Teleprompter Manhattan*, 458 U.S. 419 (1982) (taking found when city authorized cable company to install wiring on plaintiff's property)

*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) are leading cases in the unconstitutional conditions area, and the short version is that the permit conditions have to be related and roughly proportional to the impact of the development: if your shopping mall will cause huge traffic and parking problems, the city can require you to provide a parking lot to mitigate the problem you're going to cause, without it being a taking, but it can't require you to provide a park across town, and it can't require you to provide the parking for every other building in the entire city.

There are two leading cases in the "regulatory takings" area, which together consider the question of whether government land use regulation can be sufficiently intrusive to be a taking.

One of the two big ones, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) was a really crazy case. The short version is that the owners of Grand Central Station in New York city proposed to put an incredibly ugly skyscraper on top of the station. Like, horrible, one of the worst examples of mid-20th century architecture. And the city, quite understandably, said, in effect, "miss me with your brutalist eyesore." So the claim was that this was a taking, essentially because by prohibiting the development, the city was causing massive economic loss (or at least a loss of a really lucrative opportunity) for the property owner, for the aesthetic benefit of the city.

The Court, in holding that there was no taking, announced something that people since have tended

to characterize as a “test.” But it’s a bit of a muddle, one of those loopy-goopy balancing tests, where we weigh (somehow):

- The economic losses inflicted on the owner
- The interference in the owner’s investment-backed expectations for use of the land
- The “character of the government action”

The first two are relatively self-explanatory: if the government costs the private party a lot of money, that’s more likely to be a taking; if the owner has sunk a lot of money into, for example, acquiring a bunch of land for development purposes which the government suddenly says “hey, no, you can’t develop it,” then it’s more likely to be a taking. It’s basically a reasonable reliance standard, if people sunk a bunch of money into land in reliance on one regulatory framework, it looks more like a taking if the rug is suddenly pulled out from under them. The character prong is sort of meaningless; the idea in Penn Central was that an actual “physical invasion” was more likely to be a character than just a mere regulation, but in later cases it became more broadly accepted that a physical invasion is pretty much always a taking, at least if it’s a permanent invasion (like an easement) so there’s not a lot left of this prong. (There are other views of the character prong, but they’re all pretty messy, and there’s little point in diving into this swamp.)

Actually, in Penn Central, Rehnquist’s dissent probably gives a more coherent theory of takings than the majority: for him, the key idea of a taking is that it imposes a unique burden on an individual landholder, essentially makes the landholder pay for a general benefit, rather than imposing the costs of the benefit on the whole community through taxation. This view of takings naturally tracks some of the ideas we talked about in the early part of the course, the procedural due process concern with protecting against individualized action, the ideal of general law underlying the equal protection clause, etc.

The other big leading case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In a lot of ways a less melodramatic case (since nobody proposed to destroy an architectural landmark), it concerned environmental regulation to prevent coastal erosion—and which more or less made Lucas’s land unusable by prohibiting essentially any development on it. A couple key ideas that are particularly interesting from Lucas are (a) that prohibiting any economically viable use is going to be a taking, and (b) that the capacity of the state to regulate existing property interests depends, at least to some degree, on preexisting common law principles. On the latter, the most interesting part of the case is probably the weight the Court gives to the claim that the regulation South Carolina imposed wouldn’t fall within traditional nuisance doctrine.

## Exercise: Career Counseling

The state of Illinois enacts the following law:

- (a) It is the conclusion of the Illinois Legislature that young Illinoisans are choosing, because of ignorance and economic over-optimism, to start their careers in low-paying rather than high-paying employment. Research suggests that a citizen's lifetime earning potential is strongly linked to his or her first full-time job after concluding his or her formal education. Illinoisans who choose to begin their careers in low-paying employment ultimately contribute less to the state's economy and are at greater risk of receiving public benefits later in their careers.
  - (b) Accordingly, no resident of Illinois under the age of thirty (covered resident) may, after completing his or her formal education, take employment at a salary at or below the 25th percentile of the salaries for that resident's age, educational background, and locality (sub-25 position), unless she or he can demonstrate, to the satisfaction of a licensed career counselor (LCC), that she or he cannot obtain a higher-paying position. If a LCC denies any such covered resident permission to take a sub-25 position, the covered resident may appeal the LCC's decision to an ordinary trial court, which may review the LCC's factual determinations with respect to the covered resident's inability to find higher-paying work. In the event of such an appeal, the covered resident may nonetheless take such a position until such time as the judicial process is fully completed.
  - (c) The Illinois State Board of Career Counselor Licensing is hereby created in order to examine and certify the LCCs required to provide the services specified in section (b) of this statute. The Board shall establish, by regulation, licensure standards for LCCs as well as rules regarding the rates they may charge, continuing education requirements, and other suitable regulations. In no event shall the board permit a LCC to offer his or services at a rate less than \$100 per hour. The board shall issue an initial license to all current members of the Illinois Association of Career Counselors, Inc.
- Given current doctrine, under what standard will this law be evaluated?
  - What result on that standard?

Your group should write down an answer to each of those questions, as well as a brief explanation of your position.

(Yes, I know this would be an incredibly, incredibly stupid law. Suspend disbelief with me for a minute.)



## Exercise: Flipping Houses

The city of Chicago concludes that property speculators are unreasonably driving up the cost of residential property due to debt-financed house-flipping strategies. As a consequence, a local bubble is being formed and the cost of living is going through the roof. In addition, properties are becoming concentrated in the hands of exploitative landlords.

Accordingly, the city passes an ordinance: no person may sell residentially zoned real estate within three years of acquiring it, nor may any person convert an owner-occupied residence to a renter-occupied residence within that period, unless she or he establishes a personal residence more than 100 miles away. (We'll assume the city also finds a non-stupid way to apply this to corporate owners.)

A real estate developer who has purchased a number of residential properties, with the intention of flipping some of them and converting some of the others to rentals, sues, alleging a taking. What result?

## Romer v. Evans

517 U.S. 620 (1996)

**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. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”

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. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant.

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. To reach this conclusion, the state court relied on our voting rights cases, and on our precedents involving discriminatory restructuring of governmental decisionmaking. 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. 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.

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." 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.

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." 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."

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. 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.

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.

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.” Also repealed, and now forbidden, are “various provisions prohibiting discrimination based on sexual orientation at state colleges.” 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) (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 non-merit 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. 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. 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.

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*. 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.

*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. 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. 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.

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, 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.

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**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, *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,

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.") 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*

nati (6th Cir. 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”). The Supreme Court of Colorado itself appears to be of this view. (“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.”)

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. 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* (antisodomy statutes are “unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources”); Kadish, *The Crisis of Overcriminalization* (“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. 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.” 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” 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.)

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. 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, and which took the pains to exclude them specifically from the Americans with Disabilities Act.

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*Excerpts of precedents involving discriminatory restructuring of governmental decisionmaking (cited by the Court in Romer)*

*From Reitman v. Mulkey, 387 U.S. 369 (1967):*

The question here is whether Art. I, s. 26, of the California Constitution denies 'to any person the equal protection of the laws' within the meaning of the Fourteenth Amendment of the Constitution of the United States. Section 26 of Art. I, an initiated measure submitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.'

The real property covered by s 26 is limited to residential property and contains an exception for state-owned real estate.

The issue arose in two separate actions in the California courts, *Mulkey v. Reitman* and *Prendergast v. Snyder*. In *Reitman*, the Mulkeys who are husband and wife and respondents here, sued under §§ 51 and 52 of the California Civil Code alleging that petitioners had refused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that §§ 51 and 52, insofar as they were the basis for the Mulkeys' action, had been rendered null and void by the adoption of Proposition 14 after the filing of the complaint. The trial court granted the motion and respondents took the case to the California Supreme Court [which reversed].

Petitioners contend that the California court has misconstrued the Fourteenth Amendment since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to 'authorize' and 'encourage' discrimination because it makes legally permissible that which was formerly proscribed. But, as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford [antidiscrimination] Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the intent of s 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with s. 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of s. 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that s. 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 mentioned neither the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby pro tanto repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property, which is defined as any inter-

est in real property of any kind or quality, 'irrespective of how obtained or financed,' and seemingly irrespective of the relationship of the State to such interests in real property.

Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.

Affirmed.

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*From Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)*

In late 1977, shortly before the Seattle [school desegregation] Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," attempted to enjoin implementation of the Board's mandatory desegregation program through litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration. This proposal, known as Initiative 350, provided that "no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence ... and which offers the course of study pursued by such student."

The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles ... between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of "feeder" schools—that are a part of the Seattle Plan. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration.

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given

racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. But the Fourteenth Amendment also reaches “a political structure that treats all individuals as equals,” yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in *Hunter v. Erickson* (1969) [also cited in *Romer*], a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, amended the city charter to provide that ordinances regulating real estate transactions “on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.” This action “not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect.” In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council and of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

In striking down the charter amendment, the Hunter Court recognized that, on its face, the provision “draws no distinctions among racial and religious groups.” But it did differentiate “between those groups who sought the law’s protection against racial discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends,” thus “disadvantaging those who would benefit from laws barring racial discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.” In “reality,” the burden imposed by such an arrangement necessarily “falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.” In effect, then, the charter amendment served as an “explicitly racial classification treating racial housing matters differently from other racial and housing matters.” This made the amendment constitutionally suspect: “the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”

*Lee v. Nyquist* offers an application of the Hunter doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate de facto segregation in New York’s schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from “assign[ing] or compell[ing] [students] to attend any school on account of race or for the purpose of achieving [racial] equality in attendance at any school.”

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision “[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved.” In the court’s view, the statute therefore “placed burdens on the implementation of educational policies designed to deal with race on the local level” by “treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools.” This drew an impermissible distinction “between the treatment of problems involving racial matters and that afforded other problems in the same area.” This Court affirmed the District Court’s judgment without opinion.

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." Because such laws make it more difficult for every group in the community to enact comparable laws, they "provide a just framework within which the diverse political groups in our society may fairly compete." Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places special burdens on racial minorities within the governmental process," thereby "making it more difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others."

## Lawrence v. Texas

539 U.S. 558 (2003)

**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).” The applicable state law is Tex. Penal Code Ann. §21(a). It provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “deviate 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.

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.” 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. In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed.

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. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. (“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. Parliament enacted the substance of those recommendations 10 years later.

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. 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.

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," 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.

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**Justice O'Connor, concurring in the judgment.**

The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." We have consistently held, however, that some objectives, such as "a bare desire to harm a politically unpopular group," are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno*, for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to "discriminate against hippies." In *Eisenstadt v. Baird*, we refused to sanction a law that discriminated between married and unmarried



persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center*, we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans*, we disallowed a state statute that “impos[ed] a broad and undifferentiated disability on a single named group”—specifically, homosexuals.

The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas’ sodomy law are rare. This case shows, however, that prosecutions under §21.06 do occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. As the Court notes, petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement.

And the effect of Texas’ sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law “legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,” including in the areas of “employment, family issues, and housing.”

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers*, we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government’s interest in promoting morality. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating “a classification of persons undertaken for its own sake.” And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The

Texas sodomy law “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. “After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” *Romer* (Scalia, J., dissenting). When a State makes homosexual conduct criminal, and not “deviate sexual intercourse” committed by persons of different sexes, “that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander per se because the word “homosexual” “impute[s] the commission of a crime.” The State has admitted that because of the sodomy law, being homosexual carries the presumption of being a criminal. Texas’ sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals “for disfavored legal status.”

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to “a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with” the Equal Protection Clause.

Whether a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins*, would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal solely based on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court’s judgment that Texas’ sodomy law banning “deviate sexual intercourse” between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

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**Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting**

[T]he Court makes the claim, again unsupported by any citations, that “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.” The key qualifier here is “acting in private” — since the Court admits that sodomy laws were enforced against consenting adults (although the Court contends that prosecutions were “infrequen[t]”). I do not know what “acting in private” means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by “acting in private” is “on private premises, with the doors closed and windows covered,” it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a “fundamental right,” even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880-1995. There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. Bowers’ conclusion that homosexual sodomy is not a fundamental right “deeply rooted in this Nation’s history and tradition” is utterly unassailable.

Realizing that fact, the Court instead says: “[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Apart from the fact that such an “emerging awareness” does not establish a “fundamental right,” the statement is factually false. States continue to prosecute all sorts of crimes by adults “in matters pertaining to sex”: prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced “in the past half century,” in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. In relying, for evidence of an “emerging recognition,” upon the American Law Institute’s 1955 recommendation not to criminalize “consensual sexual relations conducted in private,” ante, at 11, the Court ignores the fact that this recommendation was “a point of resistance in most of the states that considered adopting the Model Penal Code.”

In any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The Bowers majority opinion never relied on “values we share with a wider civilization,” but rather rejected the claimed right to sodomy on the ground that such a right was not “deeply rooted in this Nation’s history and tradition.” Bowers’ rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization.” The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court should not impose foreign moods, fads, or fashions on Americans.”

## 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. 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. 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. 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. 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. 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.” 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." 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. 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. 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. 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.

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.

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.

In the late 20th century, following substantial cultural and political developments, 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. 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), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife."

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. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor*, 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.”

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, 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.

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.

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. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

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.” Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. 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. 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.

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. 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. 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. 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."

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."

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. 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. 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. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." 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." 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. 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.” 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.” Marriage also affords the permanency and stability important to children’s best interests.

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. 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. 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.

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.

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 *Maynard* Court 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. 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. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. 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." *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.

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*, *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. 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 *Loving*, the Court invali-

dated 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." 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." It was the essential nature of the marriage right, discussed at length in *Zablocki*, 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, invidious sex-based classifications in marriage remained common through the mid-20th century. 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." Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. 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. 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. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. 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. *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.

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.

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. 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*, 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.” 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.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. 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*. 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. 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* (10th Cir., 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*. 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. 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.

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**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.

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.* (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.

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. (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."

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. Cf. M. Cicero, *De Officiis* ("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."

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. 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."

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." 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. Even when state laws did not specify this definition expressly, no one doubted what they meant. 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." 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." 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." 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* (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. More recent cases have directly connected the right to marry with the "right to procreate."

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.

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. 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. 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.” 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.

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.”

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*. 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.” In *Lochner* itself, 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.” The majority’s contrary conclusion required adopting as constitutional law “an economic theory which a large part of the country does not entertain.” 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.”

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.” 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.”

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.” 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.”

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”).

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 uncharted area,” “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula.” 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.” 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.”

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. 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.” 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, (“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. 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.” In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. 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*.

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 *Lochner* (“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* (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.” 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. 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.”

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." 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* (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.

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* (1985). 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. 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. These apparent assaults on the character of fairminded people will have an effect, in society and in court. 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.

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**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, prohibiting the free exercise of religion, abridging the freedom of speech, infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, 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 People 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.” 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.” 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.” 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 lawyers 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 Americans), 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 com-

pose 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, cannot 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." (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." (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." 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.

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**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 cohabit 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 antisegregation 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.” For instance, Maryland’s 1664 law prohibiting marriages between “freeborne English women” and “Negro Slaves” was passed as part of the very act that authorized lifelong slavery in the colony. Virginia’s antisegregation laws likewise were passed in a 1691 resolution entitled “An act for suppressing outlying Slaves.” “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.”

## 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 secondary 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 defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint 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. For the reasons stated in this opinion, we reverse the decision of the District Court.

The first Texas State Constitution, promulgated upon Texas's entry into the Union in 1845, provided for the establishment of a system of free schools. 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, 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, 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, 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's 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 Program. 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 children, 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 billion and these increases have been reflected in consistently rising per-pupil 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 area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is 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 \$1.05 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-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In

1967-1968 the local tax rate of \$0.85 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, 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 State 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. 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. 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 rights 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, 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.' Apart from its concession that educational financing in Texas has 'defects' and 'imperfections,' 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, 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, 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 nor the fundamental-interest analysis persuasive.

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, is quite unlike any of the forms of wealth discrimination 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,' or (2) against those who are relatively poorer than others, 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 impecuniness 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* (1956), and its progeny, the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some "adequate substitute" for a full stenographic transcript.

Likewise, in *Douglas v. California*, a decision establishing an indigent defendant'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. Illinois* and *Tate v. Short* struck down criminal penalties that subjected indigents to incarceration simply because 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,' 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.' Defining 'poor' families as those below the Bureau of the Census 'poverty level,' 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 impecuniosity—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, 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." 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.' 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 Joel 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.

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 correlation 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 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 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, 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 disadvantage 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. It 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 Education* a 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.

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.

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.

The right to interstate travel had long been recognized as a right of constitutional significance, 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. Normet*, decided 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.

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,' 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.

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 information 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. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation 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 intrusion 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 expenditures 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. Williams* and *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. 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. Morgan*, expresses 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.'

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 less 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 policies. 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.' 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. 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 education—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,' 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, nevertheless 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 state-supported 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, 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 accreditation 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, the State's financial contribution to education is steadily increasing. None of Texas' school districts, however, 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. 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. 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 Emporia*. Mr. 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.'



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, 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. It may not be condemned simply because it imperfectly effectuates the State's goals. 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. 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 children 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, 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. 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. 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, 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—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, 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 democratic pressures of those who elect them.

Reversed.

*From the footnotes to majority opinion:*

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.

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**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 uncharted 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. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland* 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.

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. But 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, such 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. Maryland*, that the judgment of the District Court must be reversed.

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**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.

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**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. Much 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 \$1.20 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 \$1.05 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 \$5.76 per \$100. But state law places a \$1.50 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 Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. As the Court stated just last 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.

Neither Texas 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 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.’ 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*.

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. And in *Bullock v. Carter*, where 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.

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**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*. I must therefore respectfully dissent.

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. 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 districts 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. Without more, this state-imposed 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 significantly 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 basis to the local school districts. Obviously, such a flat grant could not alone eradicate the funding differentials attributable 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, 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. 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 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, 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, which raised only \$26 per pupil with an equalized tax rate of \$1.05 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." 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 scheme, 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. Indeed, who can ever measure for such a child the opportunities 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* 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.

Likewise, 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 1968-1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees. By contrast, during the same school year only 80.02% 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.

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. 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.' 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 interdistrict 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. 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.' 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.

But this Court has never suggested that because some 'adequate' level of benefits 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.'

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. 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 much touted ‘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 between 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. 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. Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas’s 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 evidently perceives 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. Carter*, where 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 districts. Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below, 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.' 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 property 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 con-

stitutional 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 we 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,' or is based on a distinction of a suspect character, must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. The 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. 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 emasculating of the Equal Protection Clause in the context of this case.

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories 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 Protection 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.'

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. Further, 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.' Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be 'shown to be necessary to promote a compelling governmental interest.' 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, or the right to vote in state elections, or the right to an appeal from a criminal conviction. These 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 full-blown constitutional protection.

Thus, in *Buck v. Bell*, the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma ex rel. Williamson*, the 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*.

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.' 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.' 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 stature of an independent constitutional guarantee.

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 rights 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. Baird*. In *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. 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.' 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.' But 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. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. 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.

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 be 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. Moreover, race, nationality, or alienage is "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. 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. Strange* the 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 protection 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 specter 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.*; *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?' 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. 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*:

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 recognized 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.” 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 and association 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. 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 and governmental policies is at the core of our electoral process and of the First Amendment freedoms.’ 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.’ 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.’ 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 districts—a conclusion 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. 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. Carter*. But they are not in fact consistent with the decisions in *Harper v. Virginia Board of Elections*, or *Griffin v. Illinois*, or *Douglas v. California*.

In *Harper*, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of \$1.50, 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.’ 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 \$1.50 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.’ 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 of 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 poverty.’ 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,’ and that ‘the type of an appeal a person is afforded hinges upon whether or not he can pay for the assistance of counsel.’ 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 found 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, 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. That 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. Personal poverty 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, 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.

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, 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, 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.

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, 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 analysis, 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. 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,’ or a ‘substantial’ or ‘important,’ 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, 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 to act as its action affects more directly interests of constitutional significance. Thus, by now, ‘less restrictive alternatives’ analysis is firmly established in equal protection jurisprudence. 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.’ 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.’ 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, 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.

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).”

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.

Still, we are told that this case requires us ‘to condemn the State’s judgment in conferring on political 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.

## First Amendment: Free Speech

Our class doesn’t read any free speech cases. This is purely a time issue: there just isn’t the room to cover it, and often it’s taught in a separate course altogether. Nonetheless, you ought to have *some* exposure to the doctrine, so I’m just summarizing a few of the major themes here.

Justice Black had the great line about the First Amendment: “Congress shall make no law means Congress shall make no law,” and as you know by now, when Justice Black is obviously right that’s when he loses. So we have a bunch of rules about when Congress can, in fact, make laws limiting speech. Here, I’m going to bang through them, with the idea that most of it, actually, is fairly straightforward.

As you’ll also see, there are a bunch of rules. In fact, I’d go so far as to say there’s a never-ending list of doctrinal distinctions. That’s another reason I’m not even trying to fit it into the main bit of class.

### Content-based regulation

Let’s start with a baseline rule. Most speech regulations that matter will be **content-based**. By “content-based,” we just mean the government’s trying to regulate the substance of what people are saying, as opposed to the way they’re saying it (for example, a noise regulation isn’t content-based, the government isn’t regulating what people say, just how loud they say it).

Content based regulations can generally be divided into two categories, **subject-matter based** (“no talking about abortion”) and **viewpoint based** (“no making pro-life arguments”). Both kinds of regulation are bad, presumptively invalid, and actually get **strict scrutiny**. (We’ve seen this before, right? The First Amendment is a fundamental right! It gets strict scrutiny!) But typically we say viewpoint-based restrictions are worse, somehow. Like, we imagine they get an even stricter kind of strict scrutiny



or something.

One important thing you need to understand with content discrimination is that it even can be used to invalidate regulations that otherwise prohibit conduct that the government can in fact prohibit. For example, the law “no graffiti” is totally constitutional. The law “no graffiti in favor of the democratic party” is totally unconstitutional. See the discussion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1991) (cross-burning conviction under hate speech law invalidated as content-based even though gov’t can obviously prohibit burning things on other people’s lawns).

There’s also one weird glitch in the doctrine according to which facially content-based regulations can be permissible if there’s a content-neutral motivation. The Court will sometimes say those regulations are really content-neutral, even though the content is written right into the law. But this basically only applies to dirty movie theatres. I’m serious. The idea is the state can zone porn theatres out of the neighborhood based on the content of the expression in them (i.e., the porn), in order to prevent the crime that they’re associated with. *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

### Public Forums

We often say those rules apply to the “public forum,” but the “public forum” basically means “only some kinds of government property.” So obviously the full protections of the speech clause applies to speech in one’s own home as well as out on the sidewalk. But in addition, they also apply in areas, like the sidewalk, that are considered part of the “traditional public forum”—the town square, the steps of City Hall, places where people typically showed up to rant about stuff.

This is contrasted with kinds of government space that are not public forums. There are also “limited public forums” where the government has opened up the space for a particular category of speaker or subject (e.g., the inside of a university classroom), and there are totally non-public forums (e.g., the inside of a military base). The rules are more permissive in these categories. The doctrine here is a total mess, though, particularly on limited public forums—partly because it’s hard to tell the difference between government speech (about which more below) and a limited public forum. The short version is that the government is sometimes allowed to discriminate on the basis of speakers or subjects in limited public forums. Before I came to Northwestern, I was at the University of Iowa—a public university—and I felt totally free to silence people who weren’t students, and to tell the people who were students to talk about constitutional law and related subjects rather than the latest episode of the netflix series *du jour* or something, without worrying about violating the First Amendment. And in non-public forums the government can do what it wants, broadly speaking.

### Time, Place, Manner

In public forums the government can also do reasonable time, place, and manner regulation. This basically means stuff like noise ordinances, keeping the protestors from blocking traffic, etc. The key case is *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which held basically that content-neutral time, place and manner regulations get intermediate scrutiny and must leave open alternative channels for communication. The important government interest (for applying intermediate scrutiny) must also be unrelated to the suppression of speech.

N.B. We usually say this is intermediate scrutiny, but the Court actually mixed together intermediate and strict scrutiny talk, saying “narrowly tailored to serve a substantial government interest.” But then the Court (this was a Kennedy opinion, what do you expect) elaborated to say that “narrowly tailored” doesn’t mean “least restrictive means.” (It does mean that in the equal protection/substantive due process context. But not here.) Here’s what Kennedy said:

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s

legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

So, we kinda read that as intermediate scrutiny, because it's the only way to make sense of it. Like I said, public forum doctrine is a mess.

### Organizing free speech law.

But anyway. Let's get back to the baseline rule: content-based regulation gets strict scrutiny. We've already seen our first two exceptions to "no law means no law": "unless it's in a non-public forum" and "unless it's a content-neutral time place manner regulation." To gather together the rest of the million exceptions, there are two relatively sensible dimensions to organize First Amendment free speech doctrine along. The first is the **kind of speech**. The second is the **kind of regulation**. :

#### Kinds of speech

Speech can range from wholly unprotected to more protected, or within the core of protection.

Let's start with unprotected categories of speech.

**Obscenity: unprotected.** We have a test, called the Miller test, but it's notoriously difficult to apply. So I'm just going to give you the standard, and then let you take comfort in the fact that this almost never comes up.

The Miller Test: a work is obscene if all of the following are true:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,
2. the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
3. the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The government has also occasionally tried to regulate several categories of things that seem kind of close to obscenity.

"Indecency," which as far as I can tell means "slightly less dirty speech," is usually perfectly constitutionally protected, but the Court has permitted laws regulating it in very specific circumstances when it basically gets transmitted at people, particularly children, and particularly over broadcast. So regulating dirty broadcast radio, OK; regulating dirty internet, not OK. Totally unprincipled doctrine.

The Court has also rejected attempts to extend the obscenity idea to violent video games, even for children. *Brown v. Entertainment Merchants Association*.

Incitement of Illegal Conduct: unprotected “Hey, guys, let’s go burn down that house! I’ve got a can of gas right here!”

The test here is called the Brandenburg Test. Also three parts, also all must be met:

1. Harm must be imminent. No “let’s burn down that house next month, depending on the price of gasoline!”
2. It must be likely to produce the illegal action. You can’t just be some person randomly yelling nonsense, like you stand up in class and say “ok, everybody riot now!” Nobody’s going to riot just because you say so.
3. Finally, the speaker must intend to cause the illegal action.

