



# Constitutional Rights

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# CONSTITUTIONAL RIGHTS

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## About the Author

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## Introduction

Welcome! This casebook explores individual and associational rights protected under the U.S. Constitution. It covers some of the most important and contentious topics in constitutional law: race, gender, sexuality, abortion, voting, and the list goes on. We will work together both to figure out what the Supreme Court has done and to evaluate its decisions.

The casebook focuses on “substantive” rights—i.e., rights that limit governmental regulatory authority—and it only briefly touches on civil and criminal “procedural” rights. It concentrates on the First Amendment (speech and free exercise), the Second Amendment (guns), the Fifth Amendment (substantive due process and takings), and the Fourteenth Amendment (equal protection and substantive due process).

The casebook has many goals. First and foremost is to advance your lawyerly training. Every assignment and class session is an opportunity to improve your legal aptitude. Your professor will guide the path, but your active participation in this process is essential.

Needless to say, you should carefully read for each class. But don’t just read; actively read. Ask yourself things like: What is the structure of the opinion? What logical or analogical (precedent-based) moves are the justices making? Are those moves contestable? What concerns might be driving the analysis?

As lawyers, you must read cases for comprehension, being able to identify the relevant facts and the holding. We will practice that skill throughout the course. But your aspirations should be much higher. Exceptional lawyers don’t just understand black-letter law. They understand how legal doctrines fit together, what animates them, and how they evolve over time. They come to understand law not simply as a set of legal rules but also as a cultural practice. And they can make persuasive arguments within that practice. But developing these sophisticated analytical skills requires hard work. It isn’t the sort of thing that passive reading or class attendance can supply. Professors can’t do it for you. You need to put in the work.

The same point extends to class sessions. People who study the process of learning overwhelming say the same thing: We all learn better—more thoroughly and more permanently—by actively thinking, not just passively listening. That is a principal reason why many law professors use the “Socratic method”—asking students to supply answers through a series of questions. Of course, this is a very inefficient way of conveying information. If that were all that mattered, then lectures would do the trick. But your goal should not be to fill your notebook with information. The goal should be, instead, to really learn the material—more deeply and more permanently—and to improve your legal aptitude. And all of this points in the same direction: actively engaging with the material in class.

In terms of substance, this casebook covers lots of “black-letter law,” including things to know for the final exam and the Bar Exam. But it also offers an opportunity to explore broader, more overarching features of modern rights jurisprudence. In particular, the cases you will read often return to these topics:

- ❖ *The Structure of Rights*: Are rights defined in terms of whether an individual is engaged in protected conduct, or are they defined in terms of whether the government is engaged in wrongful action? Are rights categorical rules, or are they protected interests that can be outweighed by governmental interests? Does the type or degree of the burden on the right matter?
- ❖ *Governmental Motives*: Do we care *why* the government is doing something? If so, how do we determine governmental motives? If we cannot do this effectively, are there any doctrinal frameworks to use as a proxy for discerning motives?

- ❖ *Equality*: Rights jurisprudence is full of terms like “equality” and “neutrality,” but what do these concepts mean? Do we care only about the equality of legal rules, viewed in isolation? Or does our notion of equality account for underlying inequalities in ability or financial resources? What about equality in outcomes?
- ❖ *Implementation Rules*: To what extent do legal doctrines go beyond mere *interpretation* of constitutional text and, instead, create legal rules or frameworks that help *implement* a constitutional provision?

These themes appear and reappear through the course. It’s one of the reasons that I love this course, and I hope you will as well.

Finally, this is not a history course, but understanding constitutional law requires deep engagement with the past. As Oliver Wendell Holmes Jr. famously explained in *The Path of the Law* (1897):

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Holmes was right, and his insight guides the structure of the casebook. Key doctrinal concepts like “tiers of scrutiny,” “compelling interests,” and “content neutrality” make little sense without appreciating their historical development. Moreover, modern doctrine reflects a series of modern judicial choices, and by studying the historical development of the law, we can better appreciate and critically evaluate those choices.

History matters for practical reasons, too. Practicing lawyers encounter old cases all the time. For the most part, lawyers and judges tend to treat (non-overruled) old cases as if they were part of a seamless web of caselaw that lays out a coherent set of principles. Sometimes you should take the same approach. But there might also be occasions where it will better serve your clients, and help the judge more accurately understand existing law, by contextualizing earlier cases—by explaining how certain decisions fit within a broader framework that has since changed. Thus, although my goal is to help you become exceptional lawyers in the Twenty-First Century—not in the past—doing so requires understanding earlier ways of thinking about the law. Notice that history is relevant in this respect regardless of whether the judge you are trying to persuade embraces an “originalist” interpretive approach.

Throughout the course, we will also consider the extent to which the Supreme Court defines individual rights doctrines in reference to history.

The casebook thus begins with the origin of modern rights in Unit 1, which not only sets the stage historically but also introduces many of the broader themes and problems in rights jurisprudence.

# 1. The Origin of Modern Rights

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Nowadays, it is common to say that constitutional interpretation must “begin with the text.” And perhaps that is the best approach. But think about the problem from the other direction—not as an interpreter but as an author. From that standpoint, it makes no sense to “begin with the text.” There is no text yet! The page is blank. But the mind of a writer—at least a successful one—is already full of ideas, along with a set of linguistic tools to express those ideas. Writers don’t start with the text. They start with thoughts that are embedded in a preexisting conceptual and linguistic universe.

Rather than starting with the *text* of the Bill of Rights or of the Reconstruction Amendments, we will first grapple with the conceptual and linguistic universes in which those texts were written. With that foundation, we will then be in a better position to understand and critique the interpretive developments that followed.

## 1.1. Rights at the Founding

For hundreds of years, Americans have loved talking about their “rights.” Today, rights are generally understood as limitations on governmental authority and are usually enforceable in court. So when we go back to the eighteenth-century sources and read about “rights,” we naturally assume that our constitutional forebears were speaking the same language. But appearances can be deceiving. Linguistic meaning often shifts over time, and discussions of “rights” have evolved substantially in the past two centuries.

Recovering Founding-Era understandings of “rights” requires going back to social-contract theory. This section summarizes that theory, as generally understood by American legal elites, and it describes how rights served as a foundation of their constitutional thought. In stark contrast to modern rights, however, many Founding-Era “rights” did not impose determinate limits on governmental authority and were not enforceable in court, even when enumerated in a written bill of rights. In particular, the prevailing view of “natural rights” simply shaped the way that the Founders thought about the purposes and structure of government, without providing legally enforceable privileges or immunities.

### **Social-Contract Theory\***

Social-contract theory was a thought experiment organized around different imagined stages of political development. It began by considering what things would be like without a government—a condition known as a “state of nature.” Properly understood, this inquiry was hypothetical rather than historical. The idea of a state of nature was “abstract,” James Otis explained in his famous *Rights of the British Colonies Asserted and Proved*, acknowledging that “men come into the world and into society at the same instant.” Yet that idea remained useful, Otis insisted, because “the natural and original rights of each individual may be illustrated and explained in this way better than in any other.”

In a state of nature, individuals were thought to have certain freedoms or liberties—commonly known as “natural rights.” By definition, these “rights” existed without reference to governmental authority. They were simply freedoms that individuals enjoyed vis-à-vis each other, subject only to the

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\* This part is adapted from Jud Campbell, *Republicanism and Natural Rights at the Founding*, Const. Comment. (2017). For a more detailed discussion, see Jud Campbell, *Fundamental Rights at the American Founding*, 4 CAMBRIDGE HISTORY OF RIGHTS (forthcoming).

confines of “natural law”—roughly defined as the requirements of reason, justice, and morality. As James Wilson explained, “natural liberty” was the “right” of every person to act “for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours.”

Social-contract theory then hypothesized that individuals, recognizing the benefits of collective action, would “join in one body . . . to manage, with their joint powers and wills, whatever should regard their common preservation, security, and happiness.” James Wilson, *Law Lectures*. This imagined agreement was a “social contract” (or “social compact”), and it required the consent of every individual. The result was a single entity—a body politic—composed of all the members of the political society. In the words of the Massachusetts Constitution of 1780, “The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”

Like the state of nature, the social contract was imaginary but nonetheless had powerful implications for the proper scope of governmental power. “[Whatever] the historical fact may be of a social contract,” English jurist Richard Wooddeson explained, “government ought to be, and is generally considered as founded on consent, tacit or express, on a real, or quasi, compact. This theory is a material basis of political rights; and as a theoretical point is not difficult to be maintained.”

At the next stage of political development, the body politic formed a system of government in an agreement known as a “constitution.” Unlike the social contract, which required unanimous consent, the constitution required only the consent of the body politic, based on majority rule. Even after the formation of government, however, the body politic still retained supreme political authority, or “sovereignty.” This was the crux of popular sovereignty—that members of the government exercised power merely as agents of the people.

### Founding-Era Rights

In modern American constitutional thought, we tend to think that fundamental rights attain their binding effect through the ratification of the original Constitution and the amendments. In other words, rights have constitutional force because they were constitutionally *enacted*.

At the Founding, however, constitutions were drafted and ratified only *after* the creation of a body politic in a social contract. Constitutions thus came second. And because many Americans thought that rights were recognized and preserved in the social contract, it was unnecessary to restate those rights in a constitution—just as today it is unnecessary to include a list of constitutional rights in every piece of legislation. The rights already existed! In short, it was a common view at the Founding that declarations of rights were merely declaratory.

The rights mentioned in these declarations generally fell into two categories:

First were natural rights that individuals could exercise without a government, like eating, praying, and sleeping. “A natural right is an animal right,” Thomas Paine succinctly explained, “and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals.” And when forming a political society in a social contract, individuals agreed to retain some of these rights. Retained natural rights, William Blackstone summarized, comprised “natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.”

Second, when forming a political society, the people might also recognize certain fundamental positive rights to limit governmental power. These positive rights, unlike natural rights, were legal privileges or immunities defined in terms of governmental action or inaction, like the rights of due process, habeas corpus, and confrontation.

Recovering the meanings and enforceability of Founding-Era rights thus requires attention to their type.

### Retained Natural Rights

Retained natural rights were not determinate legal rights. Rather, with the exception of certain “rights of the mind” (*i.e.*, the freedoms of conscience and opinion), these were aspects of natural liberty that were subject to regulation only in the interest of the political society and its members, and only with the consent of the people. These were also rights that the government had to help protect against *private* abridgment.

Today, we usually think about governmental interference with constitutional rights—rights like the freedom of speech, the right to free exercise of religion, the right to keep and bear arms, and so on—as presumptively unconstitutional, and valid only if the government provides a compelling justification and shows that interference with the right is necessary to achieve that governmental interest. Modern rights of this sort are not absolute, but they are still very strong.

At the Founding, retained natural rights generally did not carry this legal significance. Instead, the Founders insisted that natural liberty should be restrained whenever doing so would promote the common good. Natural liberty, Nathaniel Chipman declared, “must be in a just compromise with the convenience and happiness of others.” This was a common refrain.

And this notion of rights carried forward until the early twentieth century. “[T]he possession and enjoyment of all rights,” the Supreme Court explained in *Crowley v. Christensen* (1890), “are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.”

Proper respect for the public good meant that lawmakers had to consider everyone’s interests, and not merely those of particular individuals or factions. The government, in other words, should not be “adverse to the rights of other citizens,” as James Madison put it in *Federalist No. 10*, or act by “disregarding the rights of another.” But this principle required only *equal consideration of and respect for* the natural rights of others; it did not make those “rights” absolute or even presumptively immutable. Indeed, Americans reiterated over and over again that the common good often required the sacrifice of individual liberty.

For the Founders, the fact that rights could only be restricted in the promotion of the public good also meant that governmental power had to be aimed at *public* or *social* goods—not *private* goods, such as eternal salvation or individual pursuit of the “good life” for its own sake. Restrictions of retained natural rights, in other words, had to be *public regarding*. Preventing sin and saving souls were not valid reasons for restricting natural rights. “[P]rivate vices,” William Blackstone explained, “cannot be, the object of any municipal law” unless “by their evil example, or other pernicious effects, they may prejudice the community.” Thus, the government could not promote morality *for its own sake*. But this did not mean that morals regulations were necessarily beyond the scope of governmental power. Rather, the government could promote morality insofar as doing so aimed at *public* benefits. Thus, as the Pennsylvania Supreme Court explained, “an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals.” *Commonwealth v. Sharpless* (Pa. 1815).

In general, the government could regulate retained natural rights in any way that promoted the public good. Certain *inalienable* natural rights, however, were thought to have a more constraining effect on governmental power. The Founders usually thought of these natural rights as liberties that humans were incapable of parting with—like control over their own thoughts and beliefs. And consequently, as Nathaniel Chipman stated, inalienable rights “can never justly be subject to civil regulations, or to the control of external power.” In this way, inalienable natural rights were different

than ordinary (or “alienable”) retained natural rights, because the latter were subject to the general regulatory authority of the legislature. Inalienable natural rights, by contrast, could not be regulated in promotion of the public good. It is also worth noting, however, that the authority to locate the *boundaries* of inalienable natural rights ultimately resided in the polity, not in each individual. Thus, although in theory there was a crucial difference between alienable and inalienable rights, in practice it was generally up to the legislature to determine the limits of both types of rights.

### Fundamental Positive Rights

In contrast to ordinary retained natural rights, some positive rights imposed firm obligations and constraints on governmental authority. These fundamental positive rights included a slew of customary rules, like the guarantee of a jury trial, the right of habeas corpus, and the ban on press licensing. They were, as Thomas Jefferson put it, “certain fences which experience has proved particularly efficacious against wrong, and rarely obstructive of right.” These rights generally operated as legal privileges or immunities that litigants could assert in court.