Be careful to distinguish incitement from sort of general criminal speech. Some kinds of speech are banned under the notion that they’re not really speech, they’re really conduct, because they’re not really being done for their expressive purposes. For example, extortion happens through talking, but it’s not really about speech. Nobody’s going to raise a First Amendment defense to the blackmail charges.<sup>71</sup>

Fighting words: unprotected “Fighting words” are speech likely to provoke a violent response from the audience. The classic case is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the defendant had called a police officer a “God-damned racketeer” and a “damned fascist.” The Court said that calling someone those things is likely to provoke retaliation, and thus a breach of the peace (note, re: “fascist,” that it was 1942—the country was right in the middle of a war with some big ’ole fascists).

This doctrine is almost never used, it’s basically been dead for decades. Good to know about it though for the bar exam, in case you get a question that involves, I dunno, someone going to the ASPCA and talking about how great kicking puppies is or something. It may also be interesting to think about in the context of the rise of return of highly public and prominent racist movements in the United States and elsewhere: is neo-nazi speech a form of “fighting words?”

Commercial Speech: protected, but more weakly than normal Commercial speech basically means advertising. Regulation of commercial speech, even content-based regulation, gets intermediate scrutiny. Also, the legislature can flat-out prohibit false commercial speech (lying), and can regulate “misleading” ads; obviously, ads for illegal goods and activities are also unprotected.

There’s a hot area of free speech law right now in the extent to which the government can also compel certain kinds of commercial speech, the classic example is warning labels on cigarette packages.

Expressive conduct: protected, but more weakly than normal The classic example and leading on case of expressive conduct is burning a draft card to protest the Vietnam war. *U.S. v. O’Brien*, 391 U.S. 367 (1968). It’s speech, because it was meant to express something, but it’s also conduct, it actually destroyed a government form and (arguably) impeded the draft process.

Regulation of such expressive conduct gets intermediate scrutiny, but the same kind of weird intermediate scrutiny as in *Ward v. Rock*, that is, based on non-speech-suppressive interests and with the confusing language that sounds kind of strict-scrutiny-ish. So in the draft card case, the regulation prohibiting their destruction was constitutional because the government actually used draft cards for, you know, administering the draft. So defendant could be punished for burning it, not in order to punish the protest, but in order to prevent people from screwing up the draft bureaucracy by torching its paperwork.

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<sup>71</sup>Don’t think about this too hard, unless you really want to. I confess that I’m sometimes tempted by the idea that there could be an argument for counting conventional blackmail of the form “I’ll tell your spouse you’re cheating on them unless you give me a pile of money” as First Amendment speech. But probably don’t try that in court.

False speech: still protected, but it's a confusing category. Go back to tort law, and consider defamation and fraud.

Typically, tort laws regulating false speech are ok, however, there are special rules for defamation, privacy torts, etc. on behalf of public figures. Short version is that the public figure plaintiff has to prove "actual malice," which is a really stupidly named doctrine, because it has nothing whatsoever to do with malice. Rather, what it means is that public figure plaintiff has to prove that defendant either knew it was false or acted with reckless disregard of truth or falsity.

This is a doctrine that started with public officials, the idea being that we should be more protective of speech directed against officials, because, you know, democracy, and because defamation lawsuits are one nasty traditional way that some governments engage in political censorship—the government of Singapore is particularly notorious for this, for example, and generally the British tradition is pretty bad here. Not great for democracy: imagine if Barack Obama could have sued Donald Trump for saying he wasn't really born in the U.S.! (Maybe a bad example...) But over time it got expanded to generally people who thrust themselves in the public eye, so it's now Barack Obama and Taylor Swift.

Other kinds of false speech are a little confusing. In *U.S. v. Alvarez*, Justice Kennedy for a plurality (Kennedy for a plurality! We're doomed.) affirmed a lower court striking down the "stolen valor act," which prohibited falsely claiming military decorations. Kennedy applied the usual strict scrutiny standard for content-based regulations, and claimed that there was no special constitutional rule permitting regulation of false speech. So there you go.

Government employee speech: less protected than usual If it's on the job and within the scope of job duties, there's no First Amendment protection, *at all* for government employee speech. It's basically government speech then, and the government is entitled to control its own speech.

Even off the job, the Court applies a balancing test, employee's interest in free speech vs. government's interest in not having the job functions undermined. And this is kind of obvious, right? The President can obviously fire the Secretary of State for secretly writing nazi propaganda or something, because, goodbye credibility of the administration.

Major cases: *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1967), *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The speech of lawyers (you and me!): less protected than usual Truthful advertisements can't be prohibited, despite the many many attempts of bar associations to do so; the ordinary commercial speech rules apply. This has been a big controversy, for a long time the bar regulated lawyer advertising a lot.

Speech about pending cases can be regulated if it poses a substantial risk of prejudice, and we can understand this as an ordinary application of the standard doctrine (there's probably a compelling interest in running a fair justice system). One big question is to what extent lawyers can be punished for saying really nasty things about judges, which bar associations often try to do.

``Core political speech": extra-protected? Maybe? Sorta? You'll often hear talk about "core political speech." The idea there is that the First Amendment, if it means anything, means "protect free debate in democracy," so the courts should be extra-vigilant against restrictions of political speech. That being said, it's not clear that this is a real doctrinal category: political speech gets strict scrutiny for content-based regulations just like everything else does. It's not like there's a kind of extra-super-mondo-mega-strict scrutiny for the political stuff.

Political Campaign Expenditures: Protected. The Supreme Court, in a line of cases beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), has held that campaign expenditures are protected speech.

The key thing to know about this line of cases is that preventing corruption is a compelling government interest, so Congress can impose campaign finance regulations that are narrowly tailored to prevent corruption. However, corruption is understood only to mean actual bribe-taking. (Particularly, scholars like Zephyr Teachout have argued that corruption should take a broader meaning, like corrupting the electoral process by making it a game for the rich, but the Supreme Court has rejected this idea.)

Note the historical context of this case: Nixon was elected president in 1972. Spiro Agnew, his VP, resigned in 1973 under a cloud of bribery allegations (which turned out to be true) based in his prior disservice as Maryland governor. Nixon, of course, resigned in 1974 because of Watergate. So this was a time when corruption was on everyone's minds, we'd just had the biggest gang of criminals in American history in the Oval Office.

- Making the political process fairer for under-resourced candidates is *not* a compelling interest. So while Congress might be able to do some things (like offer public funding for elections) to level the playing field a bit, they can't engage in (subject-matter-based, I guess) restrictions on speech to do it.
- Ensuring equal influence for voters of different wealth levels is also not a compelling interest. The Court in *Buckley* essentially just equates this to an interest in censoring the rich, so it maybe isn't even legitimate.
- Reducing the cost of campaigns is also not a compelling interest.

So why is money speech? Well, here's what the Court said in *Buckley*:

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment. For example, in *Cox v. Louisiana*, the Court contrasted picketing and parading with a newspaper comment and a telegram by a citizen to a public official. The parading and picketing activities were said to constitute conduct "intertwined with expression and association," whereas the newspaper comment and the telegram were described as a "pure form of expression" involving "free speech alone" rather than "expression mixed with particular conduct." Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien*, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." ... the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.

A restriction on the amount of money a person or group can spend on political commu-

nication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

In *Buckley*, the Court upheld some contribution limits, but struck down limits either on independent expenditures (though there are complications about coordinated expenditures, etc.) or on candidate expenditures. The rationale was that independent spending poses less of a risk of corruption than do contributions. The Court also upheld disclosure requirements against a challenge on the basis of *NAACP v. Alabama* associational freedom, but held that they're OK under something like intermediate scrutiny because of interests in deterring corruption, catching violations of contribution limits, and informing voters. However, the Court notes a possibility that minor parties can come to get exemptions if risk of harassment of members can be proven. (Opening the door to as applied challenges.)

*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) made crystal clear that the only compelling interest is preventing quid pro quo corruption (not preferential access etc.). Prohibition on corporate independent spending (from corporate treasury) struck down (no ruling on corporate donations to candidates).

Campaign finance law is super complicated, but here are more concepts that have occasionally come up in the debate

- express advocacy vs issue advocacy: basically, is it ok for independent expenditures, e.g., by nonprofit groups, to explicitly name a candidate?
- PACs/dark money as ways that people can essentially launder finance to get around such laws as are allowed. But talk to an election law person; this stuff gets arcane fast.

in fact there are a huge number of ways to evade contribution limits, and essentially money in politics is unlimited. setting up all kinds of nominally independent organizations, funneling money through party organizations, etc. etc.

*McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) struck down aggregate contribution limits, i.e., limits on donating total amount to multiple candidates. Didn't strike down individual contribution to candidate limits. So I can contribute up to the individual limit to every candidate in the election if I choose. Why? Again, the idea is about quid pro quo: if you can only donate X to a candidate, the Court thinks it doesn't pose more of a danger of quid pro quo corruption to donate 100X to 100 different candidates.

#### Kinds of regulation

On to the "what kind of regulation" question. A few categories here too.

**Government speech (and money)** Typically, the government gets to control its own speech, and can say, e.g., "when you're taking this money, you can't use it to make a case for the opposite of the policy that we're trying to subsidize. (Though there are some limits.) The leading case here is *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld a restriction on federally funded family planning clinics prohibiting them (basically when they were working on the federal dime) from suggesting that their patients get abortions.

**Compelled speech** Compelled speech is fairly straightforward, same strict scrutiny as in the default rule. The classic case is *Wooley v. Maynard*, 430 U.S. 705 (1976), which held that the state of New Hampshire can't prosecute Jehovah's Witness for covering up "live free or die" motto on license plate. (The Jehovah's Witnesses are responsible for quite a lot of our First Amendment law, actually. Another huge one is *West Virginia Board of Education v. Barnette*, forbidding state from requiring pledge of allegiance in school.)

**Prior restraints: no, no, no.** A prior restraint is when the government enjoins a particular act of speech before it happens, rather than punishing it after the fact based on general laws. Prior restraint is like a burning oven, just don't touch it.

There are two classic kinds of prior restraint. First, a straight-up injunction. This will almost never be granted. (Maybe in cases of dire military necessity, like if the newspaper is about to publish the names of all the CIA agents or something.)

Second is licensure and permitting regulations, e.g., to hold a public protest on the streets. The basic rule there is that they can be permissible, but only with extremely careful procedural protections, based on objective and definite rules (i.e., like "everyone gets a permit if they apply X days in advance, pay Y fee, and nobody else has already gotten a permit for that date, and hearings have to be held within a week of application," level of rule). The idea is that too much discretion permits content-based regulation to sneak in.

**Vagueness and Overbreadth** One last important idea: you'll often read First Amendment cases where a law is struck down as "vague" or "overbroad." You need to know what those terms mean and the difference between them (they often appear together but are not the same idea).

A law is vague when it's not clear what speech is permitted. Vague criminal laws are, of course, already prohibited by due process, as you know from crim. But there's extra care in first amendment cases because of a fear that vague laws could create a "chilling effect" on protected speech.

By contrast, a law is "overbroad" if it's constitutional as applied to the actual person standing before the court challenging it, but would be unconstitutional applied to a lot of other people, and it's "substantially overbroad" in that it applies to lots of other constitutionally protected conduct.

To understand it, you first have to understand the difference between facial and as-applied challenges. The standard idea is that a facial challenge to a law says "the law is always unconstitutional, applied to everyone." An as-applied challenge is "the law is unconstitutional as applied to me." The difference between the two is kind of muddled, but the Court has said that facial challenges will rarely be accepted (*U.S. v. Salerno*, 481 U.S. 739 (1987)) For present purposes, you can think of most cases as as-applied cases, where the idea is that the law may be unconstitutional on the facts presented, but that it's possible to imagine that the law will be constitutionally applied to different facts.

Overbreadth doctrine, then, is actually best understood as a special First Amendment exception to standing doctrine! Normally, someone who brings an as-applied constitutional challenge to a law has to show that it actually is unconstitutional as applied to his or her situation, but a First Amendment plaintiff can show that even though his or her speech is unprotected, the law prohibits so much protected speech that it should go out anyway. *R.A.V. v. St. Paul*, discussed earlier, could have gone off on an overbreadth challenge; the challengers actually asserted one (the idea being that cross-burning, not protected speech, but the hate speech law covered a whole lot of protected speech), but the Court did them one better and struck the law down under a facial challenge.

Ok, that's a pretty comprehensive overview of First Amendment speech law. There's a lot of it, and there's a good amount of stuff that I've left off, but this hits the basics, enough for you to be able to find your way around the territory, understand what's going on in your bar review course, and so forth.

I've included a couple of brief exercises below (2/3 of which are blatantly swiped from real cases), just to stretch your brain, but don't feel obliged to worry about them unless you want.



## Exercise: Volunteer Labor

Finding that many ostensibly public-service-oriented organizations are replacing paid employees with “volunteers” who perform the same function, occasionally for sub-minimum wage stipends, and that such organizations are often fronts for revenue-oriented businesses, Congress passes the “Volunteer Pay Equity Act,” which requires that any person who works more than 15 hours per week under the supervision of a single entity, which includes nonprofits, individuals, and unorganized entities with a community of purpose, shall be deemed an employee and must be paid the federal minimum wage.

Immediately after the law’s passage, it is challenged by a variety of organizations and entities that rely heavily on volunteer labor, including:

- A presidential campaign committee
- A nonprofit civil rights organization, organized as a non-profit corporation
- An ideologically identified newspaper organized as a for-profit corporation

The plaintiffs claim that, in each case, volunteer labor is essential to their expressive activity, and that, accordingly, the act cannot be constitutionally applied to them.

## Exercise: Crypto

Congress finds that strong cryptography raises issues of national security as well as law enforcement, as that cryptography makes it difficult for the government to carry out searches or intelligence investigations. Congress also finds that the United States, because of its strong university system, has an advantage in the production of strong cryptographic algorithms relative to competitor nations.

Accordingly, Congress enacts the Cryptography Assessment Tribunal Statute, which, as the name suggests, establishes a tribunal, within the Department of Defense, to assess the extent to which novel cryptographic algorithms pose a danger to national security or law enforcement, and provides that all persons wishing to distribute or export cryptographic algorithms must apply for a permit to that tribunal before they do so. The statute specifically provides that publication of the details of how to implement any such algorithm in any generally available publication, or on the internet, constitutes distribution, in view of the likelihood that foreign agents or criminals will be able to acquire that algorithm and use it in ways averse to national security or law enforcement.

Carrie Cryptographer has invented a new cryptographic algorithm, and wishes to publish it in an international journal. She sues seeking a declaratory judgment that CATS is unconstitutional.

- Is the Cryptography Assessment Tribunal Statute constitutional?
- Is there any way that Congress could achieve similar goals in a way that is more likely to be constitutional?

## Exercise: Solomon Amendment

A decade ago, before gays and lesbians were fully integrated into the military, the federal government had a policy known as “don’t ask, don’t tell,” on it, gays and lesbians were technically forbidden from military service, but the military was forbidden from asking about sexual orientation, and a gay servicemember who did not disclose his or her sexual orientation would be permitted to remain.

A number of private universities considered this policy to be a violation of their nondiscrimination standards, and accordingly, forbade military recruiters from making use of campus resources. Law schools, in particular, tended to forbid military recruiting by JAG corps.

In response, Congress enacted a law called the “Solomon Amendment,” denying federal funding to universities when any part of the university declined to give military recruiters access on the same terms as other employers. A number of law schools filed suit, alleging that the Solomon Amendment violated their First Amendment rights by requiring them to “host or accommodate the military’s speech,” as well as by participating with speech (eg. recruiting emails) in the recruiting.

## McCreary County v. ACLU

545 U.S. 844 (2005)

### **JUSTICE SOUTER delivered the opinion of the Court.**

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones.

The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." In both Counties, this was the version of the Commandments posted:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven images.

Thou shalt not take the name of the Lord thy God in vain.

Remember the sabbath day, to keep it holy.

Honor thy father and thy mother.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness.

Thou shalt not covet.

Exodus 20:3-17.

In each County, the hallway display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."

In November 1999, respondents American Civil Liberties Union of Kentucky et al. sued the Counties in Federal District Court and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution. Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded,” and stating several grounds for taking that position: that “the Ten Commandments are codified in Kentucky’s civil and criminal laws”; that the Kentucky House of Representatives had in 1993 “voted unanimously . . . to adjourn . . . ‘in remembrance and honor of Jesus Christ, the Prince of Ethics’”; that the “County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore” in defense of his “display [of] the Ten Commandments in his courtroom”; and that the “Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.”

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted. In addition to the first display’s large framed copy of the edited King James version of the Commandments, the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the “display . . . be removed from [each] County Courthouse IMMEDIATELY” and that no county official “erect or cause to be erected similar displays.” The court’s analysis of the situation followed the three-part formulation first stated in *Lemon v. Kurtzman*. As to governmental purpose, it concluded that the original display “lack[ed] any secular purpose” because the Commandments “are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God.” Although the Counties had maintained that the original display was meant to be educational, “[t]he narrow scope of the display—a single religious text unaccompanied by any interpretation explaining its role as a foundational document—can hardly be said to present meaningfully the story of this country’s religious traditions.” The court found that the second version also “clearly lack[ed] a secular purpose” because the “Count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity.”

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each court-house, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the “King James Version” at Exodus 20:3-17, and quoted at greater length than before.

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the May-flower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled “The Foundations of American Law and Government Display” and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

“The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.’ The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.”

The ACLU moved to supplement the preliminary injunction to enjoin the Counties’ third display, and the Counties responded with several explanations for the new version, including desires “to demonstrate that the Ten Commandments were part of the foundation of American Law and Government” and “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.” The court, however, took the objective of proclaiming the Commandments’ foundational value as “a religious, rather than secular, purpose” and found that the assertion that the Counties’ broader educational goals are secular “crumble[s] ... upon an examination of the history of this litigation.” In light of the Counties’ decision to post the Commandments by themselves in the first instance, and later to “accentuat[e]” the religious objective by surrounding the Commandments with “specific references to Christianity,” the District Court understood the Counties’ “clear” purpose as being to post the Commandments, not to educate.

Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has “a secular legislative purpose” has been a common, albeit seldom dispositive, element of our cases.

The touchstone for our analysis is the principle that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the “understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens ....” By showing a purpose to favor religion, the government “sends the . . . message to . . . nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .”

Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan v. Maryland*, which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws.

Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon *Lemon*’s purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true “purpose” is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing.

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, e.g., *General Dynamics Land Systems, Inc. v. Cline* (interpreting statute in light of its “text, structure, purpose, and history”), and governmental purpose is a key element of a good deal of constitutional doctrine, e.g. *Washington v. Davis*. With enquiries into purpose this

common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act.

After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the Counties' alternative tack of trivializing the enquiry into it. The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties' arguments, or reason supporting them.

Lemon said that government action must have "a secular. . . purpose," and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective. [T]he Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.

The Counties' second proffered limitation can be dispatched quickly. They argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."

[Discussion of why the first display was obviously religious.]

Once the Counties were sued, they modified the exhibits and invited additional insight into their purpose in a display that hung for about six months. This new one was the product of forthright and nearly identical Pulaski and McCreary County resolutions listing a series of American historical documents with theistic and Christian references, which were to be posted in order to furnish a setting for displaying the Ten Commandments and any "other Kentucky and American historical documen[t]" without raising concern about "any Christian or religious references" in them. As mentioned, the resolutions expressed support for an Alabama judge who posted the Commandments in his courtroom, and cited the fact the Kentucky Legislature once adjourned a session in honor of "Jesus Christ, the Prince of Ethics."

In this second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties' purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as “dead and buried.” Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the “Foundations of American Law and Government” exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.”

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties’ governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done. No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be “foundational” to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that “fish-weirs shall be removed from the Thames.” If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties’ posted explanation that the Ten Commandments “influence is clearly seen in the Declaration”; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives “from the consent of the governed.” If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

In holding the preliminary injunction adequately supported by evidence that the Counties’ purpose had not changed at the third stage, we do not decide that the Counties’ past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.

Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.



## The Establishment Clause

We know, of course, that the government can't establish an official church. But how much favoritism to religion can it show otherwise? Can we have "under God" in the pledge of allegiance? Can we give student loan money to religious schools? Can we have prayers before legislative sessions (and does it depend on who is allowed to give the prayer)? Can there be Christmas decorations on city hall?

### The Lemon test

The standard test for such things is known as the "Lemon Test," after *Lemon v Kurtzman*, 403 US 602 (1971). It specifies three conditions, all of which a law must meet to survive Establishment Clause scrutiny:

1. The law must have a secular purpose.
2. The law must not have a primary effect that either inhibits or advances religion.
3. The law must not "foster an excessive government entanglement with religion."

As you can probably tell from the nature of those standards, especially the third, this test can be a bit indeterminate. And it's also been subject to wide criticism. The good thing is that it inspired probably the single best Scalia tirade ever: in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), Nino had the following (only lightly edited) to say about the Lemon test:

As to the Court's invocation of the Lemon test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test," but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, see, e.g., *Aguilar v. Fenton* (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh v. Chambers* (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," *Hunt v. McNair*. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. I will decline to apply Lemon – whether it validates or invalidates the government action in question – and therefore cannot Join the opinion of the Court today.

I do miss Scalia.<sup>72</sup>

So what does this geometry of crooked lines and wavering shapes actually work out to mean? Really, the only way to get a solid sense of it is to read a whole bunch of cases. But since we don't have time

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<sup>72</sup>Also, one of my greatest pedagogical achievements to date was finding a way to teach that case on Halloween. Suck it, *Stamboy v Ackley*.

for that, I'm going to hammer through some examples in list form.

- Tax exemptions for churches: permissible. *Waltz v. Tax Commission of New York*, 397 U.S. 664 (1970) BUT: maybe tax exemptions for publishing wings of churches not ok? *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (plurality).
- Government giving money to religious institutions earmarked for secular purposes (e.g. sending math books to religious schools): sometimes ok, sometimes not ok on the entanglement prong of the Lemon test, because then government would have to go in and monitor the use of that money, start meddling in the internal operations of the church, etc. But there are lots of cases going different ways on this. Some of the struggle can be seen in *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 US 236 (1968).
- It's clear that the state can't pay religious school teacher salaries, at least (this is Lemon itself), and can't let them come into public schools to teach religion, *McCullum v. Board of Education*, 333 U.S. 203 (1948).
- Speaking of schools (one of the huge issues): school prayer, not ok if it's set up by school, even if students can opt out. *Wallace v. Jaffree*, 472 U.S. 38 (1985). Not even at graduation. *Lee v. Weisman*, 505 US 577 (1992).
- But school vouchers, even when they direct funds to religious schools, are ok. *Zelman v. Simmons-Harris*, 536 US 639 (2002). From Rehnquist's majority opinion:

Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.
- There's also a question of the extent to which government can fund religious groups on the same terms as nonreligious groups. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), said that it can, and that failing to do so would actually be an impermissible content-based restriction on speech! (How is that reconcilable with *Rust v. Sullivan*, you might ask? Good question. Ask a justice.)
- Similarly, *Capitol Square Review Board v. Pinette*, 515 US 753 (1995): impermissible content-based discrimination to refuse to permit a private group to erect a cross in town square, even on the basis that permitting it would be an establishment clause violation. Incidentally, the real issue here wasn't religion. If you go look at the case, you'll see that the people who wanted to erect the cross were the KKK. One imagines they intended to burn it.
- Legislative prayer: ok, mainly because it's an old tradition. *Marsh v. Chambers*, 463 U.S. 783 (1983)

### Theoretical foundations

Generally, we might describe at least four broad ideas, all of which are constantly battling, and none of which has won:

“Wall of separation”: Jefferson.

Neutrality1: can't promote religion over secularism

Neutrality2: can promote religion generally, so long as it is noncoercive/doesn't actually establish a church. Can't promote one religion over others.

Can't establish an official church. Can do whatever else. Something like the Scalia view.

The theoretical ideas running underneath those views are also contested. Some say the point is to protect religion from state corruption. Some say the point is to protect the state from religious corruption. And some say the point is to permit a healthy diversity of religions. If anything, I probably agree with a Justice-O'Connor-esque view according to which the point of the establishment clause is expressive, i.e., that the notion is to not suggest that people are unwelcome as part of the U.S. political community because of their faith. But the doctrine is messy, and no one theory will really account for it.

## Employment Division v. Smith

494 U.S. 872 (1990)

### Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. Persons who violate this provision by possessing a controlled substance listed on Schedule I are “guilty of a Class B felony.” Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii* Lemaire.

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related “misconduct.” The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents’ free exercise rights under the First Amendment.

Respondents’ claim for relief rests on our decisions in *Sherbert v. Verner*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, and *Hobbie v. Unemployment Appeals Comm’n of Florida*, in which we held that a State could not condition the availability of unemployment insurance on an individual’s willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for “if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon,” and “the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.” Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all” governmental regulation of religious beliefs as such.” The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

But the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of “statues that are to be used for worship purposes,” or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of “prohibiting the free exercise [of religion]” one large step further. They contend that their religious motivation for using peyote

places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” We first had occasion to assert that principle in *Reynolds v. United States* (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” In *Prince v. Massachusetts* (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in “excluding [these children] from doing there what no other children may do.” In *Braunfeld v. Brown* (1961) (plurality opinion), we upheld Sundayclosing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States* (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual’s religion was *United States v. Lee*. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut* (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania* (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); or the right of parents, acknowledged in *Pierce v. Society of Sisters* (1925), to direct the education of their children, see *Wisconsin v. Yoder* (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*. Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all [citing cases].

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas* ] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action

on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. 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? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws,<sup>73</sup> drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races, see, e.g., *Bob Jones University v. United States* (1983). The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely

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<sup>73</sup>\*Justice Scalia had a crystal ball??? -PG

engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

**Justice O’CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.**

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today’s holding dramatically departs from wellsettled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s fundamental commitment to individual religious liberty.

The Court today interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are “one large step” removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.

To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment’s command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests “of the highest order.” “Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.”

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court’s rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that “the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to” challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of



one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas*:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

[extensive discussion of caselaw, obviously reading it very differently from the majority]

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a “constitutional anomaly,” the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a “constitutional norm,” not an “anomaly.” Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. A law that makes criminal such an activity therefore triggers constitutional concern—and heightened judicial scrutiny even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. The Court's parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an “unavoidable consequence” under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed. v. Barnette* are apt: “The very purpose of a Bill of Rights 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. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. As we recently noted, drug abuse is “one of the greatest problems affecting the health and welfare of our population” and thus “one of the most

serious problems confronting our society today.” In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive Social Security system, and military conscription are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

Thus, the critical question in this case is whether exempting respondents from the State’s general criminal prohibition “will unduly interfere with fulfillment of the governmental interest.” Although the question is close, I would conclude that uniform application of Oregon’s criminal prohibition is “essential to accomplish” its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote.

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon’s compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents’ religiously motivated conduct.

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

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion against Oregon’s asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State’s broad interest in fighting the critical “war on drugs” that must be weighed against respondents’ claim, but the State’s narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State’s favor.

The State’s interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State’s asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in “symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,” cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court’s prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. In this case, the State’s justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the State’s assumption that religious use of peyote is harmful.

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal

Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use. Moreover, other Schedule I drugs have lawful uses.

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations, and by the State of Texas, the only State in which peyote grows in significant quantities. Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This argument, however, could be made in almost any free exercise case. See Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv.L.Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. Some religious claims involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" test to all free exercise claims, not by reaching uniform results as to all claims.

Finally, although I agree with Justice O'CONNOR that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion.

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion.

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be

“forced to migrate to some other and more tolerant region.” Yoder. This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 42 U.S.C. § 1996 (“[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites”). Congress recognized that certain substances, such as peyote, “have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival.”

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

## Burwell v. Hobby Lobby

573 U.S. 682 (2014)

### **JUSTICE ALITO delivered the opinion of the Court.**

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div. v. Smith*, which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner* and *Wisconsin v. Yoder*.

Congress responded to *Smith* by enacting RFRA. “[L]aws [that are] ‘neutral’ toward religion,” Congress found, “may burden religious exercise as surely as laws intended to interfere with religious exercise.” In order to ensure broad protection for religious liberty, RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” §2000bb–1(b).<sup>3</sup>

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of \$2,000 per employee each year. These penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. When this was done, the Government made clear that its objective was to "protec[t]" these religious objectors "from having to contract, arrange, pay, or refer for such coverage." Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.

[I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a religious objection to the subsidies. As we put it in *Tilton*, they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs."

Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive

mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting “public health” and “gender equality.” RFRA, however, contemplates a “more focused” inquiry: It “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” This requires us to “loo[k] beyond broadly formulated interests” and to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold v. Connecticut*, and HHS tells us that “[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.”

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” But the contraceptive mandate is expressly excluded from this subset.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.”

The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections. This would certainly be less restrictive of the plaintiffs’ religious liberty, and HHS has not shown that this is not a viable alternative.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated

that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections.

Under that accommodation, the organization can selfcertify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."

**JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.**

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based optouts impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

[in a discussion of the legislative history of the ACA]

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions." That amendment, Senator Mikulski observed, would have "pu[t] the personal opinion of employers and insurers over the practice of medicine." Rejecting the "conscience amendment," Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

With RFRA's restorative purpose [to restore the pre-Smith caselaw] in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise . . . religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-Smith case law, the Court falters at each step of its analysis.

[discussion of corporations as persons omitted]



Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement “substantially burden[s] [their] exercise of religion.” Congress no doubt meant the modifier “substantially” to carry weight. In the original draft of RFRA, the word “burden” appeared unmodified. The word “substantially” was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court’s pre-Smith case law, “does not require the Government to justify every action that has some effect on religious exercise.” The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens’ and Hahns’ “belie[f ] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” I agree with the Court that the Green and Hahn families’ religious convictions regarding contraception are sincerely held. See *Thomas*, 450 U.S., at 715 (courts are not to question where an individual “dr[aws] the line” in defining which practices run afoul of her religious beliefs).

But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal conclusion . . . that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake.

That distinction is a facet of the pre-Smith jurisprudence RFRA incorporates. *Bowen v. Roy* is instructive. There, the Court rejected a free exercise challenge to the Government’s use of a Native American child’s Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father’s religious belief that “use of [his daughter’s Social Security] number may harm [her] spirit,” the Court concluded that the Government’s internal uses of that number “place[d] [no] restriction on what [the father] may believe or what he may do.” Recognizing that the father’s “religious views may not accept” the position that the challenged uses concerned only the Government’s internal affairs, the Court explained that “for the adjudication of a constitutional claim, the Constitution, rather than an individual’s religion, must supply the frame of reference.” See also *Hernandez v. Commissioner* (1989) (distinguishing between, on the one hand, “question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds,” and, on the other, “whether the alleged burden imposed [by the challenged government action] is a substantial one”). Inattentive to this guidance, today’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” It is doubtful that Congress, when it specified that burdens must be “substantial,” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to

use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods.

Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his “argument . . . would apply just as well if the employer said ‘no contraceptives’”

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage; that almost one-third of women would change their contraceptive method if costs were not a factor; and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be.

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993 (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967 (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees) [etc.]

The ACA's grandfathering provision allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the “grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of coinsurance, deductibles, that sort of thing.” Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time.”

The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. In short, far from ranking as a categorical exemption, the grandfathering provision is “temporary, intended to be a means for gradually transitioning employers into mandatory coverage.”

The Court ultimately acknowledges a critical point: RFRA's application "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.

Ultimately, the Court hedges on its proposal to align forprofit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that."<sup>74</sup>

Among the pathmarking pre-Smith decisions RFRA preserved is *United States v. Lee* (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. The Government urges that Lee should control the challenges brought by Hobby Lobby and Conestoga. In contrast, today's Court dismisses Lee as a tax case. Indeed, it was a tax case and the Court in Lee homed in on "[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation."

But the Lee Court made two key points one cannot confine to tax cases. "When followers of a particular

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<sup>74</sup>indeed, religious employers immediately started making objections to that accommodation on the grounds that having to file a form with the government saying "we object" would trigger third parties providing the contraception. see *Zubik v. Burwell* -PG

sect enter into commercial activity as a matter of choice,” the Court observed, “the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.”

The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would “operat[e] to impose the employer’s religious faith on the employees.” No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g., *Newman v. Piggie Park Enterprises, Inc.* (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration); *In re Minnesota ex rel. McClure* (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individua[l] living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonistic to the Bible,” including “fornicators and homosexuals”; *Elane Photography, LLC v. Willock* (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the company’s owners). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn’t the Court disarmed from making such a judgment given its recognition that “courts must not presume to determine . . . the plausibility of a religious claim”?

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test.” Not much help there for the lower courts bound by today’s decision.

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.” But the Court has assumed, for RFRA purposes, that the interest in women’s health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women’s Health Amendment.

There is an overriding interest, I believe, in keeping the courts “out of the business of evaluating the relative merits of differing religious claims,” or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.”

## Church of the Lukumi Babalu Aye, Inc. v. Hialeah

508 U.S. 520 (1993)

**Justice Kennedy delivered the opinion of the Court, except as to Part II-A-2.**

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental non-persecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

This case involves practices of the Santería religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santería, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called orishas, through the iconography of Catholic saints, Catholic symbols are often present at Santería rites, and Santería devotees attend the Catholic sacraments.

The Santería faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orishas. The basis of the Santería religion is the nurture of a personal relation with the orishas, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament, and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santería teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santería rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santería adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santería and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida.

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santería religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of Italeiro, the second highest in the Santería faith. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santería faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, it appears that it received all needed approvals by early August 1987.

The prospect of a Santería church in their midst was distressing to many members of the Hialeah

community, and the announcement of the plans to open a Santería church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the Appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87-66, which noted the “concern” expressed by residents of the city “that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and declared that “[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.” Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated in full, except as to penalty, Florida’s animal cruelty laws. Among other things, the incorporated state law subjected to criminal punishment “[w]hoever . . . unnecessarily or cruelly . . . kills any animal.”

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with state law. To obtain clarification, Hialeah’s city attorney requested an opinion from the attorney general of Florida as to whether §828.12 prohibited “a religious group from sacrificing an animal in a religious ritual or practice” and whether the city could enact ordinances “making religious animal sacrifice unlawful.” The attorney general responded in mid-July. He concluded that the “ritual sacrifice of animals for purposes other than food consumption” was not a “necessary” killing and so was prohibited by §828.12. The attorney general appeared to define “unnecessary” as “done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal.” He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict.

The city council responded at first with a hortatory enactment, Resolution 87-90, that noted its residents’ “great concern regarding the possibility of public ritualistic animal sacrifices” and the state-law prohibition. The resolution declared the city policy “to oppose the ritual sacrifices of animals” within Hialeah and announced that any person or organization practicing animal sacrifice “will be prosecuted.”

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption,” and prohibited owning or possessing an animal “intending to use such animal for food purposes.” It restricted application of this prohibition, however, to any individual or group that “kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.” The ordinance contained an exemption for slaughtering by “licensed establishment[s]” of animals “specifically raised for food purposes.” Declaring, moreover, that the city council “has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community,” the city council adopted Ordinance 87-71. That ordinance defined “sacrifice” as had Ordinance 87-52, and then provided that “[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.” The final Ordinance, 87-72, defined “slaughter” as “the killing of animals for food” and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of “small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.” All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding \$500 or imprisonment not exceeding 60 days, or both.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div. v. Smith*. Neutrality and general applicability are interrelated, and, as

becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the Smith requirements. We begin by discussing neutrality.

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty*, for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it “impose[d] special disabilities on the basis of . . . religious status.” On the same principle, in *Fowler v. Rhode Island*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah’s Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words “sacrifice” and “ritual,” words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words “sacrifice” and “ritual” have a religious origin, but current use admits also of secular meanings. The ordinances, furthermore, define “sacrifice” in secular terms, without referring to religious practices.

We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause “forbids subtle departures from neutrality,” and “covert suppression of particular religious beliefs.” Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. “The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”

The record in this case compels the conclusion that suppression of the central element of the Santería worship service was the object of the ordinances. First, though use of the words “sacrifice” and “ritual” does not compel a finding of improper targeting of the Santería religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council’s enactments discloses the improper attempt to target Santería. Resolution 87-66, adopted June 9, 1987, recited that “residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and “reiterate[d]” the city’s commitment to prohibit “any and all [such] acts of any and all religious groups.” No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion

other than Santería.

It becomes evident that these ordinances target Santería sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santería church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87-71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill... an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. It suffices to recite this feature of the law as support for our conclusion that Santería alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santería sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the oriskas, not food consumption. Indeed, careful drafting ensured that, although Santería sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87-52, which prohibits the "possession], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santería adherents but almost no others: If the killing is — unlike most Santería sacrifices — unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87-52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87-40 incorporates the Florida animal cruelty statute. Its prohibition is broad on its face, punishing "[w]hoever ... unnecessarily . . . kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13-14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." As we noted in *Smith*, in circumstances in which individualized exemptions from a general



requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Respondent’s application of the ordinance’s test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

We also find significant evidence of the ordinances’ improper targeting of Santería sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits “gratuitous restrictions” on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a fiat prohibition of all Santería sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santería sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Thus, these broad ordinances prohibit Santería sacrifice even when it does not threaten the city’s interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santería rituals and the lack of any central religious authority to require compliance with secular disposal regulations. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city’s interest in preventing cruelty to animals. With regard to the city’s interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city’s concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city’s interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, which incorporates Florida law in this regard, killing an animal by the “simultaneous and instantaneous severance of the carotid arteries with a sharp instrument” — the method used in kosher slaughter — is approved as humane. The District Court found that, though Santería sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87-72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santería religious worship.

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, “[n]eutrality in its application requires an equal protection mode of analysis.” Here, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by

members of the decisionmaking body. These objective factors bear on the question of discriminatory object.

That the ordinances were enacted “‘because of,’ not merely ‘in spite of,’” their suppression of Santería religious practice is revealed by the events preceding their enactment. Although respondent claimed at oral argument that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santería religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santería with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba “people were put in jail for practicing this religion,” the audience applauded.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santería was outlawed in Cuba, questioned: “[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?” Councilman Cardoso said that Santería devotees at the Church “are in violation of everything this country stands for.” Councilman Mejides indicated that he was “totally against the sacrificing of animals” and distinguished kosher slaughter because it had a “real purpose.” The “Bible says we are allowed to sacrifice an animal for consumption,” he continued, “but for any other purposes, I don’t believe that the Bible allows that.” The president of the city council, Councilman Echevarria, asked: “What can we do to prevent the Church from opening?”

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santería was a sin, “foolishness,” “an abomination to the Lord,” and the worship of “demons.” He advised the city council: “We need to be helping people and sharing with them the truth that is found in Jesus Christ.” He concluded: “I would exhort you ... not to permit this Church to exist.” The city attorney commented that Resolution 87-66 indicated: “This community will not tolerate religious practices which are abhorrent to its citizens ...Ibid. Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santería worshippers because of its religious motivation.

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santería adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause “protect[s] religious observers against unequal treatment,” and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the

minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are under-inclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santería sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals"; destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value"; the infliction of pain or suffering "in the interest of medical science"; the placing of poison in one's yard or enclosure; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," and "to hunt wild hogs."

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These ipse dixits do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santería sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87-72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santería sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santería worshippers] but not upon itself." This precise

evil is what the requirement of general applicability is designed to prevent.

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." As we show above, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

## Fulton v. Philadelphia

141 S.Ct. 1868 (2021)

ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion, in which KAVANAUGH, J., joined, and in which BREYER, J., joined as to all but the first paragraph. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined.

### **Chief Justice ROBERTS delivered the opinion of the Court.**

Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. The agency must decide whether to "approve, disapprove or provisionally approve the foster family."

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.

The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that “Congress shall make no law ... prohibiting the free exercise” of religion. As an initial matter, it is plain that the City’s actions have burdened CSS’s religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule Smith, and the concurrences in the judgment argue in favor of doing so. But we need not revisit that decision here. This case falls outside Smith because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it “invite[s]” the government to consider the particular reasons for a person’s conduct by providing “ ‘a mechanism for individualized exemptions.’ ” For example, in *Sherbert v. Verner*, a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. The State denied her application under a law prohibiting eligibility to claimants who had “failed, without good cause ... to accept available suitable work.” We held that the denial infringed her free exercise rights and could be justified only by a compelling interest.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the “good cause” standard permitted the government to grant exemptions based on the circumstances underlying each application. Smith went on to hold that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. The City claimed that the ordinances were necessary in part to protect public health, which was “threatened by the disposal of animal carcasses in open public places.” But the ordinances did not regulate hunters’ disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable.

The City initially argued that CSS’s practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by Smith. The current version of section 3.21 specifies in pertinent part: “Rejection of Referral. Provider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.”

This provision requires an agency to provide “Services,” defined as “the work to be performed under this Contract,” to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the “sole discretion” of the Commissioner. The City has made clear that the Commissioner “has no intention of granting an exception” to CSS. But the City “may not refuse to extend that [exemption] system to cases of ‘religious hardship’ without compelling reason.”

[T]he City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it “invite[s]” the government to decide which reasons for not complying with the policy are worthy of solicitude, here, at the Commissioner’s “sole discretion.”

The contractual non-discrimination requirement imposes a burden on CSS’s religious exercise and does not qualify as generally applicable. [therefore, strict scrutiny] A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. harm of granting specific exemptions to particular religious claimants.” The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City’s asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS’s certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop*. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

As Philadelphia acknowledges, CSS has “long been a point of light in the City’s foster-care system.” CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

**Justice BARRETT, with whom Justice KAVANAUGH joins, and with whom Justice BREYER joins as to all but the first paragraph, concurring.**

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their amici, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—alone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a \*neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? What forms of scrutiny should apply? And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it. I join the Court's opinion in full.

**Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.**

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

There is no question that *Smith*'s interpretation can have startling consequences. \*1884 Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose



that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy Smith even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as Smith allows, but the present case shows that the dangers posed by Smith are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children.

One of the questions that we accepted for review is “[w]hether *Employment Division v. Smith* should be revisited.” We should confront that question.

Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City’s standard annual contract with foster care agencies. Smith’s holding about categorical rules does not apply if a rule permits individualized exemptions, and the majority seizes on the presence in the City’s standard contract of language giving a City official the power to grant exemptions. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, but the majority reverses the decision below because the contract supposedly confers that never-used power.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today’s decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today’s decision will vanish—and the parties will be back where they started. The City will claim that it is protected by Smith; CSS will argue that Smith should be overruled; the lower courts, bound by Smith, will reject that argument; and CSS will file a new petition in this Court challenging Smith. What is the point of going around in this circle?

We should reconsider Smith without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and Smith’s interpretation is hard to defend. It can’t be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment’s adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially expected, Smith has not provided a clear-cut rule that is easy to apply, and experience has disproved the Smith majority’s fear that retention of the Court’s prior free-exercise jurisprudence would lead to “anarchy.”

When Smith reinterpreted the Free Exercise Clause, four Justices—Brennan, Marshall, Blackmun, and O’Connor—registered strong disagreement. After joining the Court, Justice Souter called for Smith to be reexamined. So have five sitting Justices. So have some of the country’s most distinguished scholars of the Religion Clauses. On two separate occasions, Congress, with virtual unanimity, expressed the view that Smith’s interpretation is contrary to our society’s deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, and the Religious Land Use and Institutionalized Persons Act of 2000, Congress tried to restore the constitutional rule in place before Smith was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps.

It is high time for us to take a fresh look at what the Free Exercise Clause demands. RFRA and RLUIPA have restored part of the protection that Smith withdrew, but they are both limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

[W]e should begin by considering the “normal and ordinary” meaning of the text of the Free Exercise Clause: “Congress shall make no law ... prohibiting the free exercise [of religion].” Most of these terms and phrases—“Congress,” “shall make,” “no law,” and “religion”—do not require discussion for present purposes, and we can therefore focus on what remains: the term “prohibiting” and the phrase “the free exercise of religion.”

Those words had essentially the same meaning in 1791 as they do today. “To prohibit” meant either “[t]o forbid” or “to hinder.” S. Johnson, *A Dictionary of the English Language* (1755) (Johnson (1755)). The term “exercise” had both a broad primary definition (“[p]ractice” or “outward performance”) and a narrower secondary one (an “[a]ct of divine worship whether publick or private”). (The Court long ago declined to give the First Amendment’s reference to “exercise” this narrow reading. See, e.g., *Cantwell v. Connecticut* (1940).) And “free,” in the sense relevant here, meant “unrestrained.” Johnson (1755).

If we put these definitions together, the ordinary meaning of “prohibiting the free exercise of religion” was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.

As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith* made no real attempt to square that equal-treatment interpretation with the ordinary meaning of the Free Exercise Clause’s language, and it is hard to see how that could be done.

The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the “exercise of religion”) the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group.

The oddity of *Smith*’s interpretation can be illustrated by considering what the same sort of interpretation would mean if applied to other provisions of the Bill of Rights. Take the Sixth Amendment, which gives a specified group of people (the “accused” in criminal cases) a particular right (the right to the “Assistance of Counsel for [their] defence”). Suppose that Congress or a state legislature adopted a law banning counsel in all litigation, civil and criminal. Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants?

Or consider the Seventh Amendment, which gives a specified group of people (parties in most civil “Suits at common law”) “the right of trial by jury.” Would there be any question that a law abolishing juries in all civil cases would violate the rights of parties in cases that fall within the Seventh Amendment’s scope?

Other examples involving language similar to that in the Free Exercise Clause are easy to imagine. Suppose that the amount of time generally allotted to complete a state bar exam is 12 hours but that applicants with disabilities secure a consent decree allowing them an extra hour. Suppose that the State later adopts a rule requiring all applicants to complete the exam in 11 hours. Would anyone argue that this was consistent with the decree?

Suppose that classic car enthusiasts secure the passage of a state constitutional amendment exempting cars of a certain age from annual safety inspections, but the legislature later enacts a law requiring such inspections for all vehicles regardless of age. Can there be any doubt that this would violate the state constitution?

It is not necessary to belabor this point further. What all these examples show is that *Smith*’s interpretation conflicts with the ordinary meaning of the First Amendment’s terms.

Is there any way to bring about a reconciliation? The short answer is “no.” Survey all the briefs filed in support of respondents (they total more than 40) and three decades of law review articles, and what

will you find? Philadelphia's brief refers in passing to one possible argument-and the source it cites is a law review article by one of Smith's leading academic critics, Professor Michael W. McConnell. Trying to see if there was any way to make Smith fit with the constitutional text, Professor McConnell came up with this argument-but then rejected it.

The argument goes as follows: Even if a law prohibits conduct that constitutes an essential religious practice, it cannot be said to "prohibit" the free exercise of religion unless that was the lawmakers' specific object.

This is a hair-splitting interpretation. It certainly does not represent the "normal and ordinary" meaning of the Free Exercise Clause's terms. Consider how it would play out if applied to some of the hypothetical laws discussed at the beginning of this opinion. A law categorically banning all wine would not "prohibit" the celebration of a Catholic Mass? A law categorically forbidding the slaughter of a conscious animal would not "prohibit" kosher and halal slaughterhouses? A rule categorically banning any head covering in a courtroom would not "prohibit" appearances by orthodox Jewish men, Sikh men, and Muslim women who wear hijabs? It is no wonder that Smith's many defenders have almost uniformly forgone this argument.

Not only is it difficult to square Smith's interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

It is not as if there were no models that could have been used. Other constitutional provisions contain non-discrimination language. For example, Art. I, § 9, cl. 6, provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." Under Art. IV, § 2, cl. 1, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Language mandating equal treatment of one sort or another also appeared in the religious liberty provisions of colonial charters and state constitutions.<sup>33</sup> But Congress eschewed those models. The contrast between these readily available anti-discrimination models and the language that appears in the First Amendment speaks volumes.

While we presume that the words of the Constitution carry their ordinary and normal meaning, we cannot disregard the possibility that some of the terms in the Free Exercise Clause had a special meaning that was well understood at the time. *Heller*, again, provides a helpful example. *Heller* did not hold that the right to keep and bear arms means that everyone has the right to keep and bear every type of weaponry in all places and at all times. Instead, it held that the Second Amendment protects a known right that was understood to have defined dimensions.

Following *Heller*'s lead, we must ask whether the Free Exercise Clause protects a right that was known at the time of adoption to have defined dimensions. But in doing so, we must keep in mind that there is a presumption that the words of the Constitution are to be interpreted in accordance with their "normal and ordinary" sense. Anyone advocating a different reading must overcome that presumption.

What was the free-exercise right understood to mean when the Bill of Rights was ratified? And in particular, was it clearly understood that the right simply required equal treatment for religious and secular conduct? When *Smith* was decided, scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court. Since then, however, the historical record has been plumbed in detail, and we are now in a good position to examine how the free-exercise right was understood when the First Amendment was adopted.

By that date, the right to religious liberty already had a long, rich, and complex history in this country.

What appears to be the first “free exercise” provision was adopted in 1649. Prompted by Lord Baltimore, the Maryland Assembly enacted a provision protecting the right of all Christians to engage in “the free exercise” of religion. Rhode Island’s 1663 Charter extended the right to all. Early colonial charters and agreements in Carolina, Delaware, New Jersey, New York, and Pennsylvania also recognized the right to free exercise, and by 1789, every State except Connecticut had a constitutional provision protecting religious liberty. In fact, the Free Exercise Clause had more analogs in State Constitutions than any other individual right. In all of those State Constitutions, freedom of religion enjoyed broad protection, and the right “was universally said to be an unalienable right.”

What was this right understood to protect? In seeking to discern that meaning, it is easy to get lost in the voluminous discussion of religious liberty that occurred during the long period from the first British settlements to the adoption of the Bill of Rights. Many different political figures, religious leaders, and others spoke and wrote about religious liberty and the relationship between the authority of civil governments and religious bodies. The works of a variety of thinkers were influential, and views on religious liberty were informed by religion, philosophy, historical experience, particular controversies and issues, and in no small measure by the practical task of uniting the Nation. The picture is complex.

For present purposes, we can narrow our focus and concentrate on the circumstances that relate most directly to the adoption of the Free Exercise Clause. As has often been recounted, critical state ratifying conventions approved the Constitution on the understanding that it would be amended to provide express protection for certain fundamental rights, and the right to religious liberty was unquestionably one of those rights. As noted, it was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment.

When we look at these provisions, we see one predominant model. This model extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger “the public peace” or “safety.”

This model had deep roots in early colonial charters. It appeared in the Rhode Island Charter of 1663, the Second Charter of Carolina in 1665, and the New York Act Declaring Rights & Privileges in 1691.

By the founding, more than half of the State Constitutions contained free-exercise provisions subject to a “peace and safety” carveout or something similar. The Georgia Constitution is a good example. It provided that “[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.” The founding era Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all contained broad protections for religious exercise, subject to limited peace-and-safety carveouts.

The predominance of this model is highlighted by its use in the laws governing the Northwest Territory. In the Northwest Ordinance of 1787, the Continental Congress provided that “[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.” Art. I (emphasis added). After the ratification of the Constitution, the First Congress used similar language in the Northwest Ordinance of 1789. Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect.

The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public “peace” or “safety” would be endangered—is antithetical to Smith. If, as Smith held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn’t they also be sufficient to address the same type of conduct when carried out for a religious reason?

Smith's defenders have no good answer. Their chief response is that the free-exercise provisions that included these carveouts were tantamount to the Smith rule because any conduct that is generally prohibited or generally required can be regarded as necessary to protect public peace or safety.

This argument gives "public peace and safety" an unnaturally broad interpretation. Samuel Johnson's 1755 dictionary defined "peace" as: "1. Respite from war.... 2. Quiet from suits or disturbances.... 3. Rest from any commotion. 4. Stil[l]ness from riots or tumults.... 5. Reconciliation of differences.... 6. A state not hostile.... 7. Rest; quiet; content; freedom from terrour; heavenly rest...." In ordinary usage, the term "safety" was understood to mean: "1. Freedom from danger.... 2. Exemption from hurt. 3. Preservation from hurt...."

When "peace" and "safety" are understood in this way, it cannot be said that every violation of every law imperils public "peace" or "safety." In 1791 (and today), violations of many laws do not threaten "war," "disturbances," "commotion," "riots," "terror," "danger," or "hurt." Blackstone catalogs numerous violations that do not threaten any such harms, including "cursing"; refusing to pay assessments for "the repairs of sea banks and sea walls" and the "cleansing of rivers, public streams, ditches and other conduits"; "retaining a man's hired servant before his time is expired"; an attorney's failure to show up for a trial; the unauthorized "solemniz[ing of a] marriage in any other place besides a church, or public chapel wherein banns have been usually published"; "transporting and seducing our artists to settle abroad"; engaging in the conduct of "a common scold"; and "exercis[ing] a trade in any town, without having previously served as an apprentice for seven years."