Because of the idea that the people had secured their rights in a social contract that predated the enactment of a constitution, many Founders thought that fundamental positive rights limited governmental authority even when unenumerated. Consider, for instance, the rule against press licensing, commonly known as the “freedom of the press.” This right, one commentator explained during the ratification debates, was “a privilege, with which every inhabitant is born;—a right . . . too sacred to require being mentioned.” “[T]he Liberty of the Press,” another writer insisted, was “an inherent and political right, as long as nothing was said against it.”

### Enforcing Rights

The Founders generally thought that rights belonged to the people and that it was therefore the people who were responsible for maintaining those rights. As James Madison explained when he introduced the Bill of Rights in Congress, the main purpose of incorporating rights into the Constitution was that enumerated rights would “have a tendency to impress some degree of respect for [rights], to establish the public opinion in their favor, and rouse the attention of the whole community.”

The point of enumerating rights, however, was not to provide an exhaustive list, nor was it to suppress the dynamic process by which the Founders argued about the content of their (imaginary!) social contract. Indeed, the Ninth Amendment indicates that the list of rights in the Constitution was not meant to be exclusive: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

But none of this is to say that the Founders wanted *judges* to make up rights. And on this issue—the degree of judicial enforcement of rights—it is essential to distinguish between natural rights and fundamental positive rights.

Many fundamental positive rights were *legal rules* about what the government had to do (*e.g.*, provide a jury trial) or could not do (*e.g.*, impose cruel and unusual punishments). When included in a written constitution, the existence of these rights was obvious. But even without enumeration, judges sometimes recognized fundamental positive rights based on longstanding tradition. Fundamental positive rights, after all, were mostly *customary* rights.

By contrast, natural rights were generally regulable in promotion of the public good, and therefore *legislators*—not judges—had nearly complete control over determining whether and how to restrain natural liberty. Judges might still try to ascertain if a legislature had aimed at something other than the common good. For instance, if a group of legislators passed a statute simply to help their friends or harm their opponents, rather than to promote the general welfare, perhaps there was an opening for

judicial invalidation. Yet given traditional limits on the judicial role, judges usually had no way of evaluating whether legislators were acting for public-spirited reasons. At the Founding, there was thus little way of directly enforcing natural rights.

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### Comprehension Questions

1. What was the difference between retained natural rights and fundamental positive rights? What are examples of each?

2. Throughout this course, we will often think about rights in terms of their *scope* and their *strength*. (For the most part, these are *my* terms, used to help you learn the structure of rights jurisprudence; but they aren't terms that judges and lawyers conventionally use.) The *scope* of a right refers to the boundaries of that right—defining when it applies and when it does not apply. The *strength* of a right, by contrast, refers to how it limits governmental power. Some rights, for instance, are absolutes, whereas others are defeasible if the government has good enough reasons to restrict them.

How was the *scope* of retained natural rights determined?

What was the *strength* of retained natural rights?

How was the *scope* of fundamental positive rights determined?

What was the *strength* of fundamental positive rights?

3. In addition to *limiting* governmental power by providing a “negative” right *against* the government, the idea of retained natural rights also *bolstered* governmental power by providing an “affirmative” right *to* certain benefits from the government. How? What exactly were those benefits?

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## 1.2. Rights against the States

It is now taken for granted that the federal Bill of Rights did not apply to the states prior to the passage of the Fourteenth Amendment. Indeed, that seems to be the holding of the famous case of *Barron v. Baltimore* (1833). According to Chief Justice Marshall, “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.” On this view, it would seem that the federal bill of rights had nothing to do with limits on state power.

That is what law students still learn in most Con Law courses. But the full picture is more complicated.\* For those who understood the federal amendments as merely *declaratory* of existing rights, the federal amendments supplied evidence of the people’s rights just as did the various provisions of state constitutions. Rights, on this view, were declared and secured by constitutions—not created by them.

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\* This part draws heavily from Jud Campbell, *Constitutional Rights Before Realism*, III. L. Rev. (2020). For further discussion, see William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, Stan. L. Rev. (2024).

The Georgia Supreme Court was particularly vocal in its embrace of this view. For example, in *Nunn v. State* (Ga. 1846) the defendant challenged a Georgia concealed-carry restriction based on the right to keep and bear arms, even though that right was not mentioned in Georgia’s written constitution. Writing for the Georgia Supreme Court, Chief Justice Joseph Lumpkin began by citing cases from other states explicating the scope of the right. “It is true,” he acknowledged, “that these adjudications are all made on clauses in the State Constitutions.” That, however, was a distinction without a difference, because “these instruments confer no *new rights* on the people which did not belong to them before.” Rather, the right to bear arms was a right “guarantied to British subjects” and “one of the fundamental principles, upon which rests the great fabric of civil liberty.” Moreover, Lumpkin pointed out, the Second Amendment to the federal constitution had, “in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before [in the English Bill of Rights].”

Notice that Lumpkin was not rejecting the holding in *Barron v. Baltimore*. He was not saying that the federal Bill of Rights directly applied to the states. Rather, he was invoking the federal amendments in a different way. “[T]he people of the several States, in ratifying [the federal amendments] in their respective State conventions, have virtually adopted them as beacon-lights to guide and control the action of their own legislatures, as well as that of Congress.” Consequently, the declaration of an “unalienable right” in the federal constitution affirmed the existence of that right “at the bottom of every free government.” These protections, Lumpkin explained, were “as perfect under the State as the national legislature, and cannot be violated by either.” For Lumpkin, the federal Bill of Rights was *evidence* of general fundamental principles of Anglo-American law, and those principles limited the constitutional authority of the government of Georgia.

Given the holding of *Barron*, federal courts could not enforce the federal Bill of Rights against the states *as a matter of federal law*. In diversity cases, however, federal courts essentially sat as if they were state courts, and in those cases they sometimes invoked “general principles which are common to our free institutions.” *Fletcher v. Peck* (1810).

In light of this history, the Supreme Court’s famous holding in *Barron v. Baltimore* appears more modest than we typically see it today. Because the Court’s appellate jurisdiction in direct review of state court decisions was strictly limited to considering questions of *federal law*, it was enough for Chief Justice Marshall to say in *Barron* that the Takings Clause of the Fifth Amendment did not directly bind state governments. But in suits brought in state court, as well as in suits brought in federal court in the first instance (as with diversity suits), the Fifth Amendment could still be invoked as *declaratory* of principles that bound the federal and state governments alike. As the New Jersey Supreme Court put it in *Sinnickson v. Johnson* (N.J. 1839):

This principle [of requiring compensation for takings] has been made by express enactment, a part of the Constitution of the United States; . . . but it has been decided that as a constitutional provision, it does not apply to the several States. Still . . . it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution.

This view made perfect sense in a world where rights were thought to be protected in the social contract, before the framing of a constitution.

### **The Privileges and Immunities Clause**

The original constitutional design generally presupposed that states would adequately protect their own citizens’ rights. It did not, however, make the same assumption about each state’s treatment of the citizens of *other states*. According to the Article IV Privileges and Immunities Clause, “The



Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Notice that this Clause did not *create* federal constitutional rights as such. Rather, it presupposed that there were certain “privileges and immunities of citizens,” and then it extended those rights to the citizens of other states.

But what were these “privileges and immunities of citizens”?

One possibility was that the Privileges and Immunities Clause applied to *all* legal rights that states conferred on their own citizens. But the logical implications of that view were absurd. For instance, if a state provided all citizens a right to vote, surely it wouldn’t have to provide this right to out-of-staters. And there was a problem in the opposite direction, too: Could a state *withdraw* a right from the protection of the Privileges and Immunities Clause simply by denying that right to some of its own citizens? For instance, if a state declared that some of its citizens had no rights at all, would that turn the rights guaranteed by the Privileges and Immunities Clause into a null set?

A different possibility—and the one generally accepted in the 1800s—was that the Privileges and Immunities Clause was more narrowly focused on a particular type of rights: “privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.” *Corfield v. Coryell* (E.D. Pa. 1825). These rights did not include all legal entitlements that a state happened to provide to its own citizens. For instance, if a state happened to let all of its adult citizens vote, that would not give out-of-staters the right to vote, too. Rather, on this “fundamental rights” view, the privileges and immunities of citizenship were limited to retained natural rights and fundamental positive rights.

This did not, however, mean that every state had to provide identical protections for retained natural rights. Retained natural rights, it bears emphasis, were regulable in promotion of the public good. As Justice Bushrod Washington noted in *Corfield*, these rights were subject “to such restraints as the government may justly prescribe for the general good of the whole.” This meant that protections for retained natural rights could—and often did—vary from state to state. When a citizen of North Carolina visited New York, for instance, the citizen would have the same rights under tort law, contract law, and so on, that citizens of New York enjoyed. But these rights were specified by New York law—not the law of North Carolina. As Justice Denio of the New York Court of Appeals observed in *Lemmon v. People* (N.Y. 1860):

The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than 7 per cent per annum of interest, and many others, void. In other States such contracts, or some of them, may be lawful. But no one would contend that if made within this State by a citizen of another State where they would have been lawful, they would be enforced in our courts.

Rather, as Justice Wright observed in the same case, the Privileges and Immunities Clause was designed “to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens.” As indicated by the phrase “whatever they might be,” the specific details of citizenship rights varied from state to state. North Carolina tort law was not necessarily the same as New York tort law. And the Privileges and Immunities Clause simply required *equal* treatment of out-of-state citizens regarding fundamental rights; it did not create or imply a uniform national standard of tort law, contract law, or property law. The details—the *regulations* of retained natural rights—varied from state to state.

Nonetheless, the Privileges and Immunities Clause was premised on the idea that all states would recognize a common set of basic “fundamental” rights—albeit regulable in different ways under state law. And the notion that all states would secure retained natural rights was a reasonable assumption at the Founding. In the Antebellum period, however, it posed a serious problem for defenders of white supremacy. The existence of slavery itself was not at issue because nobody in power thought that enslaved persons were citizens. But what about free Black people? Could the free Black citizens of New York, for instance, enjoy the legal rights of citizenship while visiting North Carolina? This was a looming question in the infamous *Dred Scott* case.

The question presented in *Dred Scott* was whether free Black people could be citizens for purposes of Article III diversity jurisdiction. But the Article IV Privileges and Immunities Clause was on Chief Justice Taney’s mind:

[It] cannot be believed that the large slaveholding States regarded [slaves] as included in the word citizens, or [those states would not] have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which [the slave-holding states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible . . . to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution [and] procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them. . . .

[If a person] ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State . . . . And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

Those who disagreed with *Dred Scott* agreed that citizenship carried with it certain fundamental rights (known as “civil rights”). They simply thought that free Black people were entitled to these rights, too.

In the aftermath of the Civil War and emancipation, however, many Southern states maintained “Black Codes” to deprive Black people of basic rights. Republicans in Congress responded by passing the Civil Rights Act of 1866. The proposal declared that Black people were entitled to citizenship and that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State” on account of race. In particular, Black people would have “the same right 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,” with equal punishment for violations. The Act also created criminal penalties for violations of the act, and it provided for filing and removing certain cases to federal court.

Proponents of the Civil Rights Act frequently denied that it created any new rights. According to Ohio Representative William Lawrence, the bill “does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States.” Illinois Senator Lyman Trumbull expressed the same idea. “So long as a State does not abridge the great fundamental rights that belong, under the Constitution, to all citizens,” he explained, “it may grant or withhold such civil rights as it pleases.” The basic assumption, then, was that Black people were *already* entitled to these fundamental rights by virtue of their citizenship. As Lawrence put it, “there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him.”

But many politicians questioned the constitutionality of the Civil Rights Act of 1866. For one thing, some Congressmen noted that *Dred Scott* had not yet been overruled, and therefore any effort to confer citizenship on Black people would be invalid. “If the Supreme Court decision is a binding one,” Maryland Senator Reverdy Johnson cautioned, “[the Civil Rights Act] will be held of course to be of no avail, as far as it professes to define what citizenship is.”

Another problem was whether the *federal* government had power to enforce rights of citizenship against *state* governments. Even assuming that Black people were citizens, and even assuming that each state’s imagined social contract guaranteed to all citizens a basic equality of civil rights, where did Congress obtain the power to enforce those rights? According to *Barron v. Baltimore*, the federal Bill of Rights only limited federal power. And although many thought that the Privileges and Immunities Clause of Article IV *implied* the existence of basic fundamental rights of citizenship that were common to all Americans, the Clause itself seemed to supply only an antidiscrimination rule with respect to out-of-staters. Moreover, it did not expressly provide Congress with any enforcement power. “A grant of power . . . is a very different thing from a bill of rights,” Ohio Representative John Bingham noted.

Bingham responded to these concerns about the constitutionality of the Civil Rights Act by proposing what later became the Fourteenth Amendment, including protection for the “Privileges or Immunities of Citizens of the United States.” On Bingham’s view, these were rights that states were *already* required to respect under principles of general fundamental law, even though the rights were yet not *federally* enforceable. Consequently, he insisted, the Amendment would not “interfere with the reserved rights of the States.” But under Bingham’s proposal, violations of those obligations could now be federally remedied. Congress, he explained, would be “vested with power to hold them to answer before the bar of the national courts for the violation . . . of the rights of their fellow-men.”

Bingham responded to these concerns by proposing a constitutional amendment, the first draft of which read as follows:

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.