In contrast to these violations, Blackstone lists "offences against the public peace." Those include: riotous assembling of 12 persons or more; unlawful hunting; anonymous threats and demands; destruction of public floodgates, locks, or sluices on a navigable river; public fighting; riots or unlawful assemblies; "tumultuous" petitioning; forcible entry or detainer; riding or "going armed" with dangerous or unusual weapons; spreading false news to "make discord between the king and nobility, or concerning any great man of the realm"; spreading "false and pretended" prophecies to disturb the peace; provoking breaches of the peace; and libel "to provoke ... wrath, or expose [an individual] to public hatred, contempt, and ridicule." These offenses might inform what constitutes actual or threatened breaches of public peace or safety in the ordinary sense of those terms. But the ordinary meaning of offenses that threaten public peace or safety must be stretched beyond the breaking point to encompass all violations of any law.

That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States. When there were important clashes between generally applicable laws and the religious practices of particular groups, colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests.

Oath exemptions are illustrative. Oath requirements were considered "indispensable" to civil society because they were thought to ensure that individuals gave truthful testimony and fulfilled commitments. Quakers and members of some other religious groups refused to take oaths, and therefore a categorical oath requirement would have resulted in the complete exclusion of these Americans from important civic activities, such as testifying in court and voting.

Tellingly, that is not what happened. In the 1600s, Carolina allowed Quakers to enter a pledge rather than swearing an oath. In 1691, New York permitted Quakers to give testimony after giving an affirmation. Massachusetts did the same in 1743. In 1734, New York also allowed Quakers to qualify to vote by making an affirmation, and in 1740, Georgia granted an exemption to Jews, allowing them to omit the phrase "on the faith of a Christian" from the State's naturalization oath. By 1789, almost all States had passed oath exemptions.

Some early State Constitutions and declarations of rights formally provided oath exemptions for religious objectors. For instance, the Maryland Declaration of Rights of 1776 declared that Quakers, Mennonites, and members of some other religious groups "ought to be allowed to make their solemn

affirmation” instead of an oath. Similarly, the Massachusetts Constitution of 1780 permitted Quakers holding certain government positions to decline to take the prescribed oath of office, allowing affirmations instead. The Federal Constitution likewise permits federal and state officials to make either an “Oath or Affirmation, to support this Constitution.”

Military conscription provides an even more revealing example. In the Colonies and later in the States, able-bodied men of a certain age were required to serve in the militia, but Quakers, Mennonites, and members of some other religious groups objected to militia service on religious grounds. The militia was regarded as essential to the security of the State and the preservation of freedom, but colonial governments nevertheless granted religious exemptions. Rhode Island, Maryland, North Carolina, and New Hampshire did so in the founding era. In 1755, New York permitted a conscientious objector to obtain an exemption if he paid a fee or sent a substitute. Massachusetts adopted a similar law two years later, and Virginia followed suit in 1776.

The Continental Congress also granted exemptions to religious objectors because conscription would do “violence to their consciences.” This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, the very survival of the new Nation often seemed in danger, and the Members of Congress faced bleak personal prospects if the war was lost. Yet despite these stakes, exemptions were granted.

Defenders of Smith have advanced historical arguments of their own, but they are unconvincing, and in any event, plainly insufficient to overcome the ordinary meaning of the constitutional text.

One prominent argument points to language in some founding-era charters and constitutions prohibiting laws or government actions that were taken “for” or “on account” of religion. That phrasing, it is argued, reaches only measures that target religion, not neutral and generally applicable laws. This argument has many flaws.

No such language appears in the Free Exercise Clause, and in any event, the argument rests on a crabbed reading of the words “for” or “on account of” religion. As Professor McConnell has explained, “[i]f a member of the Native American Church is arrested for ingesting peyote during a religious ceremony, then he surely is molested ‘for’ or ‘on account of’ his religious practice—even though the law under which he is arrested is neutral and generally applicable.”

This argument also ignores the full text of many of the provisions on which it relies. While some protect against government actions taken “for” or “on account of” religion, they do not stop there. Instead, they go on to provide broader protection for religious liberty. See, e.g., Maryland Act Concerning Religion (1649) (guaranteeing residents not be “troubled ... in the free exercise [of religion]”).

[much more history]

In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for Smith fails to overcome the more natural reading of the text. Indeed, the case against Smith is very convincing.

That conclusion cannot end our analysis. “We will not overturn a past decision unless there are strong grounds for doing so,” but at the same time, *stare decisis* is “not an inexorable command.” It “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” And it applies with “perhaps least force of all to decisions that wrongly denied First Amendment rights.”

In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against Smith: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. No relevant factor, including reliance, weighs in Smith’s favor.

Smith’s reasoning. As explained in detail above, Smith is a methodological outlier. It ignored the

“normal and ordinary” meaning of the constitutional text, and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment’s adoption. And the Court adopted its reading of the Free Exercise Clause with no briefing on the issue from the parties or amici.

Then there is Smith’s treatment of precedent. It looked for precedential support in strange places, and the many precedents that stood in its way received remarkably rough treatment. [detailing Smith treatment of precedent]

Finally, having swept all these cases from the board, Smith still faced at least one big troublesome precedent: *Yoder*. *Yoder* not only applied the *Sherbert* test but held that the Free Exercise Clause required an exemption totally unrelated to unemployment benefits. To dispose of *Yoder*, Smith was forced to invent yet another special category of cases, those involving “hybrid-rights” claims. *Yoder* fell into this category because it implicated both the Amish parents’ free-exercise claim and a parental-rights claim stemming from *Pierce v. Society of Sisters*. And in such hybrid cases, Smith held, the *Sherbert* test survived.

It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of Smith.

And then there is the problem that the hybrid-rights exception would largely swallow up Smith’s general rule. A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims. Take the claim in Smith itself. To members of the Native American Church, the ingestion of peyote during a religious ceremony is a sacrament. When Smith and Black participated in this sacrament, weren’t they engaging in a form of expressive conduct? Their ingestion of peyote “communicate[d], in a rather dramatic way, [their] faith in the tenets of the Native American Church,” and the State’s prohibition of that practice “interfered with their ability to communicate this message” in violation of the Free Speech Clause. And, “if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in [the so-called] hybrid cases to have mentioned the Free Exercise Clause at all.” It is telling that this Court has never once accepted a “hybrid rights” claim in the more than three decades since Smith.

Consistency with other precedents. Smith is also discordant with other precedents. Smith did not overrule *Sherbert* or any of the other cases that built on *Sherbert* from 1963 to 1990, and for the reasons just discussed, Smith is tough to harmonize with those precedents.

The same is true about more recent decisions. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990 (ADA). When the school discharged a teacher, she claimed that she had been terminated because of disability. Since the school considered her a “minister” and she provided religious instruction for her students, the school argued that her discharge fell within the so-called “ministerial exception” to generally applicable employment laws. The Equal Employment Opportunity Commission maintained that Smith precluded recognition of this exception because “the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability.” We nevertheless held that the exception applied.

There is also tension between Smith and our opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* (2018). In that case, we observed that “[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could

not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.” The clear import of this observation is that such a member of the clergy would be entitled to a religious exemption from a state law restricting the authority to perform a state-recognized marriage to individuals who are willing to officiate both opposite-sex and same-sex weddings.

Other inconsistencies exist. Smith declared that “a private right to ignore generally applicable laws” would be a “constitutional anomaly,” but this Court has often permitted exemptions from generally applicable laws in First Amendment cases. For instance, in *Boy Scouts of America v. Dale*, we granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, parade sponsors’ speech was exempted from the requirements of a similar law.

The granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, and cases holding generally applicable laws unconstitutional as applied are unremarkable. “[T]he normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact.” *Ayotte v. Planned Parenthood of Northern New Eng.* Thus, in *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)* (1982), we held that a law requiring disclosure of campaign contributions and expenditures could not be “constitutionally applied” to a minor party whose members and contributors would face “threats, harassment or reprisals.” Cf. *NAACP v. Alabama* (1958) (exempting the NAACP from a disclosure order entered to purportedly investigate compliance with a generally applicable statute). In *Hustler Magazine, Inc. v. Falwell* (1988), and *Snyder v. Phelps* (2011), the Court held that an established and generally applicable tort claim (the intentional infliction of emotional distress) could not constitutionally be applied to the particular expression at issue. Similarly, breach-of-the-peace laws, although generally valid, have been held to violate the Free Speech Clause under certain circumstances.

Workability. One of Smith’s supposed virtues was ease of application, but things have not turned out that way. Instead, at least four serious problems have arisen and continue to plague courts when called upon to apply Smith.

- (1) The “hybrid rights” exception, which was essential to distinguish *Yoder*, has baffled the lower courts. They are divided into at least three camps. Some courts have taken the extraordinary step of openly refusing to follow this part of Smith’s interpretation. The Sixth Circuit was remarkably blunt: “[H]old[ing] that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights ... is completely illogical.” A second camp holds that the hybrid-rights exception applies only when a free-exercise claim is joined with some other independently viable claim. The third group requires that the non-free-exercise claim be “colorable.”

It is rare to encounter a holding of this Court that has so thoroughly stymied or elicited such open derision from the Courts of Appeals.

- (2) Rules that “target” religion. Post-Smith cases have also struggled with the task of \*1919 determining whether a purportedly neutral rule “targets” religious exercise or has the restriction of religious exercise as its “object.” A threshold question is whether “targeting” calls for an objective or subjective inquiry. Must “targeting” be assessed based solely on the terms of the relevant rule or rules? Or can evidence of the rulemakers’ motivation be taken into account? If subjective motivations may be considered, does it matter whether the challenged state action is an adjudication, the promulgation of a rule, or the enactment of legislation? Should courts consider the motivations of only the officials who took the challenged action, or may they also take into account comments by superiors and others in a position of influence? And what degree of hostility to religion or a religious group is required to prove “targeting”?

The genesis of this problem was Smith’s holding that a rule is not neutral “if prohibiting the exercise of



religion” is its “object.” Smith did not elaborate on what that meant, and later in *Lukumi*, which concerned city ordinances that burdened the practice of Santeria, Justices in the Smith majority adopted different interpretations. Justice Scalia and Chief Justice Rehnquist took the position that the “object” of a rule must be determined by its terms and that evidence of the rulemakers’ motivation should not be considered. This interpretation had the disadvantage of allowing skillful rulemakers to target religious exercise by devising a facially neutral rule that applies to both the targeted religious conduct and a slice of secular conduct that can be burdened without eliciting unacceptable opposition from those whose interests are affected.

The alternative to this approach takes courts into the difficult business of ascertaining the subjective motivations of rulemakers. In *Lukumi*, Justices Kennedy and Stevens took that path and relied on numerous statements by council members showing that their object was to ban the practice of Santeria within the city’s borders. Thus, *Lukumi* left the meaning of a rule’s “object” up in the air.

When the issue returned in *Masterpiece Cakeshop*, the question was only partially resolved. Holding that the Colorado Civil Rights Commission violated the free-exercise rights of a baker who refused for religious reasons to create a cake for a same-sex wedding, the Court pointed to disparaging statements made by commission members, and the Court noted that these comments, “by an adjudicatory body deciding a particular case,” “were made in a very different context” from the remarks by the council members in *Lukumi*. That is as far as this Court’s decisions have gone on the question of targeting, and thus many important questions remain open.

The present case highlights two—specifically, which officials’ motivations are relevant and what degree of disparagement must be shown to establish unconstitutional targeting. In *Masterpiece Cakeshop*, the commissioners’ statements—comparing the baker’s actions to the Holocaust and slavery and suggesting that his beliefs were just an excuse for bigotry—went too far. But what about the comments of Philadelphia officials in this case? The city council labeled CSS’s policy “discrimination that occurs under the guise of religious freedom.” The mayor had said that the Archbishop’s actions were not “Christian,” and he once called on the Pope “to kick some ass here.” In addition, the commissioner of the Department of Human Services (DHS), who serves at the mayor’s pleasure, disparaged CSS’s policy as out of date and out of touch with Pope Francis’s teachings.

The Third Circuit found this evidence insufficient. Although the mayor conferred with the DHS commissioner both before and after her meeting with CSS representatives, the mayor’s remarks were disregarded because there was no evidence “that he played a direct role, or even a significant role, in the process.” The city council’s suggestion that CSS’s religious liberty claim was a “guise” for discrimination was found to “fal[l] into [a] grey zone,” and the commissioner’s debate with a CSS representative about up-to-date Catholic teaching, which “some might think ... improper” “if taken out of context” was “best viewed as an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition.” One may agree or disagree with the Third Circuit’s characterization and evaluation of the statements of the City officials, but the court’s analysis highlights the extremely impressionistic inquiry that Smith’s targeting requirement may entail.

Confusion and disagreement about “targeting” have surfaced in other cases. [describing more]

- (3) The nature and scope of exemptions. There is confusion about the meaning of Smith’s holding on exemptions from generally applicable laws. Some decisions apply this special rule if multiple secular exemptions are granted. Others conclude that even one secular exemption is enough. And still others have applied the rule where the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct.
- (4) Identifying appropriate comparators. To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State’s reasons for regulating the religious conduct apply with equal force to the

secular conduct with which it is compared. In *Smith*, this inquiry undoubtedly seemed straightforward: The secular conduct and the religious conduct prohibited by the Oregon criminal statute were identical. But things are not always that simple.

Cases involving rules designed to slow the spread of COVID-19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID-19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities that should be used for comparison has been hotly contested.

In *South Bay United Pentecostal Church v. Newsom* (2020), where the Court refused to enjoin restrictions on religious services, THE CHIEF JUSTICE's concurrence likened religious services to lectures, concerts, movies, sports events, and theatrical performances. The dissenters, on the other hand, focused on "supermarkets, restaurants, factories, and offices."

In *Calvary Chapel Dayton Valley v. Sisolak* (2020), Nevada defended a rule imposing severe limits on attendance at religious services and argued that houses of worship should be compared with "movie theaters, museums, art galleries, zoos, aquariums, trade schools, and technical schools." Members of this Court who would have enjoined the Nevada rule looked to the State's more generous rules for casinos, bowling alleys, and fitness facilities.

In *Roman Catholic Diocese of Brooklyn, Justices in the majority compared houses of worship with large retail establishments, factories, schools, liquor stores, bicycle repair shops, and pet shops, while dissenters cited theaters and concert halls.*

In *Danville Christian Academy, Inc. v. Beshear*, the District Court enjoined enforcement of an executive order that compelled the closing of a religiously affiliated school, reasoning that the State permitted pre-schools, colleges, and universities to stay open and also allowed attendance at concerts and lectures. The Sixth Circuit reversed, concluding that the rule was neutral and generally applicable because it applied to all elementary and secondary schools, whether secular or religious.

Much of *Smith*'s initial appeal was likely its apparent simplicity. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise.

Subsequent developments. Developments since *Smith* provide additional reasons for changing course. The *Smith* majority thought that adherence to *Sherbert* would invite "anarchy," but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and we have observed that the courts are well "up to the task" of applying that test.

Multiple factors strongly favor overruling *Smith*. Are there countervailing factors?

None is apparent. Reliance is often the strongest factor favoring the retention of a challenged precedent, but no strong reliance interests are cited in any of the numerous briefs urging us to preserve *Smith*. Indeed, the term is rarely even mentioned.

All that the City has to say on the subject is that overruling *Smith* would cause "substantial regulatory ... disruption" by displacing RFRA, RLUIPA, and related state laws, but this is a baffling argument. How would overruling *Smith* disrupt the operation of laws that were enacted to abrogate *Smith*?

One of the City's amici, the New York State Bar Association, offers a different reliance argument. It claims that some individuals, relying on *Smith*, have moved to jurisdictions with anti-discrimination laws that do not permit religious exemptions. The bar association does not cite any actual examples of individuals who fall into this category, and there is reason to doubt that many actually exist.

For the hypothesized course of conduct to make sense, all of the following conditions would have to be met. First, it would be necessary for the individuals in question to believe that a religiously motivated party in the jurisdiction they left or avoided might engage in conduct that harmed them. Second, this conduct would have to be conduct not already protected by Smith in that it (a) did not violate a generally applicable state law, (b) that law did not allow individual exemptions, and (c) there was insufficient proof of religious targeting. Third, the feared conduct would have to fall outside the scope of RLUIPA. Fourth, the conduct, although not protected by Smith, would have to be otherwise permitted by local law, for example, through a state version of RFRA. Fifth, this fear of harm at the hands of a religiously motivated actor would have to be a but-for cause of the decision to move. Perhaps there are individuals who fall into the category that the bar association hypothesizes, but we should not allow violations of the Free Exercise Clause in perpetuity based on such speculation.

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in Smith should now be corrected.

If Smith is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that Smith replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.

CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people today find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights.

We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding.

The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.

Suppressing speech-or religious practice-simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable," with racism, which is neither. And it promised 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." An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community.

## Free Exercise

### Is there a tension between Free Exercise and Establishment?

So the first thing to notice about the religion clause of the First Amendment is, of course, that it's actually two clauses, free exercise and establishment. And it has, accordingly, spawned two different doctrinal lines.

I'd like to start with a hypo that highlights the difficult issues between the two clauses. Should the government give exceptions to the military draft for people with religious objections to serving? Here's one thing you might think about this. The First Amendment forbids Congress from prohibiting the free exercise of religion. If I'm a Quaker, the free exercise of my religion means pacifism. If Congress throws me in the slammer for refusing to do violence, it's prohibited the free exercise of my religion. Unconstitutional.

But here's another thing you might think. There's also the establishment clause. And (I'll give you a sneak preview) we know the establishment clause doesn't just mean that Congress can't set up a national church, like the Church of England (the strict concept of an "established church"). Typically, we think that the Establishment clause at a minimum requires the government to be religiously neutral, not to prefer some religions to others (or to nonreligion altogether). Providing special privileges to a handful of religions, that's not neutral! Draft exemption for the Quakers? Unconstitutional!

Obviously, those two views can't both be right, as they contradict one another. But it's something the Court and scholars have struggled with. What can we do about it?

Yet the Framers didn't think the two clauses were in tension with one another. The classic founding-era document about the relationship between Establishment and Free Exercise is James Madison's "Memorial and Remonstrance," where he scolded the Virginia legislature for proposing to use tax dollars to support teachers of religion. Let's just say Madison was not happy with this proposal; at one point he went so far as to call it "an unhallowed perversion of the means of salvation"!!!!

Most importantly, however, he made absolutely clear that he saw such an establishment of religion as an infringement of free exercise as well, because the underlying idea underneath the two, treating adherents to different religions equally, was violated. Here's Madison:

[T]he proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree.

Madison said that, note, about the mere provision of public funding for religious instruction. So it will be profitable to us to think about the religion clauses in that light. Of course, "profitable" is not the same as "conclusive," because people who prefer to read the Establishment clause as of narrower scope have lots of other founding-era documents to point to. But I like the Remonstrance.

Ok, enough of that, let's hammer through some doctrine.

### Free Exercise doctrine basics

Most of the doctrine here is actually pretty simple and straightforward, but it also has changed, and so you need some history.

First, a basic proposition: everybody agrees that the government can't target religion. "The Catholic Church is banned." Not constitutional. Likewise, the government can't target religious practice as such. "No communion wine." Not cool.

But the real question is the one I gave you a minute ago in the hypo: the extent to which the government can make believers obey generally applicable laws that conflict with their faith. That is, does religion provide an exemption to laws that are not targeted against religious practice?

#### The old doctrine: some accommodations

In the middle of the 20th century, we had a bunch of cases which might lead one to suspect that the government is obliged to provide people of faith exemptions to generally applicable laws, or at least to meet some kind of heightened scrutiny if it wants to do so.

For example, in *Wisconsin v. Yoder*, 406 US 205 (1972), the Court held that the state could not force Amish parents to send their children to school beyond age 14 pursuant to a generally applicable law requiring such schooling. The Court applied some unclear kind of heightened scrutiny to carve out a religious exemption to the law, holding that "in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Moreover, the Court quite explicitly made clear that the law's general applicability would not save it (at least from an as-applied challenge):

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Earlier, in *Sherbet v. Verner*, 374 U.S. 398 (1963), the other landmark case along these lines, the Court upheld the claim to unemployment compensation of a Seventh-Day Adventist who was fired for refusing to work on her Saturday sabbath. Reversing the underlying ruling denying her benefits, the Court said:

[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Moreover, the Court stated a standard that sounded quite a lot like strict scrutiny for legal burdens on religious practice.

#### The modern doctrine: no accommodations

*Employment Division v. Smith* changed all that: now, governmental intrusions on religious practice via generally applicable law get rational basis. Needless to say, I want you to look at what the Court does with *Yoder* and *Sherbert* and ponder questions like "how much of those cases survive," and "what is the actual justification for this decision?"

So is that it? Is the free exercise clause dead? Well, no, for two reasons. First, as noted, everyone agrees that the government can't target religious practice. And every once in a while the government is dumb enough to do so. *Lukumi Babalu Aye* is really a hilariously easy case on this respect—there's a reason it was 9-0 in the court. Hopefully the city fired its lawyers. If you ever write a bill so stupidly drafted I'm going to personally come and take your law degree back, and I'm going to turn it over to Leonidas wrapped around a scratching post.<sup>75</sup>

The second issue is “but wait a minute, Gowder, didn't we just have the Hobby Lobby case?” Indeed, I've even assigned the Hobby Lobby case to you. And if you haven't been living in a cave for the last few years, you might know that Hobby Lobby was a challenge to a generally applicable law, namely, the requirement that employers provide contraception insurance, on the basis of a religious objection. So what's the dealio with that?

#### RFRA

Well, the dealio with that is that Congress didn't like *Employment Division v. Smith*. So it passed a law known as the “Religious Freedom Restoration Act” (RFRA) which attempted to legislatively override the Smith, subjecting generally applicable laws that burden religion to strict scrutiny.

Congress tried to apply RFRA to the states as well as the federal government, but the Court in *City of Boerne v. Flores*, held that the application to the states was beyond Congress's enumerated powers. (We'll read that later.)

But RFRA still applies to the federal government.<sup>76</sup> So that's where the law is right now. When you read Hobby Lobby, I'd like you to focus primarily on two things, first, figuring out the notion of what a burden on religious exercise is, and second, figuring out what the corporate, and more generally economic, function of the challenger plays in the decision.

#### No judicial theology

One other big and important point that I want to mention about the Free Exercise clause as well as statutory religious exemptions: one thing the Courts clearly can't do is interpret people's beliefs for them. If you're a Catholic, and you think your religion forbids eating meat, and somehow this has become legally relevant, the Court can't say “actually, the Pope's encyclical number X clearly says that bacon is yummy, so this doesn't burden your religion.”

Similarly, the courts cannot, obviously, make rulings about the truth or falsity of religious belief, an issue that comes up particularly when religions claim things that might have real-world impact, like a belief in faith healing or fortune-telling.

Finally, courts will often decline to get involved in internal church disputes, even when those disputes touch on issues of general law; for example, there are cases where the courts have refused to adjudicate property disputes between a church and a splinter group.

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<sup>75</sup>Believe it or not, that is actually only the *second-dumbest* law to show up in a Supreme Court First Amendment case. Check out *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), where the airport people enacted a regulation prohibiting— wait for it — all “First Amendment activities.” **Important legal career hint:** if you write a law that actually describes the activity you're prohibiting in terms of the very Constitutional provision that says you can't prohibit it, that law is going to be struck down.

<sup>76</sup>Of course, if you're a sensible type, you might ask “sure, I can see how it applies to things like federal regulations, but can it really apply to Acts of Congress? Isn't there a basic rule of law that says that later enactments implicitly repeal earlier enactments to the extent they conflict, such that the RFRA can't be applied to, oh, say, Obamacare?” See e.g. *Credit Suisse v. Billing*, 551 U.S. 264 (2007). My answer to this objection is: “you'd think so, wouldn't you? Ask a justice, not me.” This has actually been the object of substantial discussion in the con law community. One way to possibly resolve the problem is just to treat RFRA as giving the courts a strong presumption on how later laws are to be interpreted, and hence forbidding *implicit* repeal while still, obviously, permitting explicit repeal or carve-out.

But what courts can and do do is judge the sincerity of a litigant's religious belief. This comes up a lot when people cook up frivolous religious claims to get out of obligations they don't like. ("I'm a Quaker, honest, don't send me to war!") Prisoners are notorious for inventing the Church of Free Steak and Whiskey and filing lawsuits claiming that the prisons are obliged to feed them thusly, but, of course, they don't actually hold those beliefs and the Court can recognize that fact.

#### IS ANY OF THIS TRUE ANY MORE??

Well, maybe. As *Fulton* indicates, there are at least 3 justices who flat-out want to overrule *Smith*, and a fourth (Barrett) who is strongly leaning toward the idea. We'll see what happens when someone gives the court a case that Roberts and Barrett can't dispose of without doing so. A lot of the impetus for this really came from the covid cases—as the Alito opinion in *Fulton* hints, we've seen a *lot* of cases where churches successfully challenged stay-at-home orders during covid, universally on the argument that the laws weren't neutral under *Lukumi* because other secular activities like going to the grocery store were permitted.<sup>77</sup>

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<sup>77</sup>This seems to me a strained application of *Lukumi*, because we damn well know the motivations of the religious bigots running the city of Hialeah, whereas by contrast it's pretty hard to believe that people like Andrew Cuomo, for all their flaws, were bent on persecuting Christians. But Alito's points about the difficulty of figuring out comparators really come out in thinking about those cases.

## 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*, 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 Cases* should 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. 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. 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*, 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.

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 Cases* involved 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. 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.

Finding no constitutional protection against state intrusion of the kind envisioned 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. 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 (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* ("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* (claiming an "overwhelming consensus among leading constitutional scholars" that the opinion is "egregiously wrong"); C. Black, *A New Birth of Freedom* (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. 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 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. 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.”

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, 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.

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. 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. 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.” While 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.”

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.” 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.”

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*. 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.” Similarly, in *Wolf v. Colorado* the 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. 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*. 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.

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.” Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice.

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.” 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.”

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.

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*, .

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, and in *Heller*, we held that individual self-defense is “the central component” of 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.” 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*. *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.”

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*. 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. Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. 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. 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. 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.” see also 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. Abolitionist authors wrote in support of the right. 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.” 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.”

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. 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.” [Here the court also cited Louisiana, Kentucky, Florida and Alabama laws.]

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.” 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 Amendment<sup>19</sup>— contained numerous examples of such abuses. 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].” 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.”

Union Army commanders took steps to secure the right of all citizens to keep and bear arms, 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.” 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, 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 (“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. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen’s Bureau Act, aimed to protect “the consti-

tutional 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 (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.” 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).