Notably, this draft presupposed the existence of rights of citizenship (“privileges and immunities”) and the right of all persons to “equal protection in the rights of life, liberty, and property”—rights that, as Bingham pointed out, were recognized in Article IV’s Privileges and Immunities Clause and in the Due Process Clause of the Fifth Amendment, respectively. Consequently, he insisted, the Amendment would not “interfere with the reserved rights of the States.” But under Bingham’s proposal, violations of those obligations could be federally remedied. Congress, he explained, would be “vested with power

to hold them to answer before the bar of the national courts for the violation . . . of the rights of their fellow-men.”

Bingham’s draft adequately addressed his own constitutional concerns, but his colleagues quickly noted several objections.

First, some feared that Bingham’s proposed equal-protection clause would, as New York Representative Robert Hale put it, “confer[ ] upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property.” Or, as New York Representative Giles Hotchkiss noted, the equal-protection amendment would “authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property.” In other words, the amendment’s recognition of rights of life, liberty, and property might give Congress a general legislative power, supplying authority to enact virtually any criminal statute and pass legislation regarding rights of tort, contract, and property. Indeed, as Nevada Senator William Stewart observed, providing for equality in the protection of the law on a nation-wide basis would require “Congress to legislate fully upon all subjects affecting life, liberty, and property.”

Second, some representatives worried that Bingham’s amendment, as *only* a grant of power, would require accompanying federal legislation. Consequently, Hotchkiss explained, it would not “permanently secur[e] those rights.” He continued: “I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override.”

Third, the reference to “all privileges and immunities of citizens in the several States”—drawn directly from the Privileges and Immunities Clause in Article IV—was potentially unclear. As we have seen, American jurists had widely construed that Clause as referring only to general fundamental rights. These were, as Representative Lawrence described them, “inherent in every citizen of the United States,” and did not include those “conferred by local law [that] pertain only to the citizen of the State.” But not everyone had taken that view. Some jurists viewed the Privileges and Immunities Clause as banning discrimination with respect to *all* rights that states conferred on their own citizens—including political rights, like the right to vote—without being (in the words of *Corfield*) “confine[d] . . . to those privileges and immunities which are, in their nature, fundamental.” It was unwise, then, for Bingham to merely duplicate Article IV’s disputed language.

In response to these concerns, Bingham redrafted his proposal as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

How did this proposal respond to the three concerns noted above? Answering that question will help you better understand the original design of the Fourteenth Amendment.

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### Comprehension Questions

1. Based on *Corfield*, what was the *scope* of the rights of citizenship (or “civil rights”) recognized in Article IV’s Privileges and Immunities Clause? What was the *strength* of those rights? (Recall that the *scope* of a right refers to the boundaries of that right—defining when it applies and when it does not apply. The *strength* of a right, by contrast, refers to how it limits governmental power.)

2. Did the rights recognized by Article IV's Privileges and Immunities Clause apply to *in-state* citizens with respect to *their own government*? How might you argue that the answer is "yes"? How might you argue that the answer is "no"?

3. In the minds of Republicans such as Bingham, exactly what did the Fourteenth Amendment accomplish? What was the need for the Amendment, and how did it alter existing law?

### 1.3. State Action and the 14th Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

U.S. Const., Amdt. XIV, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amdt. XIV, § 5.

After the Fourteenth Amendment was ratified in 1868, Congress passed legislation to help better secure the rights of citizens and other persons. Of particular concern to Congress in the early 1870s was private violence, including the Ku Klux Klan's violent campaign for white supremacy. In the Civil Rights Acts of 1870 and 1871, Congress responded by creating federal criminal and civil liability against those who conspired to deny rights "secured by" the Fourteenth Amendment. Many provisions of these acts applied to *private* infringements of life, liberty, and property.

A primary rationale for the Civil Rights Acts was that states—and particularly state prosecutors, judges, and juries—had failed to adequately protect individuals against private abridgments of rights, and therefore federal law could provide for the transfer of these cases to federal court. As Representative George Hoar of Massachusetts explained,

Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. . . .

But transferring cases to federal court was *highly* controversial at the time, and particularly among Democrats, who enjoyed considerable support in western states like Illinois, Indiana, and Ohio. According to Representative Michael Kerr of Indiana, for instance, the Civil Rights Acts were merely efforts to "transfer . . . a large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States."

More moderate Republicans generally supported these Acts. But they did so only on the condition—as Representative (and future President) James Garfield of Ohio stated—that the laws were "so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." Importantly, federalism was not an

issue that only Democrats cared about. According to moderate Republicans (though not some of their “Radical Republican” colleagues), the Fourteenth Amendment did not authorize pulling ordinary tort, contract, and property suits into federal court absent some state failure to protect those rights.

In some provisions of the Civil Rights Acts, however, Congress did not require any *case-specific* showing that a state had violated or failed to protect a particular litigant’s rights. Rather, Congress authorized suits in federal court based on a *general* congressional finding that leaving cases in state courts was inadequate. But was that within congressional power?

Notice the core problem here: There’s no way to create a perfect federal remedy, because it’s impossible to easily identify when violations of the Fourteenth Amendment have occurred or will occur. Rather, the federal enforcement of these rights inevitably has to be *over-inclusive* or *under-inclusive* (or some combination of the two).

By analogy: Suppose that during a pandemic, a state legislature passed a law stating that “the governor must ensure that all persons with the disease are isolated until not infectious.” But suppose that it is difficult to determine who is infectious. (For purposes of this hypothetical, don’t worry about due process issues; just focus on the scope of the power granted.) Would this law authorize the governor to impose mandatory isolation on persons whose symptoms showed a very high likelihood of infection but whose test results had not yet come back?

If your answer is “yes,” then you’ve construed the governor’s power in an *over-inclusive* way, extending beyond “persons with the disease” and reaching all those who *seem* to have the disease (including some who *don’t actually have it*). And notice the obvious harm in this answer: The governor has power to isolate people who *don’t* actually have the disease!

If your answer is “no,” then you’ve construed the governor’s power in an *under-inclusive* way, not encompassing those “persons with the disease” (*i.e.*, people who actually have the disease) but where that condition is likely but not yet confirmed. And notice the obvious harm in this answer: The governor won’t be nearly as effective in slowing the spread of the disease!

A similar tension occurs constantly in constitutional disputes. And this was at the root of debates over the Fourteenth Amendment, including the Section Five enforcement power. Did that power authorize Congress to pull ordinary criminal and civil litigation into federal court whenever it seemed likely that states were violating or inadequately protecting the rights secured by the Privileges or Immunities Clause and the Equal Protection Clause? Or was Congress only allowed to authorize federal litigation to enforce private rights in those particular cases where litigants could prove, *in their case*, that a state had violated those Clauses?

Before you read two of the early cases about this issue, two points are worth emphasizing up front: First, everybody agreed that private parties could *not* violate the Fourteenth Amendment, which was obviously written in reference to state power. Second, everybody also agreed that private parties *could* violate the retained natural rights that the Fourteenth Amendment helped to secure. These principles coexisted. For instance, one citizen stealing another citizen’s property was obviously *not* a violation of the Fourteenth Amendment. But could federal law authorize that theft suits be brought directly in federal court against private parties if Congress determined that state courts were generally hostile to theft claims? If yes, that would be an *over-inclusive* rule—authorizing a sweeping expansion of federal-court jurisdiction. But if not, that would be an *under-inclusive* rule, leaving many theft victims to suffer in hostile state courts.

The following case, *United States v. Hall*, was one of the first circuit court decisions interpreting the Civil Rights Act of 1870 and assessing whether Congress had power under Section 5 to authorize litigants (including prosecutors) to bring suits in federal court against *private* parties. How did the judge interpret the Privileges or Immunities Clause and Equal Protection Clause? And please don’t get

discouraged if you have trouble understanding these decisions—they are *really* challenging! But it is worth giving it your best shot. These lower-court decisions tee up important conceptual problems that framed the Supreme Court’s early Fourteenth Amendment decisions.

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United States v. Hall (S.D. Alabama 1871)

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**Woods, Circuit Judge.**

This is an indictment for a violation of the [Civil Rights Act of 1870]. [Defendants were charged with having] conspire[d] together, with intent to injure, oppress, threaten and intimidate . . . citizens of the United States of America, with intent to prevent and hinder their free exercise and enjoyment of the right of freedom of speech, the same being a right and privilege granted and secured to them by the constitution of the United States . . . [and] the right and privilege to peaceably assemble, the same being a right and privilege granted and secured to them by the constitution of the United States. . . .

It is not claimed by counsel for the United States that freedom of speech and the right peaceably to assemble are rights granted by the constitution, but it is asserted that they are rights recognized and secured. On the other hand, counsel for defendants assert that while the constitution recognizes the existence of these rights it does not secure them [against the state governments]. That the constitution only inhibits congress from impairing them, but that no such restriction applies to the states. [*Among other cases, the defendants cited* Barron v. Baltimore.] . . .

[The defendants have] claimed that when congress is prohibited from interfering with a right by legislation, that does not authorize congress to protect that right by legislation; that as the states are not prohibited by the constitution from interference with the rights under consideration, congress, although prohibited itself from impairing these rights, has no grant of power to interfere for their protection as against the states. . . . We are of opinion . . . that under the original constitution and the first eight articles of amendment, congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion, or in the right peaceably to assemble. . . .

[But] the fourteenth amendment has a vital bearing upon the question raised . . . . The amendment proceeds: “No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.” What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. *Corfield v. Coryell* (E.D. Pa. 1823). Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble. . . .

Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them . . . . The next clause of the fourteenth amendment reads: “Nor shall any state deny to any person within its jurisdiction the equal protection of the laws.” Then follows an express grant of power to the federal government: “Congress may enforce this provision by appropriate legislation.” From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of

the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws.

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A competing perspective on the constitutionality of legislation reaching private parties under the Fourteenth Amendment is Justice Bradley's lower-court opinion in *United States v. Cruikshank*, which stemmed from the horrific 1873 Colfax Massacre. Much of the opinion addressed the Fifteenth Amendment, but the excerpt below focuses on the Fourteenth Amendment.

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### United States v. Cruikshank (D. Louisiana 1874)

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#### **Bradley, Circuit Justice.**

The indictment in this case is founded on the 6th [ ] section[ ] of the [Civil Rights Act of 1870]. . . . [T]he defendants are charged with having unlawfully and feloniously banded or conspired together to intimidate certain persons of African descent . . . and deprive them of the free exercise and enjoyment of certain supposed constitutional rights and privileges, . . . in one count, the right peaceably to assemble themselves together; in another, the right to keep and bear arms; in a third, the right to be protected against deprivation of life, liberty and property without due process of law; in a fourth, the right to the full and equal benefit of the laws . . . [Defendants argue] that the act is unconstitutional . . . .

The main ground of objection is that the act is municipal in its character, operating directly on the conduct of individuals, and taking the place of ordinary state legislation; and that there is no constitutional authority for such an act, inasmuch as the state laws furnish adequate remedy for the alleged wrongs committed.

It cannot, of course, be denied that express power is given to congress to enforce by appropriate legislation the 13th, 14th and 15th amendments of the constitution, but it is insisted that this act does not pursue the appropriate mode of doing this. . . .

[In] [t]he sixth section [of the 1870 Act] . . . it is made penal to enter into a conspiracy to injure or intimidate any citizen, with intent to prevent or hinder his exercise and enjoyment . . . of any right or privilege granted or secured to him by the constitution or laws of the United States.

The question is at once suggested, under what clause of the constitution does the power to enact such a law arise? It is undoubtedly a sound proposition, that whenever a right is guaranteed by the



constitution of the United States, congress has the power to provide for its enforcement . . . . *Prigg v. Pennsylvania* (1842). . . .

The method of enforcement, or the legislation appropriate to that end, will depend upon the character of the right conferred. It may be by the establishment of regulations for attaining the object of the right, the imposition of penalties for its violation or the institution of judicial procedure for its vindication when assailed, or when ignored by the state courts; or it may be by all of these together. One method of enforcement may be applicable to one fundamental right, and not applicable to another.

With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them, and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the state, or the United States, as the case may be. The fulfillment of this guaranty by the United States is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residuary sovereignty.

For example, when it is declared that no state shall deprive any person of life, liberty, or property without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime committed by individual malefactors, so as to give congress the power to pass laws for the punishment of such crimes in the several states generally. It is a constitutional security against arbitrary and unjust legislation by which a man may be proceeded against in a summary manner and arbitrarily arrested and condemned, without the benefit of those time-honored forms of proceeding in open court and trial by jury, which is the clear right of every freeman, both in the parent country and in this. It is a guaranty of protection against the acts of the state government itself . . . , not a guaranty against the commission of individual offenses; and the power of congress, whether implied or expressed, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the states. This would be to clothe congress with power to pass laws for the general preservation of social order in every state. The enforcement of the guaranty does not require or authorize congress to perform the duty which the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform. The duty and power of enforcement take their inception from the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed. No state may pass a law impairing the obligation of contracts. Does this authorize congress to pass laws for the general enforcement of contracts in the states? Certainly not. But when the state has passed a law which violates the prohibition, congress may provide a remedy. It did so in the twenty-fifth section of the judiciary act by authorizing an appeal to the supreme court of the United States of all cases where a constitutional or federal right should be denied or overruled in a state court.

Again, “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” But this does not authorize congress to pass a general system of municipal law for the security of person and property . . . . Where no violation is attempted [by states], the interference of congress would be officious, unnecessary, and inappropriate. . . .

[Therefore, Congress may not] pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the state

courts, unless, indeed, the state should deny to the class of persons referred to the equal protection of the laws. Then, of course, congress could provide remedies for their security and protection. But, in ordinary cases, where the laws of the state are not obnoxious to the provisions of the amendment, the duty of congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only. . . .

It is claimed that, by this amendment, congress is empowered to pass laws for directly enforcing all privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, because it provides, amongst other things, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and because it gives congress power to enforce its provisions by appropriate legislation. If the power to enforce the amendment were equivalent to the power to legislate generally on the subject matter of the privileges and immunities referred to, this would be a legitimate conclusion. But . . . that subject matter may consist of rights and privileges not derived from the grants of the constitution, but from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights which are recognized and regarded as sacred in all free governments; and the only manner in which the constitution recognizes them may be in a prohibition against the government of the United States, or the state governments, interfering with them.

It is obvious, therefore, that the manner of enforcing the provisions of this amendment will depend upon the character of the privilege or immunity in question. If simply prohibitory of governmental action there will be nothing to enforce until such action is undertaken. How can a prohibition, in the nature of things, be enforced until it is violated? Laws may be passed in advance to meet the contingency of a violation, but they can have no application until it occurs. On the other hand, when the provision is violated by the passage of an obnoxious law, such law is clearly void, and all acts done under it will be trespasses. The legislation required from congress, therefore, is such as will provide a preventive or compensatory remedy or due punishment for such trespasses; and appeals from the state courts to the United States courts in cases that come up for adjudication. If these views are correct, there can be no constitutional legislation of congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the United States, where the only constitutional guaranty of such privileges and immunities is, that no state shall pass any law to abridge them, and where the state has passed no laws adverse to them, but, on the contrary, has passed laws to sustain and enforce them.

I will now proceed to examine the several counts in the indictment, and endeavor to test their validity by the principles which have been laid down. These have been so fully enunciated and explained, that a very brief examination of the counts will suffice.

The first count is for a conspiracy to interfere with the right "to peaceably assemble together with each other, and with other citizens, for a peaceable and lawful purpose." This right is guaranteed in the first amendment to the constitution, which declares that "congress shall make no law abridging the

right of the people peaceably to assemble and to petition the government for a redress of grievances.” Does this disaffirmance of the power of congress to prevent the assembling of the people amount to an affirmative power to punish individuals for disturbing assemblies? This would be a strange inference. That is the prerogative of the states. It belongs to the preservation of the public peace and the fundamental rights of the people. The people of the states do not ask congress to protect the right, but demand that it shall not interfere with it. Has anything since occurred to give congress legislative power over the subject matter? The 14th amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities, still, does it give congress power to legislate over the subject? Power to enforce the amendment is all that is given to congress. If the amendment is not violated, it has no power over the subject.

The second count, which is for a conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first.

The third count charges a conspiracy to deprive certain citizens of African descent of their lives and liberties without due process of law. Every murderer and robber does this. Congress surely is not vested with power to legislate for the suppression and punishment of all murders, robberies, and assaults committed within the states. In none of these counts is there any averment that the state had, by its laws, interfered with any of the rights referred to, or that it had attempted to deprive the citizens of life, liberty, or property without due process of law, or that it did not afford to all the equal protection of the laws. The third count cannot be sustained. . . .

The fourth count charges a conspiracy to deprive certain colored citizens of African descent, of the free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property which is enjoyed by the white citizens. The right and privilege to interfere with the exercise of which is here alleged to have been the object of the conspiracy is not contained in the constitution in express terms. The 14th amendment, amongst other things, declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. But the indictment does not allege that this has been done.

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### Notes and Questions

1. How did Justice Bradley’s approach in *Cruikshank* differ from Judge Wood’s approach in *Hall*? How did these judges construe the legal effect of the Fourteenth Amendment? How, for instance, did each judge understand the “privileges or immunities of citizens of the United States,” and what was the scope of congressional power to protect those rights?

2. Notice the core problem in these cases: As a conceptual matter, the retained natural rights secured by the Privileges or Immunities Clause did not require any state action! Retained natural rights were not merely limits on the government; they also constrained *private* action. And maintaining these rights against private abridgment constituted one of the foundational purposes of government: *the protection of the laws*.

At the same time, however, the protection of private rights against private abridgment was quintessentially a *state* power, not a federal power. Tort law, contract law, property law, and so on, were matters of state law, and the application of these bodies of law was originally left almost entirely to state courts. And where the federal Constitution limited state power, as in the Contracts Clause, it did so only in a negative or, to quote Justice Bradley, “prohibitory” way, without implying a transfer of legislative power to Congress. The remedy for a violation of the Contracts Clause, it was widely

assumed at the time, was direct review of state-court decisions by the U.S. Supreme Court under Section 25 of the Judiciary Act of 1789.\*

What the circuit-court decisions in *Hall* and *Cruikshank* highlight is that questions about rights, state-action, and federal enforcement power were all interrelated. The entire debate was deeply framed by concerns about federalism. American jurists in the 1860s and 1870s broadly accepted that individuals had fundamental rights that states *already* had an obligation to protect (under general social-contractarian principles). The existence of these rights was not the issue. Rather, the key dispute was about the extent to which these rights were *federally* enforceable.

As we will next see, similar concerns influenced the Supreme Court’s view of the scope of the Privileges or Immunities Clause.

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### A Summary of Modern State Action Doctrine

Because the Constitution is the law that governs the government, only *governmental* actors—*i.e.*, the government itself, or its agents—are capable of violating the Constitution. But notice that the term “state action” is somewhat misleading. It applies to *federal, state, and local* governmental action—not simply the action of *states*. For instance, the U.S. Department of Transportation and a local public-school teacher are both “state actors.”

In many situations, the distinction between state action and non-state action is clear. If the National Basketball Association (“NBA”)—a private organization—tells players that they have to wear uniforms that say “Black Lives Matter,” can a player claim that this requirement violates his First Amendment right against being compelled to speak? Of course not! The NBA is not the government—*i.e.*, it is not a *state actor*—and so even without knowing *anything* about First Amendment law, you can still identify that the First Amendment does not apply in this situation.

But there are times where the question of “state action” becomes far more difficult. Suppose, for instance, that the City of Richmond, Virginia, discovers a diamond cache worth billions of dollars on public property. The City then decided to invest the earnings by purchasing an NBA team. Could a player on that team argue that forcing him to wear a “Black Lives Matter” uniform violates the First Amendment? Perhaps so! In the last paragraph, it was obvious that the NBA wasn’t a “state actor,” so the First Amendment was irrelevant. But governmental ownership of the team makes the player’s argument far more plausible.

In difficult cases, state-action doctrine can get *really* confusing and muddled. But here’s a sketch of the basics of state-action doctrine. For simplicity, let’s focus on whether *the defendant* is a state actor.

➤ **Is the defendant a (federal, state, or local) government or governmental agency?**

If yes, there’s state action. If no, continue to the next question.

➤ **Is the defendant a governmental employee acting with apparent authority?**

The question here is: Was the defendant *acting as a public employee at the time of the alleged conduct*? In other words, was the defendant acting with *apparent* authority?

If yes, there’s state action. If no, continue to the next step.

Most of the time, it is easy to assess whether an official is acting with apparent authority. For instance, an on-duty police officer who arrests someone obviously acts with apparent authority—regardless of

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\* Direct review was unnecessary, of course, in cases proceeding in diversity jurisdiction, and the Framers expected many high-value contract disputes to proceed in federal court.

whether there is *actually* legal authority to make the arrest. By contrast, a police officer who is off-duty and punches a neighbor during a personal altercation would not be acting as a public employee.

But some cases are more difficult. Many of these involve public employees (like a teacher or police officer) who have off-duty encounters with people they know from their public employment. *See, e.g., Becerra v. Asher* (5th Cir. 1997) (holding that a public-school teacher accused of misconduct with a former student was not a state actor despite having “first befriended and shown a special interest in” the victim at school). Other cases involve activities by public employees that are questionably outside the scope of their employment. For instance, if a public official uses her personal Facebook account for job-related public announcements, does she engage in state action when she blocks certain individuals from commenting on her posts? *See Lindke v. Freed* (2024) (holding that it depends).

➤ **The defendant is not a government or a public employee.**

Since we’ve now identified that the defendant isn’t a government and wasn’t acting as a public employee, you should start with a default assumption: There is *not* state action.

But there are some important exceptions where otherwise private actors are nonetheless treated as “state actors.” Here is one court’s summary: “(1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor.” *Andrews v. Federal Home Loan Bank of Atlanta* (4th Cir. 1993).

For instance, if a police officer forced a private landlord to conduct a search of a suspect’s apartment, that would count as “state action” under the first two categories. But mere police presence at the scene would not. Another example of state action is if the government contracts with a private prison (rather than incarcerating inmates in a state-run facility), then the guards and supervisors at the private prison would be “state actors” because they would be performing a public function. But the governmental functions category is fairly limited—mostly focusing on those areas where the government traditionally has had sole control. Just because the government *often* performs certain functions does not make private counterparts into “state actors.” Private schools and private utility companies, for instance, are generally not “state actors,” even though the government often runs public schools and public utilities.

Another category of “state action” is when a private person or private entity makes decisions that are significantly “entwined” with decisions by public officials. For instance, a high-school sports league can be a private entity but nonetheless be considered a “state actor” if public-school officials are heavily involved in the league’s decision-making. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n* (2001). But the fact that the government has simply *regulated* or *funded* a private actor’s conduct is usually not enough for it to count as “state action.” Private universities, for instance, are regulated by the state and federal governments and receive lots of state and federal funds, but they are generally not “state actors” for purposes of constitutional law.

➤ **Other state-action problems.**

State-action problems can be even trickier when the plaintiff and defendant are private actors but where one of them alleges that it would be unconstitutional for the court to recognize or enforce certain private decisions. This is a controversial category. The foundational case is *Shelley v. Kraemer* (1948), which held that a state court’s enforcement of racially restrictive covenants in a deed was unconstitutional. In this situation, the deed *itself* did not implicate the Constitution; the deed was just a private agreement! Rather, *enforcement* of the racially restrictive covenant is what counted as “state action” (that violated the Equal Protection Clause).

Another example is racially exclusionary jury selection by *private* attorneys. In *Edmonson v. Leesville Concrete Co.* (1991), the Supreme Court held that because the jury acts as a “state actor,” the *selection* of jurors was properly understood as a type of “state action.” Therefore, it is unconstitutional for private attorneys to exclude jurors based on their race.

Notice, however, that this type of reasoning has to have a stopping point. For instance, suppose the NBA brings a breach-of-contract suit against a player who refused to wear a jersey that says “Black Lives Matter.” Would a judicial ruling in favor of the NBA count as “state action,” thus bringing the First Amendment into play? No! The court would only be enforcing the private contract. Yet finding a distinction between this hypothetical and the situation in *Shelley v. Kraemer* is famously difficult.

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## 1.4. The Privileges or Immunities Clause

The question presented in the *Slaughter-House Cases* was whether the Fourteenth Amendment barred Louisiana from granting monopoly power to the privately owned (but publicly chartered) Slaughter-House Company, thus preventing (or severely restricting) other butchers from operating their businesses. Before reading the opinions, try on your own to come up with an argument about how general principles from social-contract theory might limit the state legislature’s authority to pass this type of monopoly law. Does the Fourteenth Amendment make those social-contractarian limits judicially enforceable under the federal Constitution? Basically, this is what the *Slaughter-House Cases* were all about.

Because of the difficulty of these materials, the opinions are arranged in a more digestible order: *First*, a summary of the case from the majority opinion; *second*, Justice Field’s dissenting opinion, which does a much better job than the majority opinion at explaining (and defending) the constitutional arguments against the Louisiana law; *third*, the majority opinion; and *fourth*, Justice Bradley’s and Justice Swayne’s dissenting opinions. And here is one other thing to note: Both Justice Field’s dissent and Justice Miller’s majority opinion begin by assessing whether the law at issue was a valid exercise of the police power and *then* turn to the effect of the Fourteenth Amendment—likely reflecting the fact that both Justices agreed that social-contractarian principles circumscribed legislative authority even before the Fourteenth Amendment was enacted. As we will see, however, Field and Miller disagreed about how to apply those principles in this case and also disagreed about whether those principles were made federally enforceable through the Fourteenth Amendment.

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### Slaughter-House Cases (1873)

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#### **Justice Miller . . . delivered the opinion of the court.**

These cases . . . arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it . . .

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

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans . . . The second section [creates a privately owned corporation called the Slaughter-House Company]. The third and fourth sections [grant the Slaughter-House Company] the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. . . . Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June. . . .

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

**Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, dissenting.**

[I]t is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. . . . In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The [locations covered] contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people. . . .

The substance of the [plaintiffs' claim] is . . . that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body. . . . I shall endeavor to show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. . . . But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle

within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

*[Justice Field then distinguished monopolies for ferries, bridges, and turnpikes, which he argued were permissible because the task of providing transportation is “the duty of government,” and it may delegate that duty to a private entity, whereas the slaughtering of cattle was not “a right . . . appertaining to the government” but instead was “one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.” He also distinguished the exclusive licenses that the government granted through intellectual-property rights, saying that the government “only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.”]*

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions. . . . [U]pon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. . . .

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” It then declares that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”



The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. . . .

In the *Dred Scott* case this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. [*Justice Curtis wrote a dissenting opinion in Dred Scott and then resigned in protest!*] And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws.

The Chief Justice, in that case, and a majority of the court with him, held . . . that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; . . . that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. . . . The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgment by State legislation? . . .