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.” 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. 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*; J. Pomeroy, *An Introduction to the Constitutional Law of the United States*.

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. 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 Amendment 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.” 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. 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, those groups were widely involved in harassing blacks in the South.

Fourth, municipal respondents’ purely antidiscrimination theory of the Fourteenth 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. 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. 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.” 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. Therefore, the municipal re-

spondents 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.

This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. 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. 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." 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." 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."

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."

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; second, the right does not protect minorities or persons neglected by those holding political power; 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; 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. 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. Another brief submitted by 38 States takes the same position.



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." 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. "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."

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. 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.

*From the footnotes to the majority opinion:*

In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.

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**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. It is that claim I wish to address.

After stressing the substantive dimension of what he has renamed the "liberty clause," Justice Stevens proceeds to urge readoption of the theory of incorporation articulated in *Palko v. Connecticut*. 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," many of the rights Justice Stevens thinks are incorporated could not pass muster under either test: abortion; homosexual sodomy; the right to have excluded from criminal trials evidence obtained in violation of the Fourth Amendment; and the right to teach one's children foreign languages, 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." Not all such rights are in, however, since only "some fundamental aspects of personhood, dignity, and the like" are protected. 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*, as a right can be. I can find no other explanation for such certitude except that Justice Stevens, despite his forswearing of "personal and private notions," 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. Courts, he proclaims, must "do justice to [the Clause's] urgent call and its open texture" by exercising the "interpretive discretion the latter embodies." (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"—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," who can be entrusted with deciding the Due Process Clause's scope—which rights serve the Amendment's "central values"—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. 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, but as he has just made clear, he thinks historical inquiry unavailing. Moreover, trusting the meaning of the Due Process Clause to what has historically been protected is circular, 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." 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. 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." 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, *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*. But his view of it is surely not very confining, since he holds out as a "canonical" exemplar of the proper approach *Lawrence*, which overruled a case decided a mere 17 years earlier, *Bowers v. Hardwick*. 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, 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.

Justice Stevens also relies on the requirement of a "careful description of the asserted fundamental liberty interest" to limit judicial discretion. I certainly agree with that requirement, though some cases Justice Stevens approves have not applied 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" 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. 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" 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." Justice Stevens must therefore have in mind some other use for the careful-description requirement—perhaps just as a means of ensuring that courts "proceed slowly and incrementally." 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. 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 fundamental because it is "different in kind" from other rights we have recognized. 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." 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. 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, 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. 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. Justice Stevens, of course, has no problem with applying the Establishment Clause to the States. While he insists that Clause is not a "federalism provision," 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. 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. 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.” 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* (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 “intervene,” 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. 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” 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, historically 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, 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” 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, 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,” but replaces it with a system in which unelected and life-tenured judges always get their way. That such usurpation is effected unabashedly—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. 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.

After defending the careful-description criterion, Justice Stevens quickly retreats and cautions courts not to apply it too stringently. 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.” That must be avoided, since it endangers rights Justice Stevens does like. 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. But it is precisely the “Second Amendment right to keep and bear arms” that petitioners argue is incorporated by the Due Process Clause. 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 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.” 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.” 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.

As Justice Stevens notes, 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.” 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.

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.” 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,” or less “enduring.” Not proven. Moreover, whatever relevance Justice Stevens ascribes to current “values and commitments of the American people,” it is hard to see how it shows fidelity to them that he disapproves a different subset of old cases than the Court does.

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**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,” and “deeply rooted in this Nation’s history and tradition.” 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* that the Constitution did not recognize black Americans as citizens of the United States or their own State.

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*, 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. 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. Cruikshank*. 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. 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." 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. 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”—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,” 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, while the plurality makes yet another effort to impose principled restraints on its exercise. 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. 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 tenuous 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*. 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. 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*

(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. [Historical discussion omitted.]

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. 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.

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#### **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, 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— 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.” 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. 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.” 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.” 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.” 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.” 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. 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." 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, still allocates a general "police power to the States and the States alone." 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. But 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. And we have declined to apply several provisions to the States in any measure. 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. In 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. 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" 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; 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. 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. 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." 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." 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. 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," 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, 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, and, above all else, the "traditions and conscience of our people," 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'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," 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." 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. 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," then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection. 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, 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," 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," our doctrine has steered away from "laws that touch economic problems, business affairs, or social conditions," and has instead centered on "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." 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," "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny," 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. 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. Courts have a “comparative advantage” over the elected branches on a limited, but significant, range of legal matters.

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.” 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,” 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.” Many of my colleagues and predecessors have stressed the same point, some with great eloquence. 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.”

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.” 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.” 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 whose assistance was sought, could prevail in a more particularized challenge.” 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.”

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." 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. 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." But it is our duty "to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake," 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, and the Court's opinion was bookended by reminders that its holding was limited to that one issue. 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," 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. 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*.

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.” 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. 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.” 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." 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."

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 (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. 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, 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." 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, 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."

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? What does it mean for a right to be "deeply rooted in this Nation's history and tradition?" 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 (dissenting opinion). 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." 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." 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; 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), 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* (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. 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 *Loving* that 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. 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.

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**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. Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others’ lives at risk. And the use of arms for private self-defense does not warrant federal constitutional protection from state regulation.

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.

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*, 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.” 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. And, indeed, neither of the parties before us in this case has asked us to employ the majority's history-constrained approach.

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 ("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. 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." *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. 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* ("[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").

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, 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.

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.” *Caroline 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. 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*. The Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to this power. A decade ago, we wrote that there is “no better example of the police power” than “the suppression of violent crime.” And examples in which the Court has deferred to state legislative judgments in respect to the exercise of the police power are legion.

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. 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.” With respect to other incorporated rights, this sort of inquiry is sometimes present. See, e.g., *Brandenburg v. Ohio* (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?

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. 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.” They are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article III 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, 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.”

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. 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. A



citizens committee spent months gathering information about handguns. It secured 6,000 signatures from community residents in support of a ban. 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. 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.

## Incorporation and Second Amendment

The basic problem that incorporation solves is really simple: the Bill of Rights only, on its terms, applies to the federal government. It's full of lines like "Congress shall make no law," rather than "the states shall make no law."

Accordingly, there's nothing on its face forbidding the states from, e.g., conducting unreasonable searches, levying cruel and unusual punishments, establishing churches, coercing confessions, and so on, and so on. And this makes sense: the Constitution was supposed to be primarily about enumerating and limiting federal power, right? At the time of the framing, the states had their own constitutions, and those were live things—in Virginia, for example, there were real serious debates about religious freedom in the terms of state law and state ideals; these were rights guaranteed in state courts. (At least, that's one conventional story.)

Like so much else in this course, the Reconstruction Amendments changed all that. After they were enacted, the question quickly arose: did the Reconstruction Amendments make the Bill of Rights apply to the states? That's called the "incorporation" question.

### Privileges and Immunities: the Supreme Court's biggest screwup?

If you've paid attention to the text of the Constitution, you might immediately have noticed a piece of text that suggests that it does. The second sentence in section 1 of the 14th Amendment, the sentence that includes the due process and equal protection clauses, starts with another clause, the privileges and immunities clause. It reads: "No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States[.]"

Now, here's one natural, indeed, I dare say "literate" thing to think. The Bill of Rights. It describes privileges and immunities of citizens of the United States. To be sure, its protections apply to non-citizens as well, but one thing we ought to be able to say about it is that it also describes the things you're entitled to in this country at a minimum as a citizen—free speech, not having soldiers quartered in your homes, etc. I mean, not having troops lying around eating all my food and scaring the cat—'Murica, in a nutshell, right? Indeed, some Supreme Court justices have thought just this. Most notable, of course, is our greatest hard-line textualist justice, Hugo Black. As always, he's the one who actually likes to read the constitution, and he thought the privileges and immunities clause incorporated the Bill of Rights.

Nope. If you've learned nothing else from our fundamental rights material, you doubtless will have learned that when the Supreme Court has a really easy provision, written right into the constitutional text, that seems to authorize it doing something it wants to do anyway, instead it'll reject that approach and find a totally different, much less textually coherent, way to do it.

So in the *Slaughterhouse* cases, 83 U.S. 36 (1873), the Court held that the privileges and immunities clause didn't incorporate the Bill of Rights. It also stated—in a case about a state's granting monopoly rights to slaughterhouses, for goodness sakes—a really narrow interpretation of the Reconstruction Amendments, basically as only to protect former slaves. All the rest of its other holdings (or dicta, or just general interpretations) have been overturned, but the privileges and immunities clause holding hasn't been. With only one exception, the privileges and immunities clause of the 14th amendment has been a dead letter since then. (The exception is an interstate travel question: *Saenz v. Roe*, 526 U.S. 489 (1999) struck down a law restricting welfare benefits for new residents on the basis of the privileges and immunities clause. It was a Stevens decision, and we know he wasn't a big fan of, well, doctrine. It hasn't been extended any further.)

## Due Process incorporation

So when the Supreme Court turned around at the end of the 19th and beginning of 20th centuries and actually started applying Bill of Rights protections to the states, guess what clause they used. I'll give you a clue: it's the same clause they use every time they want to make up some constitutional law. Yep, you got it. It's the Due Process Clause again! Because, YOLO. The Bill of Rights isn't part of the privileges and immunities of citizens, but it is, according to the wise heads on the Supreme Court, part of the liberty guaranteed by the Due Process Clause! And, as usual, never mind that on its face all that clause guarantees is process; we'll just use it once again as a second-choice textual hook for our constitutional doctrine.

So they started incorporating the Bill of Rights through the Due Process Clause. And then the debates started.

## Total vs partial incorporation

The key debate was between total incorporationists and partial incorporationists (and a weird little third position, described by Harlan in *Griswold*, who just wanted to say "liberty guaranteed by the 14th amendment," full stop, and not even talk about the text of the ten, about which the less said the better.) As usual, Justice Black had what I'll just flat-out call the correct position, as well as the sensible and direct one, namely, total incorporation. And as usual, Justice Black lost.

So instead of incorporating the whole thing, the Court incorporated the Bill of Rights in drips and drabs, and still hasn't incorporated it all. In particular, the Court has explicitly held that the civil jury trial right in the 7th amendment hasn't been incorporated, and neither has the grand jury in criminal cases. Those are the most important ones, where the Court explicitly held "no incorporation," but there are also a few provisions where the Court hasn't reached the question, like the 3rd amendment (of course). The excessive fines clause of the 8th Amendment just got incorporated in 2019 (*Timbs v. Indiana*). But the broad idea, which we'll see in detail when we get to our case for this material, is that the Court incorporates the stuff that seems really really important. As I noted earlier, we see language about "fundamental rights" making a confusing appearance here again.

## Second Amendment

So that's what you really need to know about incorporation. And it's also a good route into the Second Amendment question, because the the Second Amendment was only recently incorporated against the states, as you'll see, in 2010. That's the case we're reading on the subject, *McDonald*. But you need to know a little about the prior history.

The prior history is essentially one case: *District of Columbia v. Heller*, 554 U.S. 570 (2008). Two years before *McDonald*, Scalia, writing for the court, declared that the Second Amendment protected an individual right to bear arms, and struck down a D.C. handgun law.<sup>78</sup>

At the time, it was very much an open question whether the Second Amendment created an individual right. The text of the amendment is famously ambiguous: "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." A big question stood in the path of the Court finding an individual right: what's the deal with this "militia" stuff? Does it mean that the right at issue is only for states to have militias? At the time of the revolution, lots of folks believed that the military force should be state militias, not standing federal armies, and one way to read the Second Amendment is that it is just a reservation of rights to the states to do so. But then there's this "the people" language. Does "the people" mean individuals?

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<sup>78</sup>Note that because it's D.C., that is, a territory under the direct control of the federal government, the Court didn't need to resolve the incorporation issue in order to strike down that municipal regulation.

So in *Heller*, Scalia naturally spent many, many pages doing the originalist thing. The key sentence from *Heller* summarizes this historical review: "In numerous instances, 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia." So the "prefatory" clause, the militia bit, was understood to support, not to undermine, the notion of bearing arms as a military right. In Scalia's words: "the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights."

#### Second Amendment after Reconstruction

The other big question about the Second Amendment as an individual right is, even if one disagrees with Scalia, did the Reconstruction Amendments change its meaning? There's some evidence, much of which Scalia cites, that the radical Republicans were particularly concerned with the way that Southern states disarmed freed slaves (for obvious reasons). Here's a representative passage from Scalia in *Heller*:

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms.. Their arms are taken from them by the civil authorities... Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed."

So even if you disagree with the claim that the founders originally thought that the Second Amendment was an individual right, you might think that it became an individual right in what we might call the re-founding of the republic after the civil war. Of course, there's plenty of room to disagree; see the dissents in *Heller*.

#### Bear arms for what purpose?

Particularly, there's a further question, aptly raised by Stevens. Suppose the Second Amendment protects a right to collectively or individually bear arms, e.g., to potentially form a militia at some point or to resist a tyrannical English king—or some postbellum Southern re-enslavers/lynch mobs. Does it also protect an individual right to bear arms for hunting, for self-defense against street crime, or the like?

This is an important question, because lots of gun regulations require things like trigger locks, disassembled storage, and the like, which make it harder, arguably, to use guns for self-defense against some imaginary burglar, but still perfectly possible to take the gun out and use it to participate in the revolution to throw off the stamp act or some bloody colonial nonsense, or to go out hunting deer, or whatever. Likewise, consider regulations of things like concealed carry: probably won't impede hunting, might impede vigilantism or rebellion.

The Court had to confront those issues in *Heller*, and struck down a D.C. trigger lock requirement on the grounds that it would make the weapon less useful for self defense. Scalia again: "We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." So this substantially restricts the scope of regulations that might be permissible, by constitutionalizing a principle of self-defense use.

Onto McDonald.

Breyer's dissent in *Heller* focuses on the idea of a "well-regulated" militia. Doesn't that, just textually, imply that there's a substantial scope for, well, regulation? And then he has a lot of talk about the standard to apply to Second Amendment cases, which Scalia basically just dismisses.

That takes us to *McDonald*. In reading *McDonald*, look for the standard by which the court decides incorporation questions, and also for the way the court uses post-framing history, especially around the time of the civil war. Also consider the question of the messy relationship between incorporation and substantive due process, as discussed by Stevens, and his exchange with Scalia's concurrence—and perhaps even think about it in the context of Harlan's opinion in *Griswold*. This is a case where the concurrences and the multiple dissents really add a bunch of value to thinking about the root-level constitutional issues in play. We get a bunch of really interesting and important theories about the reconstruction amendments flying about in this case, and it needs to be read very carefully.

FYI, as of this writing there's a new Second Amendment case pending before the Supreme Court, *New York State Rifle & Pistol Association Inc. v. Bruen*,<sup>79</sup> so we might get some clarification soon.

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<sup>79</sup><https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-v-bruen/>

## Exercise: Many Gun Regulations

Consider the following gun regulations. Which are constitutional? Which aren't? What arguments might we make on either side?

1. No citizen may possess more than three guns.
2. No guns may be stored loaded in a home.
3. No persons with convictions for any violent crime, at any point in the past, may possess a gun. (Assume here that "violent crime" is defined in a sensible way.)
4. Before any person is permitted to possess a gun, they must pass a state-licensed firearms safety course. (Assume here that availability and standards in such a course are more-or-less reasonable.)
5. No firearms with a magazine capacity of more than six bullets may be sold or possessed within the state.
6. Any firearm possessed in the state must have a biometric trigger lock which effectively prevents it being fired by any person other than the purchaser.
7. No concealed firearms are permitted in the state; all firearms must be worn openly and visible to the public at all times.
8. There is a "gun violence remediation tax" assessed yearly on all owners of firearms, assessed at 10% of the market value of each weapon owned.
9. No firearms may be carried within 1000 yards of any school, playground, nursery, daycare, or public park.
10. When outside the home, all firearms must be carried inside a locked container that takes no less than one minute to open.
11. No semi-automatic weapons may be sold or possessed within the state. (N.B., gun advocates (a.k.a. "gun nuts") often argue that gun control advocates (a.k.a. "gun grabbers") misunderstand the definition of a semi-automatic weapon; for present purposes, assume that this law means that no gun may be sold unless it mechanically requires some separate chambering action, independent of a trigger pull, between firings.)
12. No "hollow-point" bullets may be sold or possessed in the state. (N.B., many gun control advocates argue that "hollow-point" bullets are designed to expand and do more damage to flesh on impact)
13. No person may buy more than fifty rounds of ammunition per month. (Or some higher number... what's a reasonable limit?)
14. No person may buy ammunition over the internet or mail order; all must be purchased in person.

## Heart of Atlanta Motel v. United States

379 U.S. 241 (1964)

### Mr. Justice CLARK delivered the opinion of the Court

This is a declaratory judgment action, attacking the constitutionality of Title II of the Civil Rights Act of 1964. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, s 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a 'taking' within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law.

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the Civil Rights Cases. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was

to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in \* \* \* public accommodations through the exercise by Congress of the powers conferred upon it \* \* \* to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 17327 and one in the House, H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities,

federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

This Title is divided into seven sections beginning with § 201(a) which provides that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.'

There are listed in § 201(b) four classes of business establishments, each of which 'serves the public' and 'is a place of public accommodation' within the meaning of § 201(a) 'if its operations affect commerce, or if discrimination or segregation by it is supported by State action.' The covered establishments are:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- (2) any restaurant, cafeteria \* \* \* (not here involved);
- (3) any motion picture house \* \* \* (not here involved);
- (4) any establishment \* \* \* which is physically located within the premises of any establishment otherwise covered by this subsection, or \* \* \* within the premises of which is physically located any such covered establishment \* \* \* (not here involved).'

Section 201(c) defines the phrase 'affect commerce' as applied to the above establishments. It first declares that 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se. Restaurants, cafeterias, etc., in class two affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have 'moved in commerce.' Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., 'which move in commerce.' And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment 'the operations of which affect commerce.' Private clubs are excepted under certain conditions.

Section 201(d) declares that 'discrimination or segregation' is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, § 202 affirmatively declares that all persons 'shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.'

Finally, § 203 prohibits the withholding or denial, etc., of any right or privilege secured by § 201 and § 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

It is admitted that the operation of the motel brings it within the provisions of § 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal



Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’ At the same time, however, it noted that such an objective has been and could be readily achieved ‘by congressional action based on the commerce power of the Constitution.’ Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is § 201(d) or § 202, having to do with state action, involved here and we do not pass upon either of those sections.

In light of our ground for decision, it might be well at the outset to discuss the Civil Rights Cases, *supra*, which declared provisions of the Civil Rights Act of 1875 unconstitutional. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in ‘inns, public conveyances on land or water, theaters, and other places of public amusement,’ without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation’s commerce than such practices had on the economy of another day. Finally, there is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that ‘no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments (Thirteenth, Fourteenth, and Fifteenth),’ the Court went on specifically to note that the Act was not ‘conceived’ in terms of the commerce power and expressly pointed out:

Of course, these remarks (as to lack of congressional power) do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes \* \* \*. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof.

Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the Civil Rights Cases have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself 'dramatic testimony to the difficulties' Negroes encounter in travel.<sup>80</sup> These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is 'no question that this discrimination in the North still exists to a large degree' and in the West and Midwest as well. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his 'belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.' We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

'The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' Nor does it make any difference whether the transportation is commercial in character.

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling; to criminal enterprises; to deceptive practices in the sale of products; to fraudulent security transactions; to misbranding of drugs; to wages and hours; to members of labor unions; to crop control; to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' As Chief Justice Stone put it in *United States v. Darby*:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*.

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<sup>80</sup>This is the famous "Green Book" -PG

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however ‘local’ their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no ‘right’ to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, ‘by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.’

We find no merit in the remainder of appellant’s contentions, including that of ‘involuntary servitude.’ As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval the laws of ‘all the States’ prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way ‘akin to African slavery.’

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

## Jones v. Alfred H. Mayer Co.

392 U.S. 409 (1968)

### **Mr. Justice STEWART delivered the opinion of the Court.**

In this case we are called upon to determine the scope and constitutionality of an Act of Congress, 42 U.S.C. § 1982, which provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief. The District Court sustained the respondents' motion to dismiss the complaint, and the Court of Appeals for the Eighth Circuit affirmed, concluding that §1982 applies only to state action and does not reach private refusals to sell. We granted certiorari to consider the questions thus presented. For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.

[discussion of interpreting the statute to cover private versus public discrimination mostly omitted, except for the following paragraphs which have important history]

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, 'the same right' to purchase and lease property 'as is enjoyed by white citizens.' As the Court of Appeals in this case evidently recognized, that right can be impaired as effectively by 'those who place property on the market' as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property 'is placed on the market for whites only, whites have a right denied to Negroes.' So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy 'the same right \* \* \* as is enjoyed by white citizens \* \* \* to \* \* \* purchase (and) lease \* \* \* real and personal property.'

On its face, therefore, § 1982 appears to prohibit all discrimination against Negroes in the sale or rental of property discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 'means what it says'—to use the words of the respondents' brief—then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

In its original form, 42 U.S.C. § 1982 was part of § 1 of the Civil Rights Act of 1866. That section was cast in sweeping terms:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, \* \* \* are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, \* \* \* shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and

equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The crucial language for our purposes was that which guaranteed all citizens 'the same right, in every State and Territory in the United States, \* \* \* to inherit, purchase, lease, sell, hold, and convey real and personal property \* as is enjoyed by white citizens \* \* \*.' To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by 'State or local law' but also by 'custom, or prejudice.' Thus, when Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.

Indeed, if § 1 had been intended to grant nothing more than an immunity from governmental interference, then much of § 2 would have made no sense at all. For that section, which provided fines and prison terms for certain individuals who deprived others of rights 'secured or protected' by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed. There would, of course, have been no private violations to exempt if the only 'right' granted by § 1 had been a right to be free of discrimination by public officials. Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case that § 1 was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2.

In attempting to demonstrate the contrary, the respondents rely heavily upon the fact that the Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes laws which had saddled Negroes with 'onerous disabilities and burdens, and curtailed their rights \* \* \* to such an extent that their freedom was of little value \* \* \*.' *Slaughter-House Cases*. The respondents suggest that the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States. But the Civil Rights Act was drafted to apply throughout the country, and its language was far broader than would have been necessary to strike down discriminatory statutes.

That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away with the Black Codes also had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. 'Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced' to show that 'private outrage and atrocity' were 'daily inflicted on freedmen \* \* \*.' The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.

Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward negroes and the need to protect them from the resulting persecution and discrimination. The report noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns, but described such laws as 'mere isolated cases,' representing 'the local outcroppings of a spirit \* \* \* found to prevail everywhere'—a spirit expressed, for example, by lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted. The report concluded that, even if anti-Negro legislation were 'repealed in all the States lately in rebellion,' equal treatment for the Negro would not yet be secured.

In this setting, it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in the former rebel States. That the Congress which assembled

in the Nation's capital in December 1865 in fact had a broader vision of the task before it became clear early in the session, when three proposals to invalidate discriminatory state statutes were rejected as 'too narrowly conceived.' From the outset it seemed clear, at least to Senator Trumbull of Illinois, Chairman of the Judiciary Committee, that stronger legislation might prove necessary. After Senator Wilson of Massachusetts had introduced his bill to strike down all racially discriminatory laws in the South, Senator Trumbull said this:

I reported from the Judiciary Committee the second section of the (Thirteenth Amendment) for the very purpose of conferring upon Congress authority to see that the first section was carried out in good faith \* \* \* and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted, not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights. \* \* \* And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. \* \* \* (So) when the constitutional amendment is adopted I trust we may pass a bill, if the action of the people in the southern States should make it necessary, that will be much more sweeping and efficient than the bill under consideration.'

Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. The next day Senator Trumbull again rose to speak. He had decided, he said, that the 'more sweeping and efficient' bill of which he had spoken previously ought to be enacted

at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom \* \* \*.

On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866. He described its objectives in terms that belie any attempt to read it narrowly:

Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

Of course, Senator Trumbull's bill would, as he pointed out, 'destroy all (the) discriminations' embodied in the Black Codes, but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights':

the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.'

As to those basic civil rights, the Senator said, the bill would 'break down all discrimination between black men and white men.'

That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and

as its great danger by its enemies but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly ‘determine the persons who (would) enjoy \* \* \* property within the States.’ threatening the ability of white citizens ‘to determine who (would) be members of (their) communit(ies) \* \* \*.’ The bill’s advocates did not deny the accuracy of those characterizations. Instead, they defended the propriety of employing federal authority to deal with ‘the white man \* \* \* (who) would invoke the power of local prejudice’ against the Negro. Thus, when the Senate passed the Civil Rights Act on February 2, 1866, it did so fully aware of the breadth of the measure it had approved.

In the House, as in the Senate, much was said about eliminating the infamous Black Codes. But, like the Senate, the House was moved by a larger objective –that of giving real content to the freedom guaranteed by the Thirteenth Amendment. Representative Thayer of Pennsylvania put it this way:

(W)hen I voted for the amendment to abolish slavery \* \* \* I did not suppose that I was offering \* \* \* a mere paper guarantee. And when I voted for the second section of the amendment, I felt \* \* \* certain that I had \* \* \* given to Congress ability to protect \* \* \* the rights which the first section gave \* \* \*.’

‘The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. \* \* \* The events of the last four years \* \* \* have changed (a) large class of people \* \* \* from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.’

Representative Cook of Illinois thought that, without appropriate federal legislation, any ‘combination of men in (a) neighborhood (could) prevent (a Negro) from having any chance’ to enjoy those benefits. To Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights including the ‘right to \* \* \* purchase, lease, sell, hold, and convey \* \* \* property,’ Congress must provide that ‘there \* \* \* be no discrimination’ on grounds of race or color.

It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act.

39

President Andrew Johnson vetoed the Act on March 27, and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer ‘the right \* \* \* to purchase \* \* \* real estate \* \* \* without any qualification and without any restriction whatever \* \* \*.’ Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews. Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President’s veto by the requisite majorities, and the Civil Rights Act of 1866 became law.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment. It is quite true that some members of Congress supported the Fourteenth Amendment ‘in order to eliminate doubt as to the constitutional validity of the Civil

Rights Act as applied to the States.’ But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to limit its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible. For by that time most, if not all, of the former Confederate States, then under the control of ‘reconstructed’ legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law.

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

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

Section 2 provides:

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

As its text reveals, the Thirteenth Amendment ‘is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.’ It has never been doubted, therefore, ‘that the power vested in Congress to enforce the article by appropriate legislation,’ *ibid.*, includes the power to enact laws ‘direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.’