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,” and they have been the subject of frequent consideration in judicial decisions. In *Corfield v. Coryell* (C.C. Pa. 1823), Mr. Justice Washington said he had “no hesitation in confining

these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;” and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be “all comprehended under the following general heads protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.” This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. . . .

[In *Paul v. Virginia* (1869), a claimant alleged that a state licensing law] was in conflict with that clause of the Constitution [in Article IV] which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed. . . .

The common privileges and immunities . . . belong to all citizens . . . [Under Article IV Privileges and Immunities Clause,] the citizens of each State do carry with them into other States and are secured . . . in their enjoyment [of them] upon terms of equality with citizens of the latter States. This equality in one particular was enforced by this court in the recent case of *Ward v. Maryland* (1870). A statute of that State required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the State, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each State the privileges and immunities of citizens of the several States. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What [Article IV’s Privileges and Immunities Clause] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States. . . .

Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void

at common law in the great Case of Monopolies, decided during the reign of Queen Elizabeth [in 1602 by the Court of Queen's Bench]. . . .

In that case a patent had been granted to the plaintiff giving him the sole right to import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. . . . The court held the plea good and the grant void, as against the common law and divers acts of Parliament. "All trades," said the court, "as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject."

Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman. . . .

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. . . . And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men." . . .

[T]he fourteenth amendment . . . was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. . . .

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. . . . In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a

republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. . . . That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.

[Having read Justice Field's dissent, let's now consider Justice Miller's majority opinion.]

### **Justice Miller . . . delivered the opinion of the court.**

The statute under consideration . . . does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place. . . .

The power here exercised by the legislature of Louisiana is . . . one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States . . . .

“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,” says Chancellor Kent, “be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.” This is called the police power; and . . . it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. . . .

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses . . . and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power.

If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. . . .

Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch v. Maryland* (1819) in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government. . . .

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the [Thirteenth or Fourteenth Amendments]. . . . This court is thus called upon for the first time to give

construction to these articles. We do not conceal from ourselves the great responsibility which this duty devolves upon us. . . .

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . .

The institution of African slavery [led to] the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. . . . But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned . . . . Hence the thirteenth article of amendment [banning slavery and involuntary servitude]. . . .

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it. . . .

Among the first acts of legislation adopted by several of the [Southern] States [after the Civil War] . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . .

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

[Consequently,] something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. [*So Congress passed and the states approved the Fourteenth Amendment. The Court then briefly discussed the Fifteenth Amendment—banning states from denying the right to vote on the basis of race.*] . . .

[N]o one can fail to be impressed with the one pervading purpose found in [these amendments]: we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race . . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party

interested may not be of African descent. But [when interpreting] these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all [and] the evil which they were designed to remedy . . . .

[The Fourteenth Amendment] declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, “subject to its jurisdiction” was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important . . . . It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

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

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. . . . [T]he latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

In [Article IV,] the Constitution of the United States [provides]: “The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.” . . . [This clause] embraces nearly every civil right for the establishment and protection of which organized government is instituted. . . .

[Article IV, however, did not] profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens . . . shall be the measure of the rights of citizens of other States within your jurisdiction. . . .

Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

[If this interpretation were correct, this Court would also become] a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people;

the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

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

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. . . . And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws." In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . .

**Justice Bradley, dissenting.**

. . . Th[e] right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. . . .

[E]ven if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges . . . .

The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose? . . .

If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light. . . .

Lastly: Can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances, for the want of the requisite authority.

... In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen. . . .

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed. . . .

**Justice Swayne, dissenting.**

... These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. . . . It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. . . . It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. . . .

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### Notes and Questions

1. According to Justice Field, what right were the plaintiffs asserting in the *Slaughter-House Cases*? What type of right was it? Where did that right come from? What was the scope of that right? What was the strength of that right? Why did Field conclude that it was violated? Is his argument persuasive?

2. The majority and dissenting justices agreed about the scope of Article IV's Privileges and Immunities Clause but disagreed vehemently about whether the meaning of the Fourteenth Amendment's Privileges or Immunities Clause had a similarly expansive scope. What was the textual basis of that disagreement? (Hint: It had nothing to do with the use of "and" in one clause and "or" in the other.) And looking beyond the text, how did the majority and dissenting justices describe the animating purpose of the Fourteenth Amendment? Did that purpose affect how to interpret the Amendment? If so, how?

3. Justice Bradley asserted that the case should come out the same way "even if the Constitution were silent," meaning even if the Fourteenth Amendment had omitted the Privileges or Immunities Clause. Why?

4. Justice Miller's majority opinion in the *Slaughter-House Cases* still governs Privileges or Immunities claims. Consequently, these "privileges or immunities" must arise from national citizenship, not state citizenship. In part of the opinion not included above, Miller "venture[d] to suggest some [privileges or immunities] which owe their existence to the Federal government, its National character, its Constitution, or its laws":

One of these is well described in the case of *Crandall v. Nevada* (1867). It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States." . . .



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

Typically the lone “privilege or immunity” tested on the Bar Exam is the right to move to another state and enjoy citizenship on equal terms with the citizens of that state. *See, e.g., Saenz v. Roe* (1999).

While the Court was considering the *Slaughter-House Cases*, it also heard Myra Bradwell’s claim against Illinois for denying her a bar license because she was a woman. For the five justices in the majority in the *Slaughter-House Cases*, Bradwell’s claim was easy to reject. Why? And how about the dissenters in the *Slaughter-House Cases*? Why did they vote for the claimant in the *Slaughter-House Cases* but against Bradwell? (Note: Chief Justice Chase was the only justice who supported Bradwell’s claim, but he did not write a dissenting opinion, apparently because of bad health.)

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## Bradwell v. Illinois (1873)

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### **Justice Miller delivered the opinion of the court.**

[T]he plaintiff asserted her right to a [bar] license on the grounds, among others, that . . . admission to the bar of a State of a person who possesses the requisite learning and character is one of those which a State may not deny.

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary; . . . the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license. . . .

### **Justice Bradley, concurring, joined by Justices Field and Swain.**

I concur . . . but not for the reasons specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any

lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect . . . .

The claim . . . assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence 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. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex. . . .

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### Notes and Questions

1. How would you answer the questions posed at the outset? (Namely: For the five justices in the majority in the *Slaughter-House Cases*, Bradwell's claim was easy to reject. Why? And how about

the dissenters in the *Slaughter-House Cases*? Why did they vote for the claimants in that case but against Bradwell?)

2. Looking back, it is easy to dismiss the opinion in *Bradwell* as merely the product of misogyny. And rightly so, at least to some extent. But suppose that you were a justice on the Supreme Court and had agreed with the *Slaughter-House Cases* dissenters that the privileges or immunities of citizenship guaranteed by the Fourteenth Amendment included a right to pursue gainful employment. Would states be required to admit 16-year-old citizens as attorneys? If not, why not?

3. Today, the Illinois statute would *obviously* violate the Equal Protection Clause. Why didn't Myra Bradwell—represented by one of the most eminent constitutional lawyers in the country—even think to bring an equal-protection claim?

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Shortly after *Bradwell*, the Supreme Court heard another claim involving state discrimination against women, this time involving Virginia Minor's claim that Missouri had violated the Fourteenth Amendment by rejecting her voter registration on the basis of her sex. This time, however, the justices were unanimous.

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## Minor v. Happersett (1875)

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### **Chief Justice Waite delivered the opinion of the court.**

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. . . .

The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. . . .

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership. [*The Court then went through a historical discussion showing that citizenship in the American states has always included women.*] . . .

The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has

always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. . . .

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power [and each state limited the franchise in various ways, including property restrictions, age restrictions, etc.]. . . .

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. . . . This, we think, has never been claimed. . . .

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part? . . .

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

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### Notes and Questions

1. Based on what you have read thus far, what was the *scope* of the Privileges or Immunities Clause? In other words, when did it apply at all? What types of rights did that Clause protect? And what about the *scope* of the Equal Protection Clause and Due Process Clause? (This is worth contemplating now so that you can appreciate how the domains of these clauses shifted in the decades that followed.)

2. One potential limit on the scope of the Privileges or Immunities Clause was a requirement of *state action*. Interestingly, however, that limit made less sense after the *Slaughter-House Cases*, which limited the Clause to privileges and immunities that were *national* in character, thus giving rise to an inference of *national* enforcement power under the logic of *Prigg v. Pennsylvania* (1842). Here is Chief Justice Waite's explanation in *United States v. Cruikshank* (1876):

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. . . . If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case.

According to Waite, if the indictment had alleged—and prosecutors had proved—that the defendants (who were private actors) had intended to interfere with rights of *national* citizenship, then prosecuting the violators in federal court would have been constitutional. In this situation, though, federal power would come from an inherent national power to secure rights appertaining to national citizenship (on the logic of *Prigg v. Pennsylvania*) rather than from Section 5 of the Fourteenth Amendment.

Nonetheless, it remained true that only *states* (including state and local officials) could violate the Fourteenth Amendment. As Justice Strong explained in *Virginia v. Rives* (1880):

The provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights.

## 1.5. Racial Segregation

As you read the following cases, identify how the Court drew on, and departed from, its earlier decisions. What clause(s) of the Fourteenth Amendment did it apply? What role did the social-contract theory come to play in interpreting the Fourteenth Amendment?

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**Strauder v. West Virginia (1880)**

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**Justice Strong delivered the opinion of the court.**

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. . . . [He claims] that at the trial in the State court [he] was denied rights to which he was entitled under the Constitution and laws of the United States [because, under the laws of West Virginia, only white people could serve on juries]. . . .

The [West Virginia law at issue] was enacted on the 12th of March, 1873, and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

[The question presented is] whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color . . . .

It is to be observed that the [question presented] is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . .

[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive

immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute . . . is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. . . .

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and

to strike down all possible legal discriminations against those who belong to it. . . . “In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view.” “It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.” *Slaughter-House Cases* (1873). We are not now called upon to affirm or deny that it had other purposes. . . .

**Justice Field, with whom Justice Clifford joins, dissenting.\***

[T]he first section of the Fourteenth Amendment . . . declared who are citizens of the United States and of the States. It thus removed from discussion the question, which had previously been debated, and though decided, not settled, by the judgment in the Dred Scott Case, whether descendants of persons brought to this country and sold as slaves were citizens, within the meaning of the Constitution. It also recognized, if it did not create, a national citizenship, as contradistinguished from that of the States. But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. . . .

The third clause in the first section of the amendment declares that no State “shall deprive any person of life, liberty, or property without due process of law.” It will not be contended that this clause confers upon the citizen any right to serve as a juror in the State courts. It exists in the Constitution of nearly all the States, and is only an additional security against arbitrary deprivation of life and liberty, and arbitrary spoliation of property. It means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. . . .

The fourth clause in the first section of the amendment declares that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” . . . [T]he universality of the protection secured necessarily renders [Strauder’s] position untenable. All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion. . . .

In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the States to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required.

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\* This dissent is from the companion case, *Ex parte Virginia* (1880).



The [opposing view] would lead to some singular results. If, when a colored person is accused of a criminal offence, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential, if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict, might be carried.

The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. . . .

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### Notes and Questions

1. What was the source of law for the decision in *Strauder*? Why?
2. Based on the prevailing understandings of constitutional law at the time, was the reasoning in *Strauder* persuasive? Or did Justice Field have the better argument? Obviously the West Virginia law was manifestly unjust, and of course it would be recognized as patently unconstitutional today—so much so as to not even require analysis. But the legal reasoning in *Strauder* has weaknesses. What are the weak spots in the majority’s analysis? Would there be a more persuasive way of reaching the same outcome? Are there reasons why the Court did not take that approach?
3. The version of *Strauder* that appears above is edited to focus on the meaning of Section 1 of the Fourteenth Amendment. But in its full context, *Strauder* raised a broader question about whether Congress could provide for removing cases—including prosecutions for murder—to federal court simply because a state court would violate constitutional rights. As is still true today, the usual remedy for an unconstitutional state proceeding was Supreme Court reversal of the state-court ruling on direct review (under Section 25 of the Judiciary Act), *after* the case had already made its way through the state court system. But could Congress authorize the removal of cases to federal court *before* the constitutional violation materialized?

In his influential circuit-court decision in *Cruikshank*, Justice Bradley answered “no,” at least when the Constitution simply prohibited states from taking a particular type of action. “If [a constitutional rule is] simply prohibitory of governmental action there will be nothing to enforce until such action is undertaken,” Bradley had explained. “How can a prohibition, in the nature of things, be enforced until it is violated? Laws may be passed in advance to meet the contingency of a violation, but they can have no application until it occurs.” But if the constitutional violation occurred *not* through a particular type of governmental action but rather through “the passage of an obnoxious law,” then Congress could “provide a preventive or compensatory remedy.” In other words, if it was the *statute itself*—and not merely the *enforcement* of that statute—that violated the Constitution, then Congress’s remedial power was broader, and it was ok to pull cases directly into federal court without waiting for the violation to materialize in state court.

This understanding of the Section 5 enforcement power illuminates Justice Strong’s statement in *Strauder* that:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

In other words, it was not merely the *enforcement* of a racially discriminatory statute that violated the Fourteenth Amendment, according to Strong. Rather, the *statute itself* was unconstitutional, thus warranting a “preventive” remedy.

By contrast, in *Virginia v. Rives* (1880), the Supreme Court construed federal law as *not* authorizing the removal of cases where unconstitutional conduct at trial was *anticipated* but where no state *statute* violated the Fourteenth Amendment. If state officers “exclude[d] all colored men [from juries] solely because they are colored,” the Supreme Court opined, it was up to the state court system to “correct the wrong,” subject to “the revisory powers of this court” under Section 25.

The Court further developed this view in *The Civil Rights Cases* (1883). The question presented was the constitutionality of the Civil Rights Act of 1875, which required that certain businesses not discriminate based on race. In dissent, Justice Harlan insisted that the statute was constitutional, both because the Fourteenth Amendment had created federally enforceable rights (by conferring citizenship on Black people) and because states were failing in their duty to afford equal protection of existing common-law rights. But the majority construed federal power in a more limited way.

For the majority in the *Civil Rights Cases*, the crucial factor in assessing Section 5 power was the presence or absence of an unconstitutional state *law*. In particular, Congress could authorize federal lawsuits—filed directly in federal court—only when violations of rights secured by the Fourteenth Amendment were authorized by state *law*. But “until some State law has been passed,” Congress had no such enforcement power, and Fourteenth Amendment rights could only be vindicated *ex post*, after “some State action through its officers or agents has been taken, adverse to the rights of citizens.” For the most part, this meant that litigants had to vindicate their rights in state court and then seek Supreme Court review under Section 25.\* Otherwise the federal enforcement power would be over-inclusive.

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### The Civil Rights Cases (1883)

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#### Justice Bradley delivered the opinion of the court.

[T]he primary and important question . . . is the constitutionality of the law . . . Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations . . . or privileges mentioned in the first section. . . .

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\* Because of this prevailing view—that is, that federal rights of action could be employed only when state *law* was unconstitutional—federal civil-rights statutes like 42 U.S.C. § 1983 had very limited applicability. Importantly, this flowed from the Supreme Court’s narrow reading of Section 5—not from the “color of [law]” language in § 1983. *Cf. Monroe v. Pape* (1961).

The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States. . . . Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but . . . the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous.

This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. . . .

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected; and this power was exercised. The remedy which Congress actually provided was that contained in the twenty-fifth section of the Judiciary Act of 1789 . . . . By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. . . .

We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law . . . . But . . . it must appear . . . that the Constitution had been violated by the action of the State legislature [because] . . . the constitutional prohibition is against *State laws* impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity . . . . Of course, legislation may and should be provided in advance to meet the exigency when it arises, but . . . [s]uch legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. . . . [T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation . . . .

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in States that may have violated the prohibition of the amendment. . . .

If this legislation is appropriate . . . it is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case . . . .

### **Harlan, J., dissenting.**

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. “It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.” Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted. . . .

The theory of the opinion of the majority of the court—the foundation upon which its whole reasoning seems to rest—is that the general government cannot, in advance of hostile State laws or hostile State proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment. It is said that such rights, privileges, and immunities are secured by way of *prohibition* against State laws and State proceedings affecting such rights and privileges, and by power given to Congress to legislate for the purpose of carrying *such prohibition* into effect; also, that Congressional legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. . . .

The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—“all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside”—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the “People of the United States.” They became, instantly, citizens of the United States, and of their respective states. Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the Constitution which declares that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” Article 4, § 2.

The citizenship thus acquired by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by Congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce “the provisions of this article” of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. . . .

It is, therefore, an essential inquiry what, if any, right, privilege, or immunity was given by the nation to colored persons when they were made citizens of the State in which they reside? . . . To this it may be answered, generally, upon the authority of the adjudged cases [regarding the Privileges and Immunities Clause of Article IV], that they are those which are fundamental in citizenship in a free government, “common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens.” *Paul v. Virginia* (1869). . . .

Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. . . .

It is said that any interpretation of the Fourteenth Amendment different from that adopted by the court, would imply that Congress has the authority to enact a municipal code for all the States, covering every matter affecting the life, liberty, and property of the citizens of the several States. Not so. Prior to the adoption of that amendment the constitutions of the several States, without, perhaps, an exception, secured all *persons* against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all *persons* to the equal protection of the laws. Those rights, therefore, existed before that amendment was proposed or adopted, and . . . Congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon State laws or State proceedings inconsistent with those rights[. But] it does not at all follow that privileges which have been *granted by the nation* may not be protected by primary legislation upon the part of Congress. . . . Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new right, created by the nation, with express power in Congress, by legislation, to enforce [it]. . . .

But if it were conceded that the power of Congress could not be brought into activity until the rights specified in the act of 1875 had been abridged or denied by some State law or State action, I maintain that the decision of the court is erroneous. . . . In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents of the State, because they are charged with duties to the public, and are amenable, in respect of their public duties and functions, to governmental regulation. It seems to me that . . . a denial, by these instrumentalities of the State to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States. . . .

I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him. . . .

[However, t]he right . . . of a colored citizen to use the accommodations of a public highway upon the same terms as are permitted to white citizens is no more a social right than his right, under the law, to use the public streets of a city, or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed.

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### Notes and Questions

1. *The Civil Rights Cases* once again illustrate how questions about the scope of rights were deeply intertwined with questions of federalism.

For the majority—just as the majority in *Strauder* (see note 3 on p. 41)—the crucial factor for delineating Congress’s enforcement power was the presence or absence of an unconstitutional state law. Its view was that Congress could authorize federal rights of action only when violations of rights secured by the Fourteenth Amendment were authorized by state law. But “until some State law has been passed,” Congress had no such enforcement power, and Fourteenth Amendment rights could only be vindicated *ex post*, after “some State action through its officers or agents has been taken, adverse to the rights of citizens.” For the most part, this meant litigants had to vindicate their rights in state court and then seek direct Supreme Court review under Section 25.\* Anything more than this would be to recognize an *over-inclusive* federal enforcement power.

2. In the twentieth century, the Supreme Court maintained the state-action doctrine but backed away from the strict reading of the Section 5 power. Under current doctrine, Congress can pass “prophylactic” legislation that goes beyond merely remedying Section 1 violations so long as the statutory rule is “congruent and proportional” to those violations. See *City of Boerne v. Flores* (1997). For instance, Congress can require state and local governments to follow certain employment policies (such as family-leave policies) if there is sufficient evidence that an absence of those policies *often* (even though not *always*) enables unconstitutional gender discrimination. See, e.g., *Nevada Dep’t of Human Resources v. Hibbs* (2003).

3. Justice Harlan’s dissent offered two distinct arguments for why the Fourteenth Amendment authorized the Civil Rights Act of 1875. What were they? How did Harlan’s understanding of the Fourteenth Amendment differ from the majority’s? How did his view avoid collapsing into federal “authority to enact a municipal code for all the States”?

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In the next case, *Yick Wo*, the Supreme Court considered a challenge to the enforcement of a San Francisco ordinance that required laundries operated in wooden buildings to obtain a license from the City, which had consistently approved requests from white applicants and denied permits to (non-citizen) Chinese applicants.

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\* Because of this prevailing view—that is, federal rights of action could be employed only when state law was unconstitutional—federal civil-rights statutes like 42 U.S.C. § 1983 had very limited applicability. Importantly, this flowed from the Supreme Court’s narrow reading of Section 5—not from the “color of [law]” language in § 1983. Cf. *Monroe v. Pape* (1961).

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## Yick Wo v. Hopkins (1886)

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### **Justice Matthews delivered the opinion of the court.**

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. . . .

[T]he ordinances in question [give the San Francisco Board of Supervisors an] unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries. . . . [The ordinances] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent. . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. . . .

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by [the Civil Rights Act of 1866], that “all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the

commonwealth “may be a government of laws and not of men.” For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. . . .

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged.

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### Notes and Questions

1. What was the source of law for the decision in *Yick Wo*? What was the *scope* and *strength* of that right?
2. What exactly made the government’s conduct in *Yick Wo* unconstitutional? What facts, if changed, would flip the result?

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As you read the following case, *Plessy v. Ferguson* (1896), diagram the steps in the Court’s opinion. What constitutional provision was the Court applying? What particular rule or rules did that constitutional provision establish? And how did those rules apply to this case?



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## Plessy v. Ferguson (1896)

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### **Justice Brown delivered the opinion of the court.**

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races.

The . . . statute enacts “that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races . . . . No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.” [*The statute then specified penalties for non-compliance.*] . . .

The petition for the writ of prohibition averred that petitioner [Homer Plessy] was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

### **I**

That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. . . .

### **II**

. . . The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston* (Mass. 1849), in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. “The great principle,” said Chief Justice Shaw, “advanced by the learned and eloquent advocate for the plaintiff,” (Mr. Charles Sumner,) “is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to

be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.” . . . Similar [segregation] laws have been enacted by Congress under its general power of legislation over the District of Columbia, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. . . .

[W]e think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment. . . .

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other . . . . The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo v. Hopkins* (1886) it was held by this court that a municipal ordinance . . . violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. . . .

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case,

and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. . . .

**Justice Harlan dissenting.**

. . . [W]e have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race. . . . However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States. . . .

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. . . . But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment . . . . These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." *Strauder v. West Virginia* (1880). They declared, in legal effect . . . "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their

color.” *Id.* We also said: “The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.” *Id.* . . .

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary. . . .

If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. . . . If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly

arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races . . . .

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. . . .

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds. . . .

[T]he recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law. . . .

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### Notes and Questions

1. The majority in *Plessy* identified and applied two constitutional rules. First, it recognized a requirement of “absolute equality of the two races before the law,” indicating at the end of the opinion that this principle applied to “civil and political rights.” Second, it recognized a requirement that “every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.” Where did these two rules come from? And why, in the majority’s view, did *Plessy* lose under each of these rules?

2. In one of the most famous dissenting opinions in American constitutional history, Justice Harlan denied “that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved,” further stating that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” In short, Harlan argued that the government does not merely have to provide for equality in civil rights; it must abstain from any racial distinctions whatsoever as relates to civil rights.

On what basis did Justice Harlan reach this conclusion? Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 does not mention race, nor does it specify that the government may not “have regard to the race of citizens when the civil rights of those citizens are involved.” Is Justice Harlan’s argument legally defensible?

3. As you ponder the previous note, consider Justice Harlan’s comment at the end of his opinion:

[T]he recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

Was Justice Harlan contemplating that constitutional restraints on states would apply to the federal government, too? Earlier that year, Justice Harlan wrote for the Court in *Gibson v. Mississippi* (1896):

Underlying [previous] decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race.

On what basis might the Constitution forbid *federal* racial discrimination?

4. The majority opinion in *Plessy* suggests a rigid distinction between the public realm of law, on the one hand, and the private realms of social conditions and social effects. This is clearest in two aspects of the Court’s reasoning:

*First*, regarding the *rationale* for laws: The majority acknowledged that an underlying cause for the law in *Plessy* was racial hostility—namely, the *private* racial hostility that could lead to unsafe or uncomfortable conditions in railcars. But, in the majority’s view, the legislature could take these private biases into view without infecting the law with racial hostility. Stated more generally, the majority thought that the underlying social determinants of law should not be attributed to the government. State legislatures, the majority observed, were “at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order,” without those social determinants of law impugning the governmental action as partial or arbitrary.

*Second*, regarding the *effects* of laws: The discriminatory consequences of segregation also did not infect the law with racial hostility. An “underlying fallacy of the plaintiff’s argument,” the majority explained, was the view that “the enforced separation of the two races stamps the colored race with a badge of inferiority.” This argument was fallacious, Justice Brown continued, because such a conclusion would follow “not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” In short, the law is distinct from its social effects.

*Plessy* came shortly before the “legal realism” movement transformed the landscape of American legal thought. The “realists” were diverse in their perspectives and arguments, but a recurring theme in their writings was to attack the public/private distinction. A “common point[ ] of departure” for realists, Karl Llewellyn explained, was that any law “needs constantly to be examined for its purpose,

and for its effect, and to be judged in the light of both and of their relation to each other.” Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, Harv. L. Rev. (1931). In short, there was not—either in theory or in practice—any rigid distinction between “public” and “private” or between “law” and “society.” All laws, realists insisted, were bound up with the underlying social conditions and the resulting social effects.

What do you think about this debate? When legislation responds to a social problem that is caused by racial hostility, does it make sense to attribute that hostility to the government? What about attributing to the government the social effects of law, including the way that the public perceives the law? Whichever way you are leaning, what are potential problems with that approach?

Along these lines, how would you characterize Justice Harlan’s dissenting opinion? Does he embrace an older formalism, an emergent realism, or some combination of the two?

5. In *Cumming v. Richmond County Board of Education* (1899), the Supreme Court upheld the decision of a local school board in Georgia to operate a public high school for white girls without offering anything comparable for Black students. Attendees had to pay tuition, but the school was also partly funded by county taxes. The county did not operate public high schools for Black children or white boys, but there was a local private school that admitted white boys. That school also charged tuition, but the county contributed some financial assistance to this school as well. (The county also operated segregated “primary, intermediate and grammar schools” that did not charge tuition, but the plaintiffs did not allege any constitutional violation with respect to those schools.)

Justice Harlan wrote for a unanimous Court, rejecting the claim. The county had limited resources, he explained, and it had discretion about how best to allocate those resources. Consequently, he wrote:

We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored school children of the county on account of their race. . . . [I]f it appeared that the Board’s refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court.

The state court . . . rejected the suggestion that the Board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.

How could Justice Harlan—the *Plessy* dissenter—have written this decision? Why would the state be required to maintain “color-blindness” (according to Justice Harlan) in *Plessy* but not in *Cumming*?

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## 1.6. Commercial Regulation

Some of the issues that we have seen in the context of sex discrimination and racial discrimination also arose with respect to the regulation of economic activity.