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment ‘by appropriate legislation’ include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

‘By its own unaided force and effect,’ the Thirteenth Amendment ‘abolished slavery, and established universal freedom.’ Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’ [citing the Civil Rights Cases]

Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master. Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the narrower construction of the Enabling Clause were correct, then



the trumpet of freedom that we have been blowing throughout the land has given an (uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. \* \* \* I have no doubt that under this provision \* \* \* we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.'

Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right \* \* \* to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a more paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

## Katzenbach v. Morgan

384 U.S. 641 (1966)

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

These cases concern the constitutionality of § 4(e) of the Voting Rights Act of 1965. That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4(e) insofar as it pro tanto prohibits the enforcement of the election laws of New York requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4(e) insofar as it would enable many of these citizens to vote.

We hold that, in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment<sup>5</sup> and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex parte Com. of Virginia*, ‘It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.’ A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the ‘majestic generalities’ of § 1 of the Amendment.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. [T]he question before us here [is]: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York’s English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited

to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Ex parte Com. of Virginia, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

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.'

Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by 'appropriate legislation' the provisions of that amendment; and we recently held in *State of South Carolina v. Katzenbach* that '(t)he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.' That test was identified as the one formulated in *McCulloch v. Maryland*. Thus the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4(e) is 'appropriate legislation' to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'

There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4(e) 'to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English.' The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4(e) may be readily seen as 'plainly adapted' to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is 'preservative of all rights.' This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.' It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the

English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.

The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs. Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *State of South Carolina v. Katzenbach*, to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

## Shelby County v. Holder

570 U.S. 529 (2013)

### CHIEF JUSTICE ROBERTS delivered the opinion of the Court

. The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*. As we explained in upholding the law, “exceptional conditions can justify legislative measures not otherwise appropriate.” Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide.” Since that time, Census Bureau data indicate that AfricanAmerican voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent.

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, “the Act imposes current burdens and must be justified by current needs.”

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that “[t]he 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,” and it gives Congress the “power to enforce this article by appropriate legislation.” “The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure.” In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent AfricanAmericans from voting. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.” The current version forbids any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act’s passage, these “covered” jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. A covered jurisdiction could “bail out” of coverage if it had not used a test or device in the preceding five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or

color.” In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona.

In those jurisdictions, §4 of the Act banned all such tests or devices. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D. C.— either the Attorney General or a court of three judges. A jurisdiction could obtain such “preclearance” only by proving that the change had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.”

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. In *South Carolina v. Katzenbach*, we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address “voting discrimination where it persists on a pervasive scale.”

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in §4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. That swept in several counties in California, New Hampshire, and New York. Congress also extended the ban in §4(a) on tests and devices nationwide.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Congress also amended the definition of “test or device” to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. Finally, Congress made the nationwide ban on tests and devices permanent.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a §2 suit, in the ten years prior to seeking bailout.

We upheld each of these reauthorizations against constitutional challenge.

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Congress also amended §5 to prohibit more conduct than before. Section 5 now forbids voting changes with “any discriminatory purpose” as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, “to elect their preferred candidates of choice.”

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement.

In *Northwest Austin* [a prior challenge that didn’t reach the issues], we stated that “the Act imposes current burdens and must be justified by current needs.” And we concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” These basic principles guide our review of the question before us.

” “[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth

Amendment, the power to regulate elections.’ ” Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. But States have “broad powers to determine the conditions under which the right of suffrage may be exercised.” And “[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” Drawing lines for congressional districts is likewise “primarily the duty and responsibility of the State.”

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of equal sovereignty” among the States. Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.” *Coyle v. Smith* (1911). Indeed, “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a bar on differential treatment outside that context. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

The Voting Rights Act sharply departs from these basic principles. It suspends “all changes to state election law— however innocuous—until they have been precleared by federal authorities in Washington, D. C.” States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a §2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. If a State seeks preclearance from a threejudge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding “not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.”

All this explains why, when we first upheld the Act in 1966, we described it as “stringent” and “potent.” We recognized that it “may have been an uncommon exercise of congressional power,” but concluded that “legislative measures not otherwise appropriate” could be justified by “exceptional conditions.” We have since noted that the Act “authorizes federal intrusion into sensitive areas of state and local policymaking,” and represents an “extraordinary departure from the traditional course of relations between the States and the Federal Government,” As we reiterated in *Northwest Austin*, the Act constitutes “extraordinary legislation otherwise unfamiliar to our federal system.”

In 1966, we found these departures from the basic features of our system of government justified. The “blight of racial discrimination in voting” had “infected the electoral process in parts of our country for nearly a century.” Several States had enacted a variety of requirements and tests “specifically designed to prevent” African-Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States “merely switched to discriminatory devices not covered by the federal decrees,” “enacted difficult new tests,” or simply “defied and evaded court orders.” Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites.

In short, we concluded that “[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.” We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that “Congress chose to limit its attention

to the geographic areas where immediate action seemed necessary.” The areas where Congress found “evidence of actual voting discrimination” shared two characteristics: “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.” We explained that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.” We therefore concluded that “the coverage formula [was] rational in both practice and theory.” It accurately reflected those jurisdictions uniquely characterized by voting discrimination “on a pervasive scale,” linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the “stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant.”

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” That Report also explained that there have been “significant increases in the number of African-Americans serving in elected offices”; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.

There is no doubt that these improvements are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. During the “Freedom Summer” of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. On “Bloody Sunday” in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. Today both of those towns are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act’s unusual remedies have grown even stronger.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down. Under this theory, however, §5 would be effectively immune from scrutiny; no matter how “clean” the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was “rational in both practice and theory.” The formula looked to cause (discriminatory tests) and effect



(low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the “coverage formula raise[d] serious constitutional questions.” As we explained, a statute’s “current burdens” must be justified by “current needs,” and any “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. This argument does not look to “current political conditions,” but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966.

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the “current need[ ]” for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on “second generation barriers,” which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent’s contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County’s claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland*, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is “consist[ent] with the letter and spirit of the constitution.”

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

**JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.**

In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.

“[V]oting discrimination still exists; no one doubts that.” Ante, at 2. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA’s requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of

discrimination on the basis of race, the “blight of racial discrimination in voting” continued to “infec[t] the electoral process in parts of our country.” Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable “variety and persistence” of laws disenfranchising minority citizens. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon*; in 1944, the Court struck down a “reenacted” and slightly altered version of the same law, *Smith v. Allwright*; and in 1953, the Court once again confronted an attempt by Texas to “circumven[t]” the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams*.

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of “the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.” But circumstances reduced the ameliorative potential of these legislative Acts:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.”

Patently, a new approach was needed.

Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution’s commands were most virulent—the VRA provided a fit solution for minority voters as well as for States.

After a century’s failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. Congress also found that as “registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength.” Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as “second-generation barriers” to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an “effort to segregate the races for purposes of voting.” Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority’s votes. A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majoritywhite areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the

device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.

[discussing reauthorization and evidence Congress relied on] After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. But despite this progress, “second generation barriers constructed to prevent minority voters from fully participating in the electoral process” continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. Extensive “[e]vidence of continued discrimination,” Congress concluded, “clearly show[ed] the continued need for Federal oversight” in covered jurisdictions. The overall record demonstrated to the federal lawmakers that, “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”

It is well established that Congress’ judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is “preservative of all rights.” When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress’ power to act is at its height.

The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, “Congress shall have power to enforce this article by appropriate legislation.” In choosing this language, the Amendment’s framers invoked Chief Justice Marshall’s formulation of the scope of Congress’ powers under the Necessary and Proper Clause.

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today’s opinion clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, “the Founders’ first successful amendment told Congress that it could ‘make no law’ over a certain domain”; in contrast, the Civil War Amendments used “language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality” and provided “sweeping enforcement powers . . . to enact ‘appropriate’ legislation targeting state abuses.”

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use “all means which are appropriate, which are plainly adapted” to the constitutional ends declared by these Amendments. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. “It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.” Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed “rational means.”

For three reasons, legislation reauthorizing an existing statute is especially likely to satisfy the minimal

requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld.

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA.

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime.

This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods."

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, to be working to advance the legislature's legitimate objective.

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. On that score, the record before Congress was huge. In fact, Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. Congress found that the majority of DOJ objections included findings of discriminatory intent, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the §5 preclearance requirements.

Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987.

Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found

to be “designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole.”

In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town’s election after “an unprecedented number” of African-American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen.

In 2006, this Court found that Texas’ attempt to redraw a congressional district to reduce the strength of Latino voters bore “the mark of intentional discrimination that could give rise to an equal protection violation,” and ordered the district redrawn in compliance with the VRA. In response, Texas sought to undermine this Court’s order by curtailing early voting in the district, but was blocked by an action to enforce the §5 preclearance requirement.

In 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an “ ‘exact replica’ ” of an earlier voting scheme that, a federal court had determined, violated the VRA.

In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits.

In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university.

In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, noting that it would have disqualified many citizens from voting “simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so.”

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress’ conclusion that “racial discrimination in voting in covered jurisdictions [remained] serious and pervasive.”

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an “avalanche of case studies of voting rights violations in the covered jurisdictions,” ranging from “outright intimidation and violence against minority voters” to “more subtle forms of voting rights deprivations.” This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA.

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in §4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance’s

continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." But the Court ignores that "what's past is prologue." And "[t]hose who cannot remember the past are condemned to repeat it." Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding.

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs."

Congress learned of these conditions through a report, known as the Katz study, that looked at §2 suits between 1982 and 2004. Because the private right of action authorized by §2 of the VRA applies nationwide, a comparison of §2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would expect that the rate of successful §2 lawsuits would be roughly the same in both areas. The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance."

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful §2 litigation since 1982. Controlling for population, there were nearly four times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions. The Katz study further found that §2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." [citing an academic article]

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." Just as buildings in California have a greater need to be earthquakeproofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic literature.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. It also authorizes a court to subject a noncovered jurisdiction to federal

preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H. R. Rep. No. 109-478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debate about] what [the] record shows." One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno* (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U. S. Const., Art. III, §2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice."



History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of §5, Alabama was found to have “deni[ed] or abridge[d]” voting rights “on account of race or color” more frequently than nearly all other States in the Union. This fact prompted the dissenting judge below to concede that “a more narrowly tailored coverage formula” capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting “might be defensible.” That is an understatement. Alabama’s sorry history of §2 violations alone provides sufficient justification for Congress’ determination in 2006 that the State should remain subject to §5’s preclearance requirement.<sup>81</sup>

[after giving examples of Alabama discrimination] In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated §2. *Dillard v. Crenshaw Cty.* Summarizing its findings, the court stated that “[f]rom the late 1800’s through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state.”

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it.

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example, the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that “would have eliminated the city’s sole majority-black district, which had been created pursuant to the consent decree in *Dillard*.” Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African-American councilman who represented the former majority-black district. The city’s defiance required DOJ to bring a §5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district.

These recent episodes forcefully demonstrate that §5’s preclearance requirement is constitutional as applied to Alabama and its political subdivisions. And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines* (1960) (“[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality.”). See also *Nevada Dept. of Human Resources v. Hibbs* (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress’ enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute “could constitutionally be applied to some jurisdictions”).

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress’ enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. [citing further cases]

[new section on the “equal sovereignty principle”]

Today’s unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, e.g., 28 U.S.C. §3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme “at any time during the period beginning January

<sup>81</sup>This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County’s constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to §5’s preclearance requirement by virtue of Alabama’s designation as a covered jurisdiction under §4(b) of the VRA. In any event, Shelby County’s recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to §5’s preclearance mandate.

1, 1976, and ending August 31, 1990”); 26 U.S.C. §142(l) (EPA required to locate green building project in a State meeting specified population criteria) [other examples]. Do such provisions remain safe given the Court’s expansion of equal sovereignty’s sway?

Of gravest concern, Congress relied on our pathmarking Katzenbach decision in each reauthorization of the VRA. It had every reason to believe that the Act’s limited geographical scope would weigh in favor of, not against, the Act’s constitutionality. See, e.g., *United States v. Morrison*, 529 U.S. 598, 626–627 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA’s constitutionality). Congress could hardly have foreseen that the VRA’s limited geographic reach would render the Act constitutionally suspect.

In the Court’s conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, i.e., that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

Volumes of evidence supported Congress’ determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

The sad irony of today’s decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA’s success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA’s enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress’ recognition of the “variety and persistence” of measures designed to impair minority voting rights. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years” he had served in the House. After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.” That determination of the body empowered to enforce the Civil War Amendments “by appropriate legislation” merits this Court’s utmost respect. In my judgment, the Court errs egregiously by overriding Congress’ decision.

## City of Boerne v. Flores

521 U.S. 507 (1997)

**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). 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.

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). There we considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner* (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. We stated:

Government's ability to enforce generally applicable prohibitions of socially harmful conduct cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' ... contradicts both constitutional tradition and common sense.

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. Congress announced:

- (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; "(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to

interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

The Act's stated purposes are:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

RFRA prohibits “[g]overnment” from “substantially burden[ing]” a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The Act’s mandate applies to any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” as well as to any “State, or ... subdivision of a State.” RFRA “applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].” In accordance with RFRA’s usage of the term, we shall use “state law” to include local and municipal ordinances.

*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. 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, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach*, 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." 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").

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, 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." 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. 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. Katzenbach* we emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects." 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 appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See *City of Rome* (since "jurisdictions with a demonstrable history of in-

tentional 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.”

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?”). 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. 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.

## Civil rights enforcement powers

The three Reconstruction Amendments (13th, 14th, 15th) are *primarily* individual rights amendments, and their individual rights components constitute the majority of the attention they typically get in a constitutional law class. However, you'll notice when you reread them (you should reread them) that they also authorize Congressional action.

In fact, those three amendments radically reshaped the balance between state and federal power. Let us recall the history: part of the claim of the south in the civil war was that their "state's rights" (to enslave people) were under threat. When they got beat, the first thing that Congress (dominated at the time by "Radical Republicans," whom, the historians in the room may recall, were radical mainly because they wanted to compensate the people who had been enslaved for, well, being enslaved. 40 acres and a mule and all that.<sup>82</sup>) wanted to do was weaken their power bases.

So, naturally, when they amended the Constitution to create individual rights for the freed slaves, they also decided that Congress would get to take charge of implementing those rights. They certainly weren't about to leave it to the states. So each of the Reconstruction Amendments gives Congress the power to enforce, by appropriate legislation, its provisions.

This immediately raises a number of mixed federalism/separation of powers questions:

1. Enforce against whom? We typically think that those rights only grant individuals rights *against the government* (e.g., the government can't do race discrimination); but can Congress also make laws prohibiting private citizens from doing things like race discrimination? (Recall that Congress certainly can do so under the commerce power, at least in economic life, but can it also do so under the 13th, 14th amendments?)
2. Who gets to decide the content of the rights? *Marbury v. Madison* suggests that the Supreme Court gets to decide what individual rights are under these amendments, but does Congress's enforcement power mean that Congress gets to say, for example, "We know the Supreme Court said that act X doesn't violate individual rights under the 14th amendment, but we think it does, so states shall not do it."

So the Congressional enforcement power could mean anything on a spectrum from a maximalist "Congress gets to define these individual rights violations and hold individuals responsible as well as the state," to a minimalist "Congress just gets to provide for some penalties for when states violate them."

Ultimately, what we get out of the caselaw is something in between:

- Congress can't reach private action under the 14th and 15th amendments, but it *can* reach private action under the 13th amendment, to prohibit the "badges and incidents of slavery," and can also do things like create causes of action against people who use the state's power (police officers who violate rights, for example).
- Congress cannot expand the scope of constitutional rights against the state, by forbidding things the Supreme Court has said is ok under the 14th amendment.
- Congress can implement what we might call "remedial" rules, that is, rules that don't directly prohibit what the constitution already prohibits, but do help effectuate that prohibition. (Think of the exclusionary rule in the criminal procedure context.)

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<sup>82</sup><http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/>



## Ableman v. Booth

62 U.S. 506 (1858)

**Mr. Chief Justice TANEY delivered the opinion of the court.**

The plaintiff in error in the first of these cases is the marshal Of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account, they have been argued and considered together; and the following are the facts as they appear in the transcripts before us:

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the District Court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of Congress of September 18, 1850.

Upon the examination before the commissioner, he was satisfied that an offence had been committed as charged, and that there was probable cause to believe that Booth had been guilty of it; and thereupon held him to bail to appear and answer before the District Court of the United States for the district of Wisconsin, on the first Monday in July then next ensuing. But on the 26th of May his bail or surety in the recognisance delivered him to the marshal, in the presence of the commissioner, and requested the commissioner to recommit Booth to the custody of the marshal; and he having failed to recognise again for his appearance before the District Court, the commissioner committed him to the custody of the marshal, to be delivered to the keeper of the jail until he should be discharged by due course of law.

Booth made application on the next day, the 27th of May, to A. D. Smith, one of the justices of the Supreme Court of the State of Wisconsin, for a writ of habeas corpus, stating that he was restrained of his liberty by Stephen V. R. Ableman, marshal of the United States for that district, under the warrant of commitment hereinbefore mentioned; and alleging that his imprisonment was illegal, because the act of Congress of September 18, 1850 [\*the Fugitive Slave Act -PG]\*, was unconstitutional and void; and also that the warrant was defective, and did not describe the offence created by that act, even if the act were valid.

Upon this application, the justice, on the same day, issued the writ of habeas corpus, directed to the marshal, requiring him forthwith to have the body of Booth before him, (the said justice,) together with the time and cause of his imprisonment. The marshal thereupon, on the day above mentioned, produced Booth, and made his return, stating that he was received into his custody as marshal on the day before, and held in custody by virtue of the warrant of the commissioner above mentioned, a copy of which he annexed to and returned with, the writ.

To this return Booth demurred, as not sufficient in law to justify his detention. And upon the hearing the justice decided that his detention was illegal, and ordered the marshal to discharge him and set him at liberty, which was accordingly done.

Afterwards, on the 9th of June, in the same year, the marshal applied to the Supreme Court of the State for a certiorari, setting forth, in his application the proceedings hereinbefore mentioned, and charging that the release of Booth by the justice was erroneous and unlawful, and praying that his proceedings might be brought before the Supreme Court of the State for revision.

The case was argued before the Supreme Court of the State, and on the 19th of July it pronounced its judgment, affirming the decision of the associate justice discharging Booth from imprisonment, with costs against Ableman, the marshal.

Afterwards, on the 26th of October, the marshal sued out a writ of error, returnable to this court on the first Monday of December, 1854, in order to bring the judgment here for revision ; and the defendant

in error was regularly cited to appear on that day; and the record and-proceedings were certified to this court by the clerk of the State court in the usual form, in obedience to the writ of error. And on the 4th of December, Booth, the defendant in error, filed a memorandum in writing in this court, stating that he had been cited to appear here in this case, and that he submitted it to the judgment of this court on the reasoning in the argument and opinions in the printed pamphlets therewith sent.

After the judgment was entered in the Supreme Court of Wisconsin, and before the writ of error was sued out, the State court entered on its record, that, in the final judgment it had rendered, the validity of the act of Congress of September. 18, 1850 and of February 12, 1798 [*the earlier Fugitive Slave Act -PG*], and the authority of the marshal to hold the defendant in his custody, under the process mentioned in his return to the writ of habeas corpus, were respectively drawn in question, and the decision of the court in the final judgment was against their validity, respectively.

We come now to the second case. At the January term of the District Court of the United States for the district of Wisconsin, after Booth had been set at liberty, and after the transcript of the proceedings in the case above mentioned had been returned to and filed in this court, the grand jury found a bill of indictment against Booth for the offence with which he was charged before the commissioner, and from which the State court had discharged him. The indictment was found on the 4th of January, 1855. On the 9th a motion was made, by counsel on behalf of the accused, to quash the indictment, which was overruled by the court; and he thereupon pleaded not guilty, upon which issue was joined. On the 10th a jury was called and appeared in court, when he challenged the array; but the challenge was overruled and the jury empanelled. The trial, it appears, continued from day to day, until the 13th, when the jury found him guilty in the manner and form in which he stood indicted in the fourth and fifth counts. On the 16th he moved for a new trial and in arrest of judgment, which motions were argued on the 20th, and on the 23d the court overruled the motions, and sentenced the prisoner to be imprisoned for one month, and to pay a fine of \$1,000 and the costs of prosecution ; and that he remain in custody until the sentence was complied with.

We have stated more particularly these proceedings, from a sense of justice to the District Court, as they show that every opportunity of making his defence was afforded him, and that his case was fully heard and considered.

On the 26th of January, three days after the sentence was passed, the prisoner by his counsel filed his petition in the Supreme Court of the State, and with his petition filed a copy of the proceedings in the District Court, and also affidavits from the foreman and one other member of the jury who tried him, stating that their verdict was, guilty on the fourth and fifth counts, and not guilty on the other three; and stated in his petition that his imprisonment was illegal, because the fugitive slave law was unconstitutional; that the District Court had no jurisdiction to try or punish him for the matter charged against him, and that the proceedings and sentence of that court were absolute nullities in law. On the next day, the 27th, the court directed two writs of habeas corpus to be issued — one to the marshal, and one to the sheriff of Milwaukee, to whose actual keeping the prisoner was committed by the marshal, by order of the District Court. The habeas corpus directed each of them to produce the body of the prisoner, and make known the cause of his imprisonment, immediately after the receipt of the writ.

On the 80th of January the marshal made his return, not acknowledging the jurisdiction, but stating the sentence of the District Court as his authority; that the prisoner was delivered to, and was then in the actual keeping of the sheriff of Milwaukee county, by order of the court, and he therefore had no control of the body of the prisoner; and if the sheriff had not received him, he should have so reported to the District Court, and should have conveyed him to some other place or prison, as the court, should command.

On the same day the sheriff produced the body of Booth before the State court, and returned that he had been committed to his custody by the marshal, by virtue of a transcript, a true copy of which was

annexed to his return, and which was the only process or authority by which he detained him.

This transcript was a full copy of the proceedings and sentence in the District Court of the United States, as hereinbefore stated. To this return the accused, by his counsel, filed a general demurrer.

The court ordered the hearing to be postponed until the 2d of February, and notice to be given to the district attorney of the United States. It was accordingly heard on that day, and on the next (February 3d), the court decided that the imprisonment was illegal, and ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty.

On the 21st of April next following, the Attorney General of the United States presented a petition to the Chief Justice of the Supreme Court, stating briefly the facts in the case, and at the same time presenting an exemplification of the proceedings hereinbefore stated, duly certified by the clerk of the State court, and averring in his petition that the State court had no jurisdiction in the case, and praying that a writ of error might issue to bring its judgment before this court to correct the error; The writ of error was allowed and issued, and, according to the rules and practice of the court, was returnable on the first Monday of December, 1855, and a citation for the defendant in error to appear on that day was issued by the Chief Justice at the same time.

No return having been made to this writ, the Attorney General, on the 1st of February, 1856, filed affidavits, showing that the writ of error had been duly served on the clerk of the Supreme Court of Wisconsin, at his office, on the 30th of May, 1855, and the citation served on the defendant in error on the 28th of June, in the same year. And also the affidavit of the district attorney of the United States for the district of Wisconsin, setting forth that when he served the writ of error upon the clerk, as above mentioned, he was informed by the clerk, and has also been informed by one of the justices of the Supreme Court, which released Booth, "that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the same."

It will be seen, from the foregoing statement of facts, that a judge of the Supreme Court of the State of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by habeas corpus, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

The supremacy is not, indeed, set forth, distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of habeas-corpus. But the paramount power of

the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of habeas corpus, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts, of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.

The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it, was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.

The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws

by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and" all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers, granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State, court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence) so carefully provided in the clause of the Constitution above referred to could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

In the case before the Supreme Court of Wisconsin, a right was claimed under the Constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled the provisions of the Constitution, itself, and the [Judiciary] act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having

the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass' over the line of division between the two sovereignties.

"We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a State court. And as regards the decision of the District Court; it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by habeas corpus or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law.

## Cooper v. Aaron

358 U.S. 1 (1958)

**Opinion of the Court by The CHIEF JUSTICE, Mr. Justice BLACK, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS, Mr. Justice BURTON, Mr. Justice CLARK, Mr. Justice HARLAN, Mr. Justice BRENNAN, and Mr. Justice WHITTAKER.**

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.

The following are the facts and circumstances so far as necessary to show how the legal questions are presented.

On May 17, 1954, this Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education*. The Court postponed, pending further argument, formulation of a decree to effectuate this decision. That decree was rendered May 31, 1955. *Brown v. Board of Education* [II]. In the formulation of that decree the Court recognized that good faith compliance with the principles declared in *Brown* might in some situations 'call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision.' The Court went on to state:

Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, 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, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of

the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

On May 20, 1954, three days after the first Brown opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled 'Supreme Court Decision—Segregation in Public Schools.' In this statement the Board recognized that 'It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.' Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second Brown opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the Board reached the conclusion that 'a large majority of the residents' of Little Rock were of 'the belief \* \* \* that the Plan, although objectionable in principle,' from the point of view of those supporting segregated schools, 'was still the best for the interests of all pupils in the District.'

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose 'in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court.' Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools and a law establishing a State Sovereignty Commission were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school 'off limits' to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded.

The Board's petition for postponement in this proceeding states: 'The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained.' The Governor's action caused the School Board to



request the Negro students on September 2 not to attend the high school 'until the legal dilemma was solved.' The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard 'acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students \* \* \* from entering,' as they continued to do every school day during the following three weeks.

That same day, September 4, 1957, the United States Attorney for the Eastern District of Arkansas was requested by the District Court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the District Court's direction to carry out the desegregation program. Three days later, September 7, the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program.

Upon completion of the United States Attorney's investigation, he and the Attorney General of the United States, at the District Court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae*, to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of 'chaos, bedlam and turmoil'; that there were 'repeated incidents of more or less serious violence directed against the Negro students and their property'; that there was 'tension and unrest among the school

administrators, the class-room teachers, the pupils, and the latter's parents, which inevitably had an adverse effect upon the educational program'; that a school official was threatened with violence; that a 'serious financial burden' had been cast on the School District; that the education of the students had suffered 'and under existing conditions will continue to suffer'; that the Board would continue to need 'military assistance or its equivalent'; that the local police department would not be able 'to detail enough men to afford the necessary protection'; and that the situation was 'intolerable.'

In affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the School Board, the Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the District Court as to the conditions at Central High School during the 1957-1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the Brown case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: 'The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.'