In *Gulf, Colorado & Santa Fe Railway Co. v. Ellis* (1897), for example, the Court considered the constitutionality of an act that provided for one-way fee-shifting in cases for the recovery of debts owed by railroads. (In other words, the law required railroad companies to pay attorney's fees if they lost, but the companies could not recover fees if they won.) The Court held that the law was unconstitutional because it imposed a classification that was "arbitrary" and therefore violative of the companies' right to equality of legal process under the Equal Protection Clause:

[I]t is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . .

In dissent, Justice Gray insisted that the state legislature had acted within the scope of its powers:

The legislature of a State must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the State were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants, by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party, or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts. . . .

Notice the tension in these cases. Legislatures surely had the power to identify particular social problems—*e.g.*, inadequate payment of debts by railway companies—and to create legal rules to remedy those problems. But could legislatures do so by creating formally unequal procedural rules for adjudicating cases? And what, if any, guardrails prevented legislators from abusing their powers?

The Court's response to these problems was inconsistent. In *Ellis*, the justices seemed to require formal equality, at least with respect to matters of judicial process, like fee-shifting rules. Just two years later, however, the Court upheld state legislation that imposed one-sided evidentiary rules making it easier to obtain judgments against railroad corporations. The 5-to-4 decision in *Atchinson, Topeka, & Santa Fé Railroad Co. v. Matthews* (1899) emphasized that there was no hard and fast constitutional prohibition on "special duties or liabilities upon individuals and corporations, or classes



of them.” Rather, such cases turned on the reasonableness of legislation, requiring judges to make assessments that often could not be reduced to rule-like form. “It is easy to distinguish between the full light of day and the darkness of midnight,” the Court noted, “but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness.”

Dissenting in *Matthews*, Justice Harlan insisted that notwithstanding state power to regulate businesses, the Equal Protection Clause prohibited states from creating inequality in the judicial processes used to resolve private disputes. Under the state law at issue, he observed, “a rule of evidence may be applied against the [railroad] corporation which is not applied in like actions against other corporations or against individuals for the negligent destruction of property by fire.” Rather than treating as equals all individuals and corporations that caused fire, the state had “impose[d] a penalty [on railroad companies] which it does not impose upon other litigants under like circumstances,” thus violating a requirement of “access to the courts by all litigants upon equal terms.”

*Ellis* and *Matthews* revealed many of the justices’ particular concerns under the Equal Protection Clause regarding manipulation of judicial procedures—and the lack of any clear stopping point. If politicians gave into voter demands, what would prevent the state legislature from shifting the burden of proof to corporations in all cases between citizens and corporations? The rising class tensions in the late nineteenth century—including the prospect of socialist policies—only heightened these fears among many of the justices.

Similar concerns also arose in the context of direct regulations of business and labor practices under “substantive due process” doctrine. The following section begins with an introduction to that concept, showing how it fit into prevailing attitudes about rights.

### Substantive Due Process

The term “due process of law” invokes some *procedural* safeguard for the natural rights of life, liberty, and property. This is what is often called the *procedural* dimension of due process. And some people think that this *procedural* guarantee is all that the Due Process Clauses provides. The idea that the Due Process Clauses recognize a *substantive* guarantee, John Hart Ely famously quipped, “is a contradiction in terms—sort of like ‘green pastel redness.’” John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

But the text—“due process of law”—suggests another possibility. Only a validly enacted *law*—not brute force or divine right—can warrant governmental interference with natural rights. No matter how much *process* the government provides, it cannot take away life, liberty, and property without the authority of law. If the federal government took away someone’s life, liberty, or property based on a formal decree issued by Jude Law, for instance, did the government violate the Due Process Clause? Of course! To be sure, Jude Law was amazing in that timeless classic, *The Holiday*. But he lacks authority to promulgate binding laws. No matter how much process the government provided (notice, an attorney, a jury trial, the right to confront witnesses, and so on), a *lawless* prosecution would seem to be a quintessential violation of due process.

At first glance, this principle might seem somewhat procedural, too, in the sense that it requires certain lawmaking *procedures* are followed in order to create a “law.” A bill that passes both Houses of Congress and is signed by the President becomes a “law,” whereas a decree issued by Jude Law doesn’t. To say this another way: Perhaps the only requirements for creating a “law” (for purposes of the Due Process Clauses) are the procedural steps laid out in Article I and in state constitutions.

But oftentimes we talk about “law” in a different way. As Chief Justice Marshall stated in *Marbury v. Madison* (1803), “an act of the legislature, repugnant to the constitution, is void” and is “not law” and

therefore courts should not consider it “as if it was a law.” Notice that Marshall was using the term “law” in a thicker, more substantive way. On this understanding, conformity with the lawmaking process is not sufficient to create “law”; rather, the legislative act must also comply with constitutional rules.

*Marbury* focused on compliance with the *written* Constitution. “[A]ll those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation,” Marshall explained.

But were there *unwritten* dimensions of fundamental law that limited the government’s constitutional authority? (By now, you’re in a good position to know the answer!) And, if so, did *judges* have authority to identify and enforce those limitations? These questions undergirded controversies over what is now known as *substantive due process*.

Recall that the Supreme Court initially rejected a claim along these lines in the *Slaughter-House Cases*. But it began to shift course in *Munn v. Illinois* (1877). The case involved a Fourteenth Amendment challenge to an Illinois statute that fixed the price for the transportation and storage of grain. The majority began its analysis with unenumerated first principles derived from social-contract theory:

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. “A body politic,” as aptly defined in the preamble of the Constitution of Massachusetts, “is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.

State governments, in other words, had authority to regulate life, liberty, and property “when such regulation becomes necessary for the public good.” Consequently, the majority explained, “statutes regulating the use, or even the price of the use, of private property, . . . [do not] necessarily deprive[ ] an owner of his property without due process of law.” But, the Court hinted, “[u]nder some circumstances, they may.” Not all restrictions of life, liberty, and property were necessarily designed to promote the public good. Sometimes the legislature might act in bad faith.

Indeed, the Supreme Court had already begun grappling with the ways that social-contract theory limited state power. “When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development,” the Court explained in *Yick Wo v. Hopkins* (1886), “we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.” The Court invoked the Fourteenth Amendment, too, but the argument was grounded on social-contract theory.

The following year in *Mugler v. Kansas* (1887), the Court extended this reasoning to its review of economic regulations, emphasizing the judicial responsibility to help safeguard rights recognized “in the implied compact between the State and the citizen.” These rights were not absolute immunities. The legislature, after all, had authority to curtail rights to life, liberty, and property when individual behavior “prejudicially affects the rights and interests of the community.” Nonetheless, the Court clarified,

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. “To what purpose,” it was said in *Marbury v. Madison*, “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.” The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

The solution, the justices proposed, was for courts to ensure that the legislation was “fairly adapted” to a legitimate end, rather than merely being a deprivation of private rights “under the guise merely of police regulations.” The Court did not begin striking down state legislation for over a decade, but the stage was set.

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### Lochner v. New York (1905)

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#### **Justice Peckham delivered the opinion of the court.**

The indictment . . . charges that the plaintiff . . . wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. . . . [The law imposes] an absolute prohibition upon [any bakery] employer, permitting, under any circumstances, more than ten hours work [per day] to be done in his establishment. [The law provided: “No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.”] The employee may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana* (1897). Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas* (1887).

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from

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

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy* (1898). A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, “except in cases of emergency, where life or property is in imminent danger.” It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. . . . It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. . . .

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

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

[Justice Peckham first assessed whether the statute was a “labor law,” i.e., a rule designed to protect workers from unfair employment practices.] The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights

and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.

The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

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

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

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

clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light . . . .

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed. . . .

The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. . . . It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business,

not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

**Justice Harlan, with whom Justices White and Day concurred, dissenting.**

. . . While this court has held . . . that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances . . . .

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . . If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch v. Maryland* (1819).

Let these principles be applied to the present case. . . .

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. . . . It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors. [*Justice Harlan then cited a variety of sources documenting these hazards.*] . . .

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute

prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. . . .

It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. . . .

We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. . . .

We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.

**Justice Holmes dissenting.**

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

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold



it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

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### Notes and Questions

1. What constitutional rule or principle did the majority opinion recognize? How did the Court think that judges ought to apply that rule or principle? And why, in particular, did the majority think that the New York statute was unconstitutional? How did the dissenting judges agree and disagree with the majority?

2. *Lochner* is now widely regarded as part of the “anti-canon” of constitutional cases that are universally (or nearly universally) reviled. See Jamal Greene, *The Anticanon*, Harv. L. Rev. (2011). As part of your legal training, you should know that *Lochner* is “bad.” But what exactly was objectionable about the decision?

One common critique is that *Lochner* enforced an unenumerated right. In the words of Justice Thomas, *Lochner* “located a ‘right of free contract’ in a constitutional provision that says nothing of the sort.” *United Haulers Ass’n v. Oneida-Herkimer* (2007) (Thomas, J., concurring in the judgment). Is this a fair critique of the Court’s reasoning?

Consider, for instance, the views of Felix Frankfurter, then a noted progressive lawyer and law professor at Harvard Law School: “The principle of the *Lochner* case is simple enough: that arbitrary restriction of men’s activities, unrelated in reason to the ‘public welfare,’ offends the Fourteenth Amendment. As to the principle, there is no dispute. But the principle is the beginning and not the end of the inquiry. The field of contention is in its application.” Felix Frankfurter, *Hours of Labor and Realism*, Harv. L. Rev. (1917). What, in particular, might Frankfurter have objected to?

3. After *Lochner*, the Court continued to uphold most state restrictions of liberty, as it had done before *Lochner*. State governments, after all, had constitutional power to limit life, liberty, and property in promotion of the public good. And the Court was very deferential up until the early 1920s. A well-known example of the Court’s deferential review is *Village of Euclid v. Ambler Realty Co.* (1926), which upheld local zoning rules so long as they supplied “reasonable limits” on the use of property.

But the potential implications of *Lochner* were colossal. And sure enough, although most state laws survived judicial review, judges throughout the “*Lochner* Era” ruled that hundreds of other laws—including core elements of the progressive agenda—were unconstitutional. And with several new appointments in the 1920s, the Court began to strike down progressive legislation with much greater frequency under the Equal Protection Clause and Due Process Clauses (of the Fifth and Fourteenth Amendments). Two lines of caselaw are particularly worth mention.

The first involved particular domains where courts applied rigid rules that curtailed legislative discretion. The most important of these domains was governmental regulation of *prices*—mostly in terms of the price of goods but also (according to some decisions) the price of labor (*i.e.*, wages). In a line of decisions running from 1887 to 1934, the Supreme Court held that regulation of prices was only permissible if the business was one “affected with a public interest.” As the Supreme Court later summarized in *Nebbia v. New York* (1934):

The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for

the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly.

In *Nebbia*, however, the Court reversed course, holding that regulations of prices are subject to the same constitutional limits as other restrictions on liberty and property rights—namely, that those rules have to promote the common good.

The second line of *Lochner* cases worth mentioning rejected a state interest in promoting economic equality. One of the most controversial cases was *Coppage v. Kansas* (1915), in which the Court overturned a state law banning “yellow-dog contracts”—that is, contracts whereby an employee agreed, as a condition of employment, not to join a union. The Court held that the state’s asserted interest in creating more equitable labor negotiations was not a legitimate interest. To be sure, the legislature could limit the freedom of contract in “reference to health, safety, morals, or public welfare.” But it could not do so based on an interest in “leveling inequalities of fortune.” According to the Court, “The mere restriction of liberty or of property rights cannot of itself be denominated ‘public welfare,’ and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.” But why was trying to ensure a more “just” allocation of rights not a sufficient state interest?

As we have seen, *equality* was a core feature of social-contract theory. People joined the social contract on *equal terms*, and the government thus always had to *equally* consider everyone’s interests, rather than prioritizing some peoples’ interests over others. To be sure, this did not mean that the law could not draw distinctions and burden some people more than others. “Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects,” the Court had explained in *Soon Hing v. Crowley* (1885). “Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.” Some inequality often inhered in the *means* employed to promote the public interest.

The problem in *Coppage*, by contrast, was the *ends* of the law—that is, the aim of the law was to redistribute economic power and wealth. This aspect of *Lochner*-Era jurisprudence cut to the heart of progressive legislation. And it triggered a virulent reply by progressive lawyers. The existing arrangement of wealth and property rights, they argued, was itself a product of governmental action—not an “equal” or “neutral” legal regime. A leading exponent of this view was Robert Hale:<sup>1</sup>

[T]here never was a time when individual persons started with equal property rights. It may be pointed out besides that not every acquisition of title to property is the result of individual efforts or contract unaided by law. The title to most land was derived originally from some sort of government grant, and the title to inherited property is acquired either because the law recognizes the relationship which the heir bears to the previous owner (if he has died intestate), or because it gives legal effect to the wishes of the maker of a will—it delegates to him the power to name his successor in the law’s favors. In neither case does he acquire title in a manner equally open to everyone else. Were laws of inheritance different, or had the original grants of natural resources been awarded differently by the law, the resulting inequalities would be of a different pattern from those now existent.

Beyond the *legal* critiques of the *Lochner* decision, and the similar decisions that intermittently followed, progressive lawyers waged a sustained attack on the Court’s pretensions that it was not second-guessing legislative judgments. As Frankfurter wrote:<sup>2</sup>

<sup>1</sup> Robert Hale, *Labor Legislation as an Enlargement of Individual Liberty*, Am. Labor Leg. Rev. (1925).

<sup>2</sup> Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, Harv. L. Rev. (1916).