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.' Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison* that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.' *Ableman v. Booth*.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery \* \* \*.' A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases.'

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*. The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

## 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, 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.

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).

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. 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).

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.

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, as well as bodily integrity.

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.

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating 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. 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. 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.” Our precedents “have respected the private realm of family life which the state cannot enter.” 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* (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. 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 decisis is not an "inexorable command," and certainly it is not such in every constitutional case. 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; 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; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; 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.

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, 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*, 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. 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*. 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.

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.

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, and by a majority of five in 1986, 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*; and *Eisenstadt v. Baird*, the holdings of which are "not a series of isolated points," but mark a "rational continuum." As we described in *Carey v. Population Services International* the 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.

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). 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, and advances in neonatal care have advanced viability to a point somewhat earlier. 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*. 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. 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 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, 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*. 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."

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. 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, 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”).

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. 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. 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." 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. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself 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.

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 expressing a preference for normal childbirth." *Webster v. Reproductive Health Services*. It follows 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. This, too, we find consistent with *Roe*'s 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*. 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.

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 *Maier v. 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 *Maier*). 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." 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." 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.

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. In our considered judgment, an undue burden is an unconstitutional burden. 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. 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.

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:

- a) 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."

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."

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.

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. Yet, as the Court of Appeals observed, 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. 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." 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. 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. 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 *Thornburgh v. 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. 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.” 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, 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.” 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 proce-

dure.

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, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. 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. 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." 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." 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. 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:

The vast majority of women consult their husbands prior to deciding to terminate their pregnancy.

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.

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.

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.

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.

Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered.

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.

Married women, victims of battering, have been killed in Pennsylvania and throughout the United States.

Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation.

In a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife.

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.

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.

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.

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.

Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted.

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.

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.

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."

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.” 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. In families where wifebeating takes place, moreover, child abuse is often present as well.

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. Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. 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. Thirty percent of female homicide victims are killed by their male partners.

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.

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, 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. 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. 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. 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). 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. 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.” 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*. 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* (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.” 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. 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.

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. 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.

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.

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**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 decisis* has 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. It was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut*. 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."

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." 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; 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. 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, 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. 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. 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.” 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; limited recordkeeping and reporting; as well as various licensing and qualification provisions. 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.”

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, §§ 3205(a)(2)(i)–(iii) 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, 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.

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. The statute requires that this information be given to all women seeking abortions, 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.” This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester 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, I join the remainder of the Court’s opinion.

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**Justice Blackmun, concurring in part, concurring in the judgment in part, and dissenting in part.**

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. 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.”

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. 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 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.” 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, 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. 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? 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, 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.

That numerous constitutional doctrines result in narrow differentiations between similar circumstances does not mean that this Court has abandoned adjudication in favor of regu-

lation.

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 has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 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. It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns.

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.

*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.

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.

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.” 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. 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.” 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. 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.” This characterization of the issue thus allows The Chief Justice quickly to discard the joint opinion’s reliance argument by asserting that “reproductive planning could take virtually immediate account of” a decision overruling *Roe*.

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.” 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.” 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. 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.” 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.

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**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 arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade* in 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.” 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.” 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. 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.

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." 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, but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti*. 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 *Roe* or *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. 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.

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. 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. 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.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, we concluded in *Akron* and *Ashcroft* that a State could not require that such abortions be performed only in hospitals. 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. 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.

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. 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. 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. 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.”

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. 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.

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.”

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.” 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.” 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; a right to procreate; and a right to use contraceptives. 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.” 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.” 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.” 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.

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. 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.” 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. *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. 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. 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. 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.” 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.

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.” 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.

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.

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* (*Lochner v. New York* and *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. 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 Hospital* and *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 *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that “liberty” under the Due Process Clause protected the “right to make a contract.” 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. 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.” 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.” 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 *Roe* has 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.” 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. 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.

[Omitted: sections of Chief Justice Rehnquist’s opinion applying rational basis to the parts of the act upheld by the joint opinion]

Section 3209 of the Act contains the spousal notification provision. 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.” 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. 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. 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.” 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. 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.” 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. 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.”

The State also has a legitimate interest in promoting “the integrity of the marital relationship.” This Court has previously recognized “the importance of the marital relationship in our society.” 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. 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.” 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.

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsyl-

vania 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.

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**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* and *Ohio v. Akron Center for Reproductive Health*. 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.

[I]n 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 Acton 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.” 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.” 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*. 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].” But it is obvious to anyone applying “reasoned judgment” that the same adjectives can be applied to many forms of conduct that this Court 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* (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*. 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.” 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 standardless 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, 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*.”

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 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 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.” 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 standardless 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.

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*, 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 Roe as 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.

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 statesmanlike “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 following, the Court implicitly undertakes to remain steadfast . . . . 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 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 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. Or, again, to compare this ecstasy of a Supreme Court in which there is, es-

pecially 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.

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.” 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*. To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. 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*, 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*.)

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, 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 accidentally 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 “call 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. 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.

## Korematsu v. United States

323 U.S. 214 (1944)

### **Mr. Justice Black delivered the opinion of the Court.**

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, which provides that:

. . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions, applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should, have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it

was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the Hirabayashi case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the Hirabayashi case, “. . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we

are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

**Mr. Justice Murphy, dissenting.**

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like 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. “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast “all persons of Japanese ancestry, both alien and non-alien,” clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an “immediate, imminent, and impending” public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies ... at large today" along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshipping ceremonies" and to "dual citizenship." Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." The need for protective custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands." Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to

encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. It is asserted merely that the loyalties of this group “were unknown and time was of the essence.” Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these “subversive” persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

**Mr. Justice Jackson, dissenting.**

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that “no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.” But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should

enact such a criminal law, I should suppose this Court would refuse to enforce it. But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking



and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States*, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain *Hirabayashi*’s conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said: “Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.” “We decide only the issue as we have defined it — we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.” And again: “It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.” However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

## Trump v. Hawaii

(2018)

### **CHIEF JUSTICE ROBERTS delivered the opinion of the Court.**

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen— that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order.

In response, the President revoked EO–1, replacing it with Executive Order No. 13780, which again directed a worldwide review. (EO–2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The order explained that those countries had been selected because each “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds.

This Court granted certiorari and stayed the injunctions— allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a “credible claim of a bona fide relationship” with a person or entity in the United States. The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot.

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in

consultation with the State Department and several intelligence agencies, developed a “baseline” for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. The baseline included three components. The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. DHS collected and evaluated data regarding all foreign governments. It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. She also concluded that although Somalia generally satisfied the informationsharing component of the baseline standards, its “identitymanagement deficiencies” and “significant terrorist presence” presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq’s commitment to combating ISIS.

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary’s recommendations and issued the Proclamation. Invoking his authority under 8 U.S.C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information”; “elicit improved identitymanagement and information-sharing protocols and practices from foreign governments”; and otherwise “advance [the] foreign policy, national security, and counterterrorism objectives” of the United States. The President explained that these restrictions would be the “most likely to encourage cooperation” while “protect[ing] the United States until such time as improvements occur.”

The Proclamation imposed a range of restrictions that vary based on the “distinct circumstances” in each of the eight countries. For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. For countries that have information-sharing deficiencies but are nonetheless “valuable counterterrorism partner[s]” (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas.

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. It also provides for case-by-case waivers when a foreign national demonstrates undue hard-

ship, and that his entry is in the national interest and would not pose a threat to public safety. The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims.

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." That statement remained on his campaign website until May 2017.

Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right."

One week after his inauguration, the President issued EO-1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country."

Plaintiffs also note that after issuing EO-2 to replace EO-1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct."

More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the

Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part of America.” And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.”

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst v. Mandel*, the Attorney General denied admission to a Belgian journalist and self-described “revolutionary Marxist,” Ernest Mandel, who had been invited to speak at a conference at Stanford University. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional “right to receive information” was implicated. But we limited our review to whether the Executive gave a “facially legitimate and bona fide” reason for its action. Given the authority of the political branches over admission, we held that “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U. S. citizens.

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our

review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.<sup>83</sup>

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center*. And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*.

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it "stands apart . . . in the degree to which [it] lacks command and control of its territory." As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country's key role in combating terrorism in the region. It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

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<sup>83</sup>The dissent finds "perplexing" the application of rational basis review in this context. But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the de novo "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as "throw[ing] the Establishment Clause out the window." But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals.

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs."

Finally, the dissent invokes *Korematsu v. United States*. Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U.S., at 248 (Jackson, J., dissenting).

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

**JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.**

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. If, however, its sole ratio decidendi was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation's lawfulness. The Solicitor General asked us to consider the Proclamation "as" it is "written" and "as" it is "applied," waivers and exemptions included. He warned us against considering the Proclamation's lawfulness "on the hypothetical situation that [the Proclamation] is what it isn't," while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States "if they meet the criteria" for a waiver or exemption.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions. For another thing, the Proclamation then follows more closely the basic statutory scheme, which provides for strict case-by-case scrutiny of applications. It would deviate from that system, not across the board, but where circumstances may require that

deviation.

Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States (under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system's absence?

And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban," rather than a "security-based" ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, i.e., that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security "shall coordinate to adopt guidance" for consular officers to follow when deciding whether to grant a waiver. Yet, to my knowledge, no guidance has issued. The only potentially relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not provide guidance for consular officers as to how they are to exercise their discretion.

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

Amici have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with "significant business or professional obligations" in the United States, and amici identify many scholars who would seem to qualify. The Proclamation also anticipates waivers for those with a "close family member (e.g., a spouse, child, or parent)" in the United States, and amici identify many such individuals affected by the Proclamation. The Pars Equality Center identified 1,000 individuals—including parents and children of U. S. citizens—who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria.

Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122).



[similar evidence]

Finally, in a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers. According to the affidavit, consular officers “were not allowed to exercise that discretion” and “the waiver [process] is merely ‘window dressing.’”

Declarations, anecdotal evidence, facts, and numbers taken from amicus briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a “Muslim ban,” and the assistance in deciding the issue that answers to the “exemption and waiver” questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court’s decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR’s opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

**JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.**

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing ‘25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad’ and 51% of those polled ‘agreed that Muslims in America should have the choice of being governed according to Shariah.’

Shariah authorizes such atrocities as murder against nonbelievers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.'— Donald J. Trump."

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II.

In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [ his] position" on "banning Muslims from entering the country." He answered, "No."

A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's.

In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim."

That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." Ibid.;

A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things."

As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system."

Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim."

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." He replied: "You know my plans. All along, I've proven to be right."

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769 (EO-1), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." That same day, President Trump explained to the media that, under EO-1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." Considering that past policy "very unfair," President Trump explained that EO-1 was designed "to help" the Christians in Syria.

The following day, one of President Trump's key advisers candidly drew the connection between EO-1 and the "Muslim ban" that the President had pledged to implement if elected. According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump "continue[d] to deliver on . . . his most significant campaign promises." That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result."

While litigation over EO-2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO-2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "very hard" for Muslims to assimilate into Western culture.

During a rally in April 2017, President Trump recited the lyrics to a song called "The Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]." The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!"

Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, which restricts entry of certain nationals from six Muslim-majority countries.

On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches! Those videos were initially tweeted by a British political party whose mission is to oppose"all alien and destructive politic[al] or religious doctrines, including . . . Islam." When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. McCreary. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications.

Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims

entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, “has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” As the majority notes, Mandel held that when the Executive Branch provides “a facially legitimate and bona fide reason” for denying a visa, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.” In his controlling concurrence in *Kerry v. Din*, JUSTICE KENNEDY applied Mandel’s holding and elaborated that courts can “ ‘look behind’ the Government’s exclusion of ” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” The extent to which Mandel and *Din* apply at all to this case is unsettled, and there is good reason to think they do not. Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that “dot[s] all the i’s and . . . cross[es] all the t’s,” Mandel would not “pu[t] an end to judicial review of that set of facts.”

In light of the Government’s suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly declines to apply Mandel’s “narrow standard of review” and “assume[s] that we may look behind the face of the Proclamation.” In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.

This Court’s Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. That reasonable-observer inquiry includes consideration of the Government’s asserted justifications for its actions. The Government’s invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is “far more problematic” in this case is the majority’s apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern.

[extended analysis of implausibility of national security concern omitted]

In sum, none of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the un rebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “[f ]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court’s precedent,

repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "that they are outsiders, not full members of the political community." "

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*. In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure.

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, e.g., Civil Liberties Act of 1988 (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided."

This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

## Some Doctrines we Skipped

### Eleventh Amendment and sovereign immunity

Eleventh Amendment and Sovereign Immunity doctrine are kind of messy. Here's the short version:

The idea of "sovereign immunity" is that a government may not be sued without its consent.

The text of the Eleventh Amendment only strips federal courts of jurisdiction over suits against states by "foreigners" (i.e., suits from citizens of other states, or other countries). As a citizen of Illinois, if I brought suit against Indiana, I wouldn't be entitled to bring it in federal court.<sup>84</sup>

But the Supreme Court has nonetheless created a much broader sovereign immunity doctrine with no obvious textual foundation.

How did we get here?

The Eleventh Amendment was originally enacted in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which allowed a South Carolinian to sue Georgia for revolutionary war debts. As Article III of the constitution says that the judicial power extends "to controversies... between a state and citizens of another state," it seemed the original text of the Constitution authorized these suits. Almost instantly (in constitutional time), the Eleventh Amendment was ratified.

Since then, there has been great dispute about the broader implications of the Eleventh Amendment. It has been read as expressing a rule of *sovereign immunity* from suit much broader than its plain terms would otherwise suggest.

According to this theory, the Eleventh Amendment merely captures a preexisting legal principle of sovereign immunity, according to which the Constitution, and in particular Article III, never divested the states of the immunity that they had in the first place.

One way to interpret the Eleventh Amendment on that theory is that *Chisholm* was a mistake, and that all the Eleventh Amendment did was clarify existing law. Like almost any view, this has some support in the writings of the founders; in particular, Hamilton wrote in Federalist 81 a spirited defense of the idea that states remain immune from suit.

It also has a little bit of textual support. The leading words are "The Judicial power of the United States *shall not be construed*" (emphasis mine). The "shall not be construed" language might be read to suggest that the ratifiers were not *changing* existing law, but rather reversing an unfortunate *misconstruction* of existing law—and this is consistent with the idea that the Constitution before the enactment of the Amendment did not strip states of a sovereign immunity that they originally had.

While that kind of theory is highly controversial, it makes the best sense of the Supreme Court cases that have extended sovereign immunity:

- *Hans v. Louisiana*, 134 U.S. 1 (1890), holding that states also have sovereign immunity against suits by their *own* citizens in federal court.
- *Alden v. Maine*, 527 U.S. 706 (1999), holding that states have sovereign immunity in state court too.

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<sup>84</sup>Some, including on the liberal wing of the current Court, have argued that this merely bars *diversity* jurisdiction, not federal question jurisdiction as well. But the current doctrine, to the extent it's clear, is that the Eleventh Amendment bars both federal question and subject matter jurisdiction. There are also issues about the extent to which the *federal* government has sovereign immunity, but this handout will only discuss the states.

### What's The Actual Doctrine?

There's a lot of sovereign immunity doctrine, to which we're not going to devote time in this course. However, for purposes of things like the bar exam, here are some rules:

1. States are immune to suits for damages without their own consent (however, they often do consent, e.g., by statute), by any person, in state or federal court.
2. They're also immune to claims brought in federal administrative agencies.
3. They're also immune to suits in equity (i.e., injunctive relief).
4. Congress cannot (with exceptions relating to Congress's power to enforce the Fourteenth Amendment) authorize suits against states without their consent.
5. They are *not* immune from suits brought by other states (with the exception for when they're just bringing private claims on behalf of their own citizens) or the federal government.
6. They are also not immune from some kinds of *in rem* suits, which are basically certain kinds of suits involving property, and which include some admiralty and bankruptcy claims.
7. The Eleventh Amendment does not strip the Supreme Court of jurisdiction to hear appeals from courts that do have jurisdiction over the original claims (i.e., if a state consents to be sued in state, but not federal court, about some matter, the Supreme Court may hear an appeal).
8. Sovereign immunity does not apply to suits against cities, counties, or other such political subdivisions of a state (except in some circumstances where relief would tap into the state treasury).

### Practical Sovereign Immunity Lawyering

The doctrine of sovereign immunity is not as harsh as it seems for two reasons.

First, as noted above, states often consent to suit (because, democracy). Most states have something like a tort claims act consenting to a broad array of suits, often with procedural requirements like prior notice to the state to give them an opportunity to settle.

Second, and more importantly, the Court has interpreted the doctrine of sovereign immunity in a very formalist sense: only when the state is actually named, or its treasury is directly at risk, does sovereign immunity apply. This means that a plaintiff can often sue a state official for injunctive relief which effectively works against the state.

The key case there is *Ex parte Young*, 209 U.S. 123 (1908), which allowed injunctive relief in federal court against state attorney general to prohibit enforcement of an allegedly unconstitutional statute. There's some weird theoretical shuck and jive underlying the opinion; I'm happy to talk further about it if you want.

But leaving the theory aside just this once, the practical implications of *Young* are as follows:

1. You can sue a state official for prospective injunctive relief, such as enjoining ongoing policies or practices of the state. These suits are permitted even when complying with the injunction would cost the state money.
2. You cannot sue a state official in their official capacity for damages that will be paid directly by the treasury.<sup>85</sup>

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<sup>85</sup>You also cannot sue for retrospective injunctive relief that requires payment out of the state treasury, e.g., for wrongly denied back payment of welfare benefits. *Edelman v. Jordan*, 415 U.S. 651 (1974).

3. You *can*, however, sue a state official for damages that they are personally obligated to pay, *even if* the state has agreed to indemnify them.<sup>86</sup>

Jargon note: suing a state official for damages that they're personally obliged to pay are called "individual capacity" suits. Suits against a state official for action that they must take on behalf of the state (like for the injunction) are called "official capacity" suits. Item (2) above is equivalent to saying that official capacity suits for damages are not permitted. When we label a suit an "individual capacity" or an "official capacity" suit, we don't refer to the capacity in which the official was *acting*, but the capacity in which the individual was *sued*.<sup>87</sup>

#### Wrap-up

There are lots of other rules relating to sovereign immunity. I've given you enough to do things like get through the bar exam. But these are actually only **the very basics**. There are lots more rules and exceptions to the above.

If you actually have ambitions to practice in this area, you must spend some focused time learning the rest. There are entire practice manuals devoted to suing the government. There is a pretty good section of a legal aid practice manual on the subject.<sup>88</sup>

#### Dormant Commerce Clause

The Supreme Court has concluded that Congress has such a big and overwhelming power over interstate commerce that the states themselves totally lack the power to impede it, even in the absence of federal action.

What does this mean? Well, take an obvious kind of case. Suppose the state of Illinois decides to pass a law requiring its businesses to use raw materials from Illinois if they're the same price or cheaper than out-of-state materials. You have some livestock in Illinois. You better buy Illinois corn, not Iowa corn, if it's available for the same price, or you go straight to the pokey.

By now, you should have a strong intuition that there's gotta be something wrong with that picture. After all, a big part of the point of the commerce clause and of Article I—indeed, a big part of the point of the Constitution in general, as opposed to the Articles of Confederation—was to create a unified national economy. And that obviously wouldn't work if states could start trade wars with one another.

So the Supreme Court has found this broad idea in the sort of whitespace surrounding the Commerce Clause, prohibiting states from taking action to engage in economic protectionism against other states. And the name of the set of doctrines that cover this is the "dormant commerce clause."

(FYI, quick vocabulary note: "protectionism" is a term that means "regulations meant to prefer local commerce over outsiders." The idea of the word is that advocates of protectionism are trying to "protect" their own producers against outside competition.)

#### What's the Black-Letter Law?

There's a little uncertainty around the margins of the doctrine, but most people would summarize the rule as:

1. If states discriminate against interstate commerce, the regulation is struck down unless it passes something like strict scrutiny;

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<sup>86</sup>However, before doing so, you should make yourself aware of common-law immunities these officials sometimes have, as well as immunities that may be conferred by the statute giving you a cause of action.

<sup>87</sup>*Hafer v. Melo*, 502 U.S. 21 (1991)

<sup>88</sup><http://www.federalpracticemanual.org/node/47>



2. If states adopt regulations that do not discriminate against interstate commerce but do burden interstate commerce, the regulation is subject to a balancing test that weighs the burden on interstate commerce against the state's interest in regulating.

What's a discrimination against interstate commerce?

There are basically three kinds of discrimination:

1. Facial discrimination,
2. Discrimination with a protectionist purpose, and
3. Discrimination with a protectionist effect.

The easiest case is where a state flat-out makes a law treating interstate commerce differently. Big example: *Philadelphia v. NJ*, you can't import garbage from out of state. This is called "facial discrimination." The word "facial" here doesn't refer to a beauty product. Rather, it means "on the face of the law," that is, written right into the text. (Just like in Equal Protection.)

For example, here's a facially discriminatory tax: "No grocery stores may sell fruits in Hawaii unless those fruits were grown in Hawaii."

By contrast, here's a tax that is clearly discriminatory, but isn't *facially* discriminatory against interstate commerce: "No grocery stores may sell fruits other than pineapples in Hawaii." That doesn't explicitly, that is, "facially," discriminate against non-Hawaiian produce, but it still discriminates because *who else grows pineapples in the U.S., huh?*

The cases contain reveal a few subtle issues, however. First, it isn't just regulations like "nobody from out of state shall bring their dirty trash in to dump in a landfill in New Jersey" that count. Discriminatory taxes count as well.<sup>89</sup> Subsidies out of general revenue *do not* count, but they cannot be structured as discriminatory tax exemptions or taxes on an industry that are earmarked to be rebates to local producers. For example, Illinois can subsidize corn farmers out of the taxes we all pay, but it can't impose a tax on corn and then give a rebate to the Illinois farmers.

When we get into protectionist purpose and effect, the easiest way to think about it is in terms of two key issues<sup>90</sup>:

1. Does the law exclude everyone out of state from its benefits/injure everyone out of state in the industry, or just some people?
2. Does the law have some plausible public purpose other than protectionism?

People sometimes talk about "strict scrutiny" in the dormant commerce clause context, but it's not completely clear that the strict scrutiny you know from the 14th Amendment (etc.) context is *exactly* the same thing that happens with protectionist legislation in dormant commerce clause cases (sometimes the Court talks about "important" interests, for example). It's probably close enough to use as a general working idea of what's going on.

In the dormant commerce clause case, this mostly means that very few cases of actual protectionism will go through. One likely exception would be quarantine laws, like those prior cases discussed in *Philadelphia v. New Jersey*, because of the compelling interest in preventing, e.g., the movement of diseased cattle.

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<sup>89</sup>Also, it doesn't just have to be a law, like on the statute books. Discriminatory application of non-discriminatory laws can count too, like if a licensing authority just *by an amazing coincidence* exercises its discretion to grant licenses to in-staters but not out-of-staters.

<sup>90</sup>Note: this isn't really formal "doctrine," as such, but I do think these are helpful rules of thumb.

What's the market participant exception?

Sometimes states act like ordinary economic actors—owning factories, buying and selling products, hiring construction workers, etc. The market participant exception allows states to discriminate in favor of their own residents. If Illinois owns a car repair shop, for example, it can give free oil changes to Illinoisans but not to Wisconsinites. It can even refuse to sell oil changes to Wisconsinites altogether.

However, there's a very difficult-to-understand case called *South Central Timber Development v. Wunnicke* that stands for the proposition that the state can't go too far. But the details are messy.

Tell me more about burdening interstate commerce.

Sometimes a state imposes a regulation that doesn't treat people from in-state and out-of-state differently at all, but that still makes it harder to conduct interstate commerce. One example is *Bibb v. Navajo Freight Lines*, where the Court struck down an Illinois law requiring curved mudguards. The issue here wasn't that Illinois trucks tended to have curved mudguards while out-of-state trucks tended to have straight mudguards or anything like that—there was no reason to think the law favored local interests at all. Rather, the problem was that all the other states allowed straight mudguards and one state required them, so any truck passing through Illinois—wherever it came from—would have to change its mudguards at the state line.

What happens next is a balancing test. And in balancing tests, courts have a lot of discretion, so there's not a lot that I can say to help you resolve these cases. In *Bibb*, there was substantial skepticism about the idea that it had any benefit for the state at all (it was alleged to be a safety benefit), and it was massively inconvenient for trucks to carry two sets of mudflaps, so it was struck down.

Is there anything else I need to know?

Yes, two important things.

1. The dormant commerce clause is the negative space created by Congress's power over interstate commerce, and its role as the regulator of the national economic market. It follows from this, and the Court has consistently held, that Congress has the power to authorize states to violate the dormant commerce clause. For example, Congress could pass a law providing that "states may forbid the importation of milk from out of state," and then states that did so would be safe from dormant commerce clause challenge for doing so.
2. The privileges and immunities clause also forbids some kinds of state economic discrimination (as well as various kinds of non-economic discrimination) against out-of-staters. There's some overlap (some stuff violates both), but there's not complete overlap: some things might violate privileges and immunities but not the dormant commerce clause, or vice versa.

For your extreme convenience, here are some differences between P&I and dormant commerce clause:

- P&I is an independent constitutional prohibition, Congress *does not* have the power to authorize violations of the privileges and immunities clause.
- P&I only applies to "citizens," which, most importantly, does not include corporations.
- P&I doesn't cover all kinds of commerce, although it does cover important individual economic activity like practicing a profession; it also covers the individual "fundamental" rights that you'll learn about in con law II.
- There's no market participant exception to P&I.

- Also, do not confuse the privileges and immunities clause of Article IV with the privileges and immunities clause in the Fourteenth Amendment. They're totally different things (and the latter is almost, though not quite, a dead letter for unfortunate historical reasons).

### Is the Dormant Commerce Clause Textually Justified?

You might rightfully worry about the dormant commerce clause. Did the Supreme Court just make it up? States, after all, have a general police power, and it does not necessarily follow from the mere fact that Congress is allowed to regulate interstate commerce that states are not so allowed—states and Congress might have concurrent authority over lots of things, so long as the Constitution does not divest states of authority over them.

Article I Sec. 10 specifically divests states of certain powers, including to enter into alliances, coin money, start wars, etc., but it does not explicitly divest states of the power to regulate commerce within its borders in ways that discriminate against interstate commerce.<sup>91</sup>

In the early cases, we see some talk about the possibility that the Commerce clause granted an exclusive power in Congress. But it's not obvious why that should be the case, particularly if we think that Congress always has the power to preempt contrary state laws within its domain if it disagrees with a state regulation (we'll discuss preemption next week). After all, the Constitution already prohibited states from doing stuff that the framers thought was *so dangerous* that we couldn't wait for Congressional preemption to put it down (like starting their own wars).

However, there is reason to think that nonetheless the framers meant to forbid it. After all, there's a ton of stuff in the Federalist Papers, especially from Hamilton, about how bad it is if states interfere with interstate commerce.

**Federalist 7** argues it would be really bad if states could have distinct commercial policy—that essentially it would cause civil war.

The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance.

The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment

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<sup>91</sup>There's one textual argument that one might make here: Art. I Sec. 10 prohibits states from taxing imports or exports. But that's usually read to only mean taxing *international* imports and exports. *Woodruff v. Parham*, 75 U.S. 123 (1868), though this case contradicts dicta from an earlier Marshall opinion.

of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative.

**Federalist 11** argues that part of the point of the Constitution is to promote united commercial markets:

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctuations of markets. Particular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament, and on this account the operations of the merchant would be less liable to any considerable obstruction or stagnation. The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.

In **Federalist 22**, Hamilton claims trade wars have already happened during the Articles of Confederation, and that they've led to political dissension:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless." Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

Still, you might fairly say: "Ok, we get it. Trade wars between the states? Really bad. But the framers also gave us a solution to them: Congress may regulate interstate commerce, and in doing so may use its power under the supremacy clause to make laws that preempt any such local regulations. In the absence of Congressional action, by what right do the courts act?"

That would be a fair question, and really, the only answer I can give you is "that's the doctrine we have."

## Preemption

The doctrine of preemption is a product of the Supremacy Clause: if Acts of Congress enacted pursuant to its constitutional authority are the supreme law of the land, then any other law has to give way. The constitutional term of art for “give way” is “preemption.”

Here’s a basic example. Suppose Congress passes a law saying that all cars have to be painted in neon, glow in the dark, colors so they’re easier to see at night. And suppose the state of Illinois has a light pollution law forbidding glow in the dark paint on vehicles operated within the state.<sup>92</sup> You’re picking out the paint color for your car. What do you do?

The answer is simple: you follow the federal law and paint your car with the neon glow sparkle bling. Federal and state law conflict, the federal law is within Congress’s power<sup>93</sup> so the federal law preempts the state law.

Different kinds of preemption.

The Supreme Court has explicitly named three kinds of preemption. Conceptually, there are really four categories, tracking two dimensions of doctrine, but it’s only realistically possible to ever see three of them.

The first dimension: is preemption **express or implied**? Sometimes Congress says “state law in this area is preempted.” Sometimes, it just writes legislation, and state law stuff that is inconsistent with that stuff gets preempted automatically, without Congress saying so.

The second dimension: does preemption **cover the whole field or just areas of conflict**? Sometimes, Congress keeps states from legislating in an entire area of human activity; sometimes it just keeps states from legislating where there’s a direct conflict between state legislation and federal legislation.

Put together, you have four possible categories of preemption: express field preemption, express conflict preemption, implied field preemption, or implied conflict preemption. *However*, the notion of “express conflict preemption” is kind of silly. Why? Because state law is *always* preempted when it directly conflicts with valid federal law. So Congress never says “state legislation to the contrary is preempted.” Why would it? It doesn’t need to.<sup>94</sup>

Accordingly, when you see references to “express preemption,” we’re talking about “express field preemption.” And when you see references to “conflict preemption” and “field preemption” we’re talking about “implied conflict preemption” and “implied field preemption.”

Hereafter, I’ll use the terms as given in most sources cases. With no further ado, some details:

**Express preemption** is the easy kind: sometimes Congress says “everything states do in this area is preempted.”

Here’s an example: do you want to know why airlines can lie to you about everything, overbook flights, and mess you around in dozens of different ways and not get sued for it?<sup>95</sup> Here’s why: in the Airline Deregulation Act, 49 U.S.C. §41713 provides, in relevant part:

<sup>92</sup>Let us assume away any dormant commerce clause objections to that law.

<sup>93</sup>assume that’s true here because blah blah blah channels and instrumentalities of interstate commerce, road safety, hand-wave hand-wave

<sup>94</sup>Congress can, if it wants to, say “state legislation to the contrary is *permitted*, like when it establishes its own regulatory structure for some activity but permits states to establish their own alternative regulatory structures if they want, and decrees that the federal regulations will give way if the states do so. Remember *New York v. United States*, the commandeering case? That was one of the alternatives the Court mentioned as available to Congress.

<sup>95</sup>Grouchy airline victim editorial: in any other industry, “overbooking” would be called “fraud.” Selling more stuff than you have traditionally is grounds for a prison sentence.

a State... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

However, even express preemption requires statutory interpretation. Taking this example: what is “related to a price, route, or service of an air carrier?” Does it just cover price controls and direct route regulation, or does it place airlines above the (state) law altogether by preempting things like state contract and tort law?

I’m very sad to report that the answer in the case of the Airline Deregulation Act is the latter. In *Northwest v. Ginsberg*, the Supreme Court held that the Airline Deregulation Act doesn’t preempt the rules of contract that the parties may bargain into, but it does preempt state law rules that are imposed on all contracts, like the implied duty of good faith and fair dealing, and basically all of state consumer protection law.<sup>96</sup> Incidentally, this was a 9-0 opinion. However, not all cases of express preemption are this broad. It all depends on legislative intent.<sup>97</sup>

**Field Preemption** is where Congress impliedly preempts an entire field of regulation. Typically this is by regulating it all itself (or by handing over responsibility for that area to an administrative agency, in which case Congress’s preemptive power will pass through to agency rules issued under its authority—about which, see basically all of administrative law). A court will be more likely to find field preemption in a traditional area of federal concern. Again, remember that this is *implied*: if Congress says “we preempt the whole field,” then we have a case of express preemption like the Airline Deregulation act.

There’s not a whole lot to say about field preemption, except that, like in express preemption, the the court will look at Congress’s intent. We say that if Congress intended to “fully occupy the field,” then state law is preempted. And this is so *even if the state law is fully consistent with the federal law and the purposes behind it*. That’s the difference between field preemption and conflict preemption: with field preemption (and express preemption) the state can’t legislate *even if everything the state does is totally compatible with what the feds did*.

*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) is a nice illustration of how there can be disagreement about the extent of the field that Congress intended to occupy, even when all agree that there was a field it did so intend to occupy. In that case, the Court held that Congress intended to occupy the field of safety regulations of nuclear plants, but not of economic regulations of the same.<sup>98</sup>

Sometimes the court will also look at things like the extent of the federal interest in the area and the extent to which allowing states to participate in regulation will undermine the federal scheme. We can think of those either as independent doctrinal ideas or as guidelines that might lead a court to think that Congress intended preemption (that is, as interpretive principles); it doesn’t really matter for the ultimate result.<sup>99</sup>

**Conflict Preemption** comes in two flavors (sub-types). The first is what we might call *impossibility preemption*: it’s impossible to obey the federal law and the state law. Congress requires trucks to only

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<sup>96</sup>Grouchy airline victim editorial: That’s right: thanks to Congress, *an airline is not obligated to act in good faith when it makes a contract with you*.

<sup>97</sup>This is a good opportunity to think about the policy consequences of preemption. While there’s good reason to have a national air travel market regulated by one central authority, it’s also hard to deny that it’s much easier for the airlines to lobby/corrupt Congress and the FAA than it would be to do the same in all 50 states, and harder for shafted consumers to influence those central agencies than it is to influence state legislators and regulators. In that way, preemption comes with a real democratic cost.

<sup>98</sup>See also, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which further held that Congress’s occupying the field of safety regulations did not preempt state tort claims based on nuclear injuries—in particular focusing on the fact that Congress established a program to indemnify some nuclear plant operators against private tort suits—thus, on the Court’s argument, evidencing Congress’s belief that such suits could still be brought even after its legislation.

<sup>99</sup>One good example of these ideas is *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

have curved mudflaps, Illinois requires trucks to only have straight mudflaps. Nobody can obey both laws, so the Supremacy Clause eats the state law.

The second is what we might call *purposes preemption* (sometimes also called “objectives preemption” or “obstruction preemption” or lots of other things): the state law impedes the purposes/objectives of the federal program. An example is in the PG&E case, where the challenger claimed that California’s law conflicted with the federal purpose, embodied in Congress’s atomic energy legislation, of promoting nuclear power.

The Court disagreed, largely because it had a different view of the federal purposes than the challenger did. It interpreted Congress’s having particularly carved out space for states to enact economic regulations as an indication that the Congressional purpose was not to promote nuclear power *no matter what*, but to promote nuclear power compatible with economic viability judgments made by states. California’s making an economic viability judgment, therefore, did not conflict with that Congressional objective.

As you should be able to tell by now, all the action here is in...

Legislative intent and statutory interpretation

**Hypo:** Suppose Congress passes the following law:

All widgets made in the United States shall be made with no more than .002mm tolerance between the flange and the squirtle.

and the state of Illinois passes the following law:

All widgets made in Illinois shall be made with no more than .001mm tolerance between the flange and the squirtle.

Is the Illinois law preempted? That depends. Did Congress intend to set a *floor*—that is, the .002mm tolerance is the least demanding standard that’s acceptable for widget-makers, but a state can mandate a more demanding standard? Or did Congress intend to set a *ceiling* as well—there’s no more demanding requirement allowed? In the latter circumstance, but not in the former, the Iowa law is preempted.

To sort out the answer to that question, we have to delve into legislative intent. Here are some things the Court might consider:

- What kind of judgments did Congress make in enacting the statute (as evidenced, for example, by legislative history, or by other statutory language), or, in the case of a statute where this decision is made by an administrative agency, what kind of judgments did Congress authorize the agency to make? Are those judgments inconsistent with having a higher standard? For example, is there evidence that Congress balanced the safety needs of a more demanding standard against the economic cost?
- Did Congress comprehensively regulate the area in a way that might suggest that it intended for its regulations to be the only ones covering an area? (That is, did it intend to do field preemption?)
- Is the regulation in a traditional area of state concern or an area where federal regulation is traditionally dominant? The court will be more cautious about finding preemption in the former category.<sup>100</sup>

<sup>100</sup>I like to think of this as being basically for the same reason that we use trade usage and such to interpret contracts—because when people make decisions and utter legally significant words, they do so against a backdrop of prior behavioral and linguistic practice, and if they mean to upset that prior practice, they’re likely to recognize the need to do so explicitly. Accordingly, the courts will tend to require Congress to use more explicit words if it preempts state regulation in an area (like education, family

Statutory interpretation is a subject all on its own, of which we cannot more than touch the surface in this course. It's very much worth your time to take administrative law or some other class that has a heavy focus on statutory interpretation in order to learn it properly.

## Procedural Due Process

In a lot of ways, the last big doctrinal area we're skipping is the most fundamental doctrine in all of American law: procedural due process. (I'm nonetheless skipping it for sake of time and because it is typically covered in administrative law.)

To begin, why do I say that procedural due process is so fundamental? The answer is that it describes the difference between government power under law and government power not under law. Every government in the world that can fairly be said to be ruled under law must have some kind of doctrine that works something like procedural due process.

To see why, let's look at the relevant part of the Fifth Amendment (the Fourteenth is only different in that it refers to states as the deprivors).

"No person shall be... deprived of life, liberty, or property, without due process of law.[]"

This is about as straightforward a legal rule as you can get. You can't be shot, locked up, or have your stuff taken without due process. Of course, there is no such thing as a straightforward legal rule, so there are many questions we might want to ask about this. Consider the following.

- Who is a person?
- Who are the actors whose behavior this clause regulates?
- What counts as a deprivation?
- What counts as life, liberty, or property?
- What constitutes due process of law?

The answers to a number of these questions are pretty straightforward. For the most part, a person is a legal person: corporations yes, cats no. (My cat excepted.) Likewise, it's pretty clear that this stuff just applies to the government: to the feds through the fifth amendment and through the states through the fourteenth, although we might argue whether the passive voice construction should have meant that it applied to the states from the get-go, or even whether it obligates the government to regulate private violence.

But the last three on this list are less than clear. Let's talk about them.

### What interests?

First, what interests are protected? The Constitution says "life, liberty, and property." We kind of know what life and liberty are. But property? We think we know what that means. You took a class in 1L year, you got the notions of real property, and bundles of rights, and chattel—these are the kinds of things that make up property.

But what about stuff that the government has promised to give you in the future? Well, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that this can be a property right too. The idea is that the recipient has a statutory entitlement to the benefits. And there were determinate statutory standards for who was entitled to receive the benefits. So it looks a lot like a property right—a legal rule saying that persons who meet the following conditions X Y and Z are entitled to get A B and C.

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law, etc.) traditionally controlled by the states, and will find preemption with a hair trigger in areas like foreign relations that are characterized by pervasive federal authority.



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.’” Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, or to denial of a tax exemption, or to discharge from public employment.

So let's think about a hypo for this. Suppose we attended a public university (i.e., subject to the 14th Amendment), and at that hypothetical public university, your professor promised you a passing grade in this class, in exchange for your consistent attendance? Do you have property interest in that?

What if the professor writes it in the syllabus? “everyone who shows up to every class will pass?”

What if it's part of official university policy?

What if the professor makes it into a contract? It looks like it's supported by consideration... the professor wants you to show up to class, you want a passing grade...

If not in your grades, what about your status as a student? If the professor accuses you of cheating on an exam, does the university have to give you some kind of process before trying to expel you? Does it depend on the content of a written policy from the university?

Board of Regents v. Roth, 408 U.S. 564 (1972), gives some insight on these questions. In that case, the Court held that a state university professor could have a property interest in his job, although he didn't have one in that case. And then later, in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the Court found one in the job of a school security guard.

Here's what the court said in Roth:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

So what do we get out of this? Number one, a property interest is created by some external law, like state law. You have a property interest only if the state says you're entitled to something.

Number two, it has to be important. You don't get due process if your state employer says that you have to take your lunch break at 12:30 instead of noon.

Number three, it kind of has to look like an entitlement, the kind of thing that you can justifiably rely on being provided under the substantive law in question. And you can usually tell that this is the case more or less by the extent to which the law conditions eligibility for the entitlement on specific facts or rules and operates more or less mechanically rather than by some kind of discretionary policy decision.

And this is important: once an interest is created by state law, the procedures provided in state law do not control the process that is due. What controls is the constitution, which judges whether or not the procedures provided for by the state are sufficient.

Property interests: summarized

1. Created by state law

2. But once found, state law procedures do not control, how much process is due, constitution does. This is important.
3. Must be an important interest.
4. Must be an “entitlement” — and we look for a justifiable reliance/expectation, and a test for eligibility that relies on specific fact-finding rather than open-ended policy decision.

How much process is “due?”

There are lots of different kinds of legal process someone could get before the government deprives them of a life, liberty, or property interest. Let’s think about some questions:

- Do you get a hearing before or after deprivation? (often the key issue)
- Do you get a lawyer? If so, is that lawyer to be paid for by the government?
- Do you get to call witnesses? If so, do you get compulsory process to get them (i.e., subpoenas)?
- Do you get to seek discovery from the government?
- Do you have a right to confront witnesses against you (like via cross-examination)?
- Do you have a right to a judicial officer who is independent of the agency that’s making an adverse decision? Access to a formal court?
- Do you have a right to an appeal?

In the criminal law, we have a full adversary process with extensive procedural protections for the defendant, and it has to happen before the defendant is deprived of liberty for an extended period of time—that’s what the speedy trial right does, forbids the government from taking away people’s liberty to a large degree before a hearing. Criminal defendants get a privilege against self-incrimination, a government provided lawyer, a right to confrontation, all kinds of things like that.

By contrast, here’s all the court said about the process to be provided to the fired government employee before the firing, in *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985):

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government’s interest in quickly removing an unsatisfactory employee.

However, the court also made clear that the reason so little process was provided pre-termination was because the employee was also provided with a full hearing after the fact, that is, he could get his job restored ex post. This question of pre-termination vs post-termination process is often the key issue in procedural due process cases.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Court laid out a three-part balancing test that has been applied ever since. In application, it’s honestly pretty ad hoc—it doesn’t actually give courts lots of guidance (and as a result, in actual practice, you will have to look for cases similar to yours). But you still have to give lip service to it, and it tracks a kind of intuitive notion of fair process.

The three parts are:

First, **the weight of the private interest at stake**. A person who is deprived of welfare benefits could end up sleeping on the street or struggling to get food—this is a very significant interest, and there

probably ought to be more process before the state deprives someone of that property interest. By contrast, we might imagine, say, if the state seizes your luggage at the airport there's a much smaller private interest at stake. So there's much more reason to have pre-termination process in the hearing in the former case than the latter.

Second is **the risk of erroneous deprivation**. This is a factor that makes the most sense when it's judged against the existing process that the state has provided—remember that procedural due process cases come up when someone challenges an existing procedure. And it can be broken down into two sub-factors. There's the reliability of existing procedures—are they fair? Do they do a pretty good job of getting the right answer? And then there's the marginal benefit of additional procedures—is there something that the government could do which would make the process much more reliable or fair?

Third is **the government's interest in avoiding additional process**. Sometimes the government interest will be purely administrative: extra process costs money and creates an administrative burden, the government has a legitimate interest in keeping its budget down and its bureaucracy as un-cumbersome as possible. However, sometimes the government will also have additional interests in avoiding process. If, for example, there's a military or law enforcement emergency, sometimes the government has a reason to act quickly, and the government has a strong interest in avoiding the delay that would be incurred if it had to provide pre-termination process.

What counts as a deprivation?

Doesn't everything the government does deprive someone of something? After all, when they pass a law that says "no driving over sixty-five," that deprives me of the liberty to go really fast. When they impose income taxes, they deprive all of us of property. When the city demands that homeowners get a permit before building a shed on their land, it arguably deprives homeowners of both liberty and property. Does everyone get a hearing in all of these cases?

Well, one old case suggests maybe yes. In *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) the Court held that there had to be a hearing before imposing special assessments on landowners to pay for paving the road adjacent to their land.

So how come I don't get a hearing before the IRS makes the university take a third of my salary out of my paycheck every month? The answer to that is the next case after *Londoner*: *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). There, the Court distinguished special assessments directed against particular propertyholders from a *general* increase in the property taxes in an area, applicable to all in the city. The idea is that you're not really being deprived of property when there's a change in general law—and the only process you're "due" is the democratic process.

Procedural Due Process, Equal Protection, Separation of Powers

You might have noticed that in this sense, procedural due process deeply connects both to equal protection and to separation of powers. If the legislature just wishes to raise revenue, it can do so with a general law (i.e., one that doesn't single out particular people, that doesn't give rise to a class-of-one equal protection claim). But if it wishes to smite a particular person, well, it can't: the application of overall policy (i.e., general law) to individuals is a task for the executive and judiciary.

Let me put all of that a little bit differently and longer, just to make sure it's clear. One way to understand what happened in *Bi-Metallic* is that procedural due process drew the line between the functions of the judiciary and that of the legislature. The legislature makes rules, but doesn't apply them to any person in particular; a person isn't entitled to the procedural protections of judicial process as long as the legislature sticks to that role. The judicial role begins when decisions start getting made that apply to individuals. (How does the executive fit in all this? Well, the executive applies law to individuals, but typically by invoking judicial process. Also, the executive runs the administrative

agencies, and, if you take administrative law, you'll learn that the *Bi-Metallic* case tracks what ad law people know as the distinction between "regulation" and "adjudication.")

Let's think of this a little more carefully, though. Suppose the legislature makes a law "nobody may drive over sixty-five miles per hour." I don't get to show up in court and demand procedural due process to challenge the law's mere existence. Of course, when I get pulled over for speeding, I get to challenge the application of the law to me by the executive (for example, to claim I wasn't speeding, that the police misinterpreted the statute, or to bring some other, substantive, constitutional challenge to the law), but I don't get to claim that the legislature followed improper procedures in regulating me in the first place, because the law was general. If the legislature enacted a law saying "Paul Gowder doesn't get to drive over sixty-five," then I get to challenge that law on procedural due process grounds in addition to all the rest.

In short: the legislative branch makes general law, but does not get to operate on individuals. Legislative acts, properly understood, typically aren't subject to due process challenge. (What does "general law" mean? Well, maybe the Equal Protection Clause can help?) The judiciary and executive apply those laws to individuals, and are subject to procedural constraint before doing so.

You might think this is kind of alarming. The legislature can't take your property individually. But it can enact generally applicable laws that simply strip away property rights from everyone. But isn't that worse? To be sure, the democratic process protects you against such laws, as the Court pointed out in *Bi-Metallic*. But that's cold comfort: if the government just tried to take your property individually, you'd still have the protections of the democratic process, but you'd also get the protections of the courts. So why is the more dangerous power covered by fewer protections?

One answer we might give is that the democratic process is more effective in regulating generally applicable laws. If Congress just passes a law like "the police go beat up Paul Gowder" or "we take Paul Gowder's stuff" (laws which, respectively, also violate the bill of attainder clause and, in the absence of compensation, the takings clause) then my fellow citizens don't have any particular motivation to put a stop to it. But if Congress passes a law "the police beat everyone up" then there's a pretty good chance the voters will have some things to say about it, because it hurts them too. For that reason, many constitutional scholars would say that one key idea is that the Courts give more scrutiny to laws directed at people who can't defend themselves in the political process.

That is the core message of the most famous footnote in all of constitutional law: footnote four in *United States v. Carolene Products*, 304 U.S. 144 (1938). We've already seen this, but I want to make sure you read it again, so:

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.

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 [omitted]; on restraints upon the dissemination of information, see [omitted]; on interferences with political organizations, see [omitted]; as to prohibition of peaceable assembly, see [omitted].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [omitted], or national, [omitted], or racial minorities, [omitted]: 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.

So if judicial scrutiny is directed at protecting the democratic process, then Carolene Products identifies at least two obvious grounds for invoking that scrutiny. First, “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” like infringements on voting rights and free speech, and second, “prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”

But if we interpret procedural due process as essentially the command that the legislature make generally applicable laws, rather than target particular people, then that leads us right into the Equal Protection Clause. One way to think about all of Equal Protection Clause doctrine is that it fills out the idea of general law: the government is required to have particular reasons before it treats people differently.<sup>101</sup> But this one applies not just to the legislature, but to the executive too, forbidding, for example, racial discrimination in policing.

To understand this on a doctrinal level, let’s think about two legal routes a plaintiff might use to attack government action that treats her differently.

The procedural due process route allows a plaintiff to say “this government action singled me out, and I’m entitled to procedural protections before that happens.” It isn’t an attack on the substantive result: the procedural due process claim in *Londoner* wasn’t “the tax assessment they imposed on me was illegal, or was for the wrong amount.” Instead, it’s “even if the tax assessment ultimately turns out to be legally correct, I’m entitled to a formal process to allow that to be determined.”

By contrast, think about *Village of Willowbrook v. Olech*. Recall that this was a challenge to a city requirement that plaintiff grant a 33 foot easement on her property as a condition of getting a connection to the city water supply. The basis of the challenge was that the plaintiff was treated differently: other citizens seeking water connections had only been required to give up 15-foot easements. Hence, the nub of the claim wasn’t procedural—*Olech* wasn’t claiming that she had been denied a hearing. Rather, it was substantive: she claimed that the decision was illegal for unjustifiably treating her differently from everyone else.

So one way to think about both procedural due process and equal protection are as alternative ways for plaintiffs to raise the classic kindergarten claim “UNCLE SAM WAS PICKING ON ME!” As the lawyer for plaintiff, you want to bring a procedural process claim when your client has been picked on by a **general law or power that has been applied to her individually without a hearing**. For example, the government threw your client in jail without a hearing, or the legislature passed a bill of attainder against her (quick exercise: go find out what a bill of attainder is if you don’t already know).

By contrast, you want to bring an equal protection “class of one” claim when some government agent has applied some kind of general rule or power to your client but you think the rule itself or its application is **substantively unfair**—there is insufficient reason to treat your client one way and to treat everyone else differently. We’ll fill out this notion of “insufficient reason” in the coming weeks, that’s the core doctrinal question in equal protection law.

In sum, the key doctrinal difference between EPC and PDP is that EPC is about the *substantive fairness of government action* while PDP is about the *fairness of the procedure that is used to determine government action*.

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<sup>101</sup>For further discussion in a more academic vein, see my article, “Equal Law in an Unequal World,” 99 Iowa L. Rev. 1021 (2014), and also pp. 81-86 of *The Rule of Law in the United States: An Unfinished Project of Black Liberation*.

Addendum: an algorithm for PDP problems

**Step 1: Is plaintiff challenging individualized state action?**

If YES, proceed to step 2.

If NO, stop here, there's no procedural due process claim.

**Step 2: Does plaintiff have a life, liberty, or property interest?**

If YES, proceed to step 3.

If NO, stop here, there's no procedural due process claim.

UNSURE? Here are some rules of thumb:

- Has the state created an entitlement?
- Do people rely on it?
- Is there an important interest at play?
- Is it the sort of issue where the government decision could be right or wrong?

**Step 3: Apply *Matthews* balancing**

- How important is the individual interest?
- What's the government interest in avoiding more process?
- Would additional process make the government decision more accurate?

#### # Final Note: Suing the Government

The last thing I want to make sure you have some exposure to, even though it's not explicitly part of the subject matter of the course, is some clue about how you get an individual rights constitutional challenge into court.

Of course, if your client is being criminally prosecuted, that's easy: you raise the constitutional challenge as a defense. But sometimes your client isn't likely to be subject to prosecution, or you want to raise the challenge in a less risky environment. (If your client waits to bring the challenge until they're subject to prosecution, then they if they lose they go to prison!)

*Bivens v. Six Unknown Federal Agents* found an implied constitutional tort against federal officials who violate constitutional rights. Against state officials, Congress has provided a right of action in 42 U.S.C. 1983.

Section 1983 litigation is very complicated, you could teach a large part of a class on it (and I used to practice in the area), but the main issue revolves around "qualified immunity." The short version is that an official isn't liable for damages unless the right she or he violated is "clearly established," which basically means there has to be governing authority with pretty similar facts if you want damages. Lots of police have gotten away with lots of constitutional violations under qualified immunity doctrine.

There's lots of other complexity with respect to sovereign immunity, which parties to name in the suit, official vs individual capacity suits, claims for injunctions vs claims for damages, etc. I can't teach you all that stuff (and I'd have to go refresh my memory on some of the fine details anyway), but I at least want to flag these things for you so that you know they exist before you run out and start filing constitutional lawsuits.