Despite disavowal that the policy of legislation is not the courts' concern, there is an unmistakable dread of the class of legislation under discussion. Intense feeling against the policy of the legislation must inevitably have influenced the result in the decisions. In truth this presents the point of greatest stress in our constitutional system, for it requires minds of unusual intellectual disinterestedness, detachment, and imagination to escape from the too easy tendency to find lack of power where one is convinced of lack of wisdom. . . .

Justice Brandeis captured a similar concern in his dissenting opinion in *Truax v. Corrigan* (1921):

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires, and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration, particularly when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need, is necessarily largely a matter of judgment. . . . The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law.

These critiques set the stage for yet another turn in equal-protection and due-process doctrine in the following decade. Before exploring those developments, however, let's consider *Lochner*-Era cases involving personal and familial autonomy.

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## 1.7. Personal and Familial Autonomy

The following three cases involved substantive-due-process challenges to restrictions on individual freedom. What legal principles did the justices use to resolve these cases?

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### Jacobson v. Massachusetts (1905)

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

. . . The authority of the State to enact this statute [requiring mandatory vaccination] is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and health laws of every description . . . . According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. . . .

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . In *Crowley v. Christensen* (1890), we said: “The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.” . . . The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. . . .

[I]t cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case. . . . There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person “to live and work where he will,” *Allgeyer v. Louisiana* (1897); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one’s body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger. . . .

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### Notes and Questions

1. What right was at issue in *Jacobson*? What was the *scope* of that right? What was the *strength* of that right?
2. The Supreme Court’s decision in *Jacobson* includes the following passage: “There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.” What might that passage be referring to?

3. *Jacobson* was an obscure case until 2020, when the coronavirus pandemic led to a wave of public-health restrictions—and corresponding constitutional challenges. Many lower courts began to describe *Jacobson* as “the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures.” *In re: Abbott* (5th Cir. 2020). Some judges read the opinion as essentially recognizing a pandemic exception to constitutional rights. *See id.* (“*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.”). Is that an accurate reading of the case? Did *Jacobson* create an emergency-based exception to rights?

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In *Meyer v. Nebraska* (1923), the justices held unconstitutional a state statute that banned schools from teaching students in any language other than English prior to high school. (State courts had recognized exceptions for the ancient languages of Hebrew, Greek, and Latin.) Robert Meyer, who was fined for violating the act by teaching a student in German, challenged the statute’s constitutionality. The majority opinion in *Meyer*, authored by Justice McReynolds, rested its conclusion on the “established doctrine [that] liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.” According to McReynolds:

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the [state] Supreme Court. *Adams v. Tanner* (1917) pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

For the most part, *Meyer* rested on the lack of any genuine connection between the asserted ends of the statute and its means. Requiring people to learn English, Justice McReynolds reasoned, would be sufficient to facilitate civic engagement. Thus, it served no purpose to ban all foreign-language instruction.

Beyond this general ends-means test, however, *Meyer* also pointed toward a more stringent limit on state power. In particular, Justice McReynolds focused on the state’s inability to abolish (or “prohibit”) certain non-harmful occupations, even though it could impose more tailored “regulation[s]” to restrict particular harmful aspects of those occupations. By analogy, a rule outlawing drunk driving would be a “regulation,” since it would punish inherently harmful activity, whereas a ban on all drinking, or on all driving, would be a “prohibition,” since those activities (when not combined) are often safe.

What do you think of this distinction between “regulations” and “prohibitions”? What are its strengths and weaknesses? Why would the state only be allowed to “regulate” occupations? What alternative reasons might have existed for holding the government to a higher burden of justification in *Meyer*?

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Pierce v. Society of Sisters (1925)

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**Justice McReynolds delivered the opinion of the Court.**

[T]he Compulsory Education Act . . . requires every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him “to a public school for the period of time a public school shall be held during the current year” in the district where the child resides; and failure so to do is declared a misdemeanor. There are exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. . . .

[T]he Society of Sisters, is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. . . . Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. . . . The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. . . .

[The Society] alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents’ choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. . . .

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. . . .

These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. . . .

Under the doctrine of *Meyer v. Nebraska* (1923), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture

him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. But they have business and property for which they claim protection. . . .

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### Notes and Questions

1. What right was at issue in *Pierce*? What was the *scope* of that right? What was the *strength* of that right?
2. The restrictions on foreign-language instruction (at issue in *Meyer*) and on parochial education (at issue in *Pierce*) were supported by nativist forces in American politics, such as the Ku Klux Klan. Should that have affected the way that judges viewed such laws? Why or why not?

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### Buck v. Bell (1927)

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

. . . [T]he superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. The case comes here upon [Buck's] contention that the statute authorizing [her sterilization] is void under the Fourteenth Amendment as denying [her] due process of law and the equal protection of the laws.

Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child. She was eighteen years old [when the state began the effort to sterilize her].

An Act of Virginia, approved March 20, 1924, recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives . . . who if now discharged [from state institutions] would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. The statute then enacts that whenever the superintendent of certain institutions including the above named State Colony shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, &c., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor, notice also is to be given to his parents if any with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his

guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck “is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,” and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts* (1905). Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

**Justice Butler dissents.**

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### Notes and Questions

1. What right was at issue in *Buck v. Bell*? What was the *scope* of that right? What was the *strength* of that right?
  2. *Buck v. Bell* is widely viewed as among the Supreme Court’s all-time worst decisions. What are the weakest aspects of the Court’s reasoning? Was the opinion consistent with the prevailing view of rights in the 1920s?
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## 2. Suspect Classifications

### 2.1. The Modern Shift

This Unit will introduce significant doctrinal shifts that signaled a new approach to rights jurisprudence. Pay attention to all facets of doctrine: What constitutional provision was the Supreme Court interpreting? What did that provision mean—that is, what rule or principle did it impose on governments? Finally, what doctrinal rules did the Supreme Court adopt?

The first case is *United States v. Carolene Products Co.* (1938). In part, the Supreme Court departed from its earlier “*Lochner* Era” decisions, which struck down various aspects of progressive legislation at the federal, state, and local levels. Today, however, *Carolene Products* is most famous not for its holding—or even its place in the general decline of “substantive due process”—but rather for its provocative suggestion in a very lengthy footnote that some types of classifications might warrant greater judicial scrutiny than others.

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### United States v. Carolene Products Co. (1938)

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

The question for decision is whether the “Filled Milk Act” of . . . 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 assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth 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 Court first held that the Act was within federal power under the Commerce Clause. It then turned to the Fifth Amendment argument.] . . .*

The prohibition of shipment of appellee’s product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court . . . 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. . . .

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. . . .

We may assume for present purposes that . . . a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>4</sup> The present statutory findings affect appellee no more than the reports of the Congressional committees; and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, 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

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<sup>4</sup> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See Stromberg v. California* (1931); *Lovell v. Griffin* (1938).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see Nixon v. Herndon* (1927); *Nixon v. Condon* (1932); on restraints upon the dissemination of information, *see Near v. Minnesota ex rel. Olson* (1931); *Grosjean v. American Press Co.* (1936); *Lovell v. Griffin* (1938); on interferences with political organizations, *see Stromberg v. California* (1931); *Fiske v. Kansas* (1927); *Whitney v. California* (1927); *Herndon v. Lowry* (1937); and *see Gitlow v. New York* (1925) (Holmes, J.); as to prohibition of peaceable assembly, *see De Jonge v. Oregon* (1937).

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Soc'y of Sisters* (1925), or national, *Meyer v. Nebraska* (1923); *Bartels v. Iowa* (1923); *Farrington v. Tokushige* (1927), or racial minorities, *Nixon v. Herndon* (1927); *Nixon v. Condon* (1932): whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Compare McCulloch v. Maryland* (1819); *South Carolina v. Barnwell Bros.* (1938).

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.

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### Notes and Questions

1. What did the Supreme Court suggest in Footnote 4? Why?

2. For the most part, *Carolene Products* assessed the *facial* constitutionality of the federal statute. Why did the Supreme Court reject the claimant's facial argument?

In the last paragraph of the opinion, the Court briefly recognized that claimants could bring an "as applied" claim under the Due Process Clause if they could prove 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." For example, suppose that a state created a categorical rule against taking photographs in gym locker rooms. The statute reads: "In order to protect privacy, any person who takes any picture in a gym locker-room shall be guilty of a misdemeanor, with no exceptions whatsoever." As a general matter, this prohibition would be constitutional. But now suppose that it was applied in the following scenarios:

Scenario 1: A gym locker breaks. After hours, once the gym is closed, a gym employee takes a picture of the broken locker and sends the picture to his supervisor. The employee is prosecuted for violating the statute.

Scenario 2: During gym hours, but at a time when the locker room is not busy, a person using the gym notices a rash on her arm. While in the locker room, she takes a picture of the rash to send to her doctor. The gym patron is prosecuted for violating the statute.

In both of these scenarios, the defendants might argue that the *application* of the photography ban violates the Due Process Clause. How might the government respond? Whom do you think should win?

Claims of this sort are often called "as applied" challenges. That's because the claimants are not challenging the validity of the rule *in all circumstances*. Rather, they are contesting the rule's validity in a subset of cases. But notice that resolution of this issue turns on whether the *scope of the statute* is reasonable—*i.e.*, whether the statute's *means* are sufficiently tailored to its *ends*—not on whether the individual's *conduct* is constitutionally privileged. In other words, the judge will need to assess whether the legislature had a reasonable basis for drawing the rule in the way that it did. And so, in some sense, the mode of resolving these claims resembles "facial" analysis, with judges assessing the validity of *the rule*, albeit only as applied to a particular subset of cases.

3. It is worth remembering that back in 1938, Footnote 4 was just a footnote. It did not constitute a holding of the Court, and it did not foretell all the developments that followed. Footnote 4 did, however, offer a revealing window into how the Justices were thinking. And subsequent cases sometimes reflected its logic. As Justice Roberts explained for a nearly unanimous Court in *Schneider v. State* (1939):

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

4. In law, it is common for us to read earlier cases in light of what came after. The Supreme Court's infamous decision in *Korematsu v. United States* (1944), for instance, is often cited for the notion that "strict scrutiny" applies in cases involving racial discrimination. This reflects a common feature of legal rhetoric, which is to ground present-day decisions on earlier decisions, thus making the outcome seem like it turns on *existing* law rather than on legal rules and principles that the judges make up on the spot. As lawyers, it is important to speak and argue in this way—generally framing your argument in terms of what the law *already requires* rather than in terms of what judges should do to change the law.

If we examine judicial decisions critically, however, it is important to appreciate that judges make up new law all the time. Sometimes this is nefarious, but often it is simply a product of the fact that the law can be ambiguous, so cases frequently require lawyers and judges to confront unanswered questions. In doing so, judges inevitably "make new law" in some sense. But they do so by appropriating existing terms and concepts, thus making it harder for people today to understand the past on its own terms. It becomes harder, for instance, for us to read *Korematsu* and realize that "strict scrutiny" was not a recognized legal category in 1944, and that it did not become such a category until decades later. See Richard H. Fallon, Jr., *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* (2019).

The same point is true of the “rational basis” test mentioned in *Carolene Products*. Back in 1938, the Court was still willing to consider real-world evidence when evaluating whether a statute had a “rational basis,” though Justice Stone also noted that legislators could also rely on their own “knowledge and experience.” By the 1950s, however, the “rational basis” had become extremely weak, as illustrated in the following case.

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### Williamson v. Lee Optical of Oklahoma, Inc. (1955)

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

This suit was instituted in the District Court to have an Oklahoma law declared unconstitutional and to enjoin state officials from enforcing it for the reason that it allegedly violated various provisions of the Federal Constitution. . . .

The District Court held unconstitutional portions of three sections of the Act. First, it held invalid under the Due Process Clause of the Fourteenth Amendment the portions of § 2 which make it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

An ophthalmologist is a duly licensed physician who specializes in the care of the eyes. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses. The optician is an artisan qualified to grind lenses, fill prescriptions, and fit frames.

The effect of § 2 is to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. In practical effect, it means that no optician can fit old glasses into new frames or supply a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. The District Court conceded that it was in the competence of the police power of a State to regulate the examination of the eyes. But it rebelled at the notion that a State could require a prescription from an optometrist or ophthalmologist “to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer.” It held that such a requirement was not “reasonably and rationally related to the health and welfare of the people.” The court found that through mechanical devices and ordinary skills the optician could take a broken lens or a fragment thereof, measure its power, and reduce it to prescriptive terms. . . . It was, accordingly, the opinion of the court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician’s right to do business. . . .

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not

only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. *See Nebbia v. New York* (1934). We emphasize again what Chief Justice Waite said in *Munn v. Illinois* (1877), “For protection against abuses by legislatures the people must resort to the polls, not to the courts.” . . .

[T]he District Court [also] held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, that portion of § 3 which makes it unlawful “to solicit the sale of . . . frames, mountings . . . or any other optical appliances.” The court conceded that state regulation of advertising relating to eye examinations was a matter “rationally related to the public health and welfare” . . . . But regulation of the advertising of eyeglass frames was said to intrude “into a mercantile field only casually related to the visual care of the public” and restrict “an activity which in no way can detrimentally affect the people.”

An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation . . . ; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers. . . .

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### Notes and Questions

1. *Williamson* did not deny that the Fourteenth Amendment Due Process Clause provides against arbitrary deprivations of “life, liberty, and property.” In theory, judges could still apply an ends/means test, as they had in *Lochner*. But why, then, did the Court uphold the restrictions at issue in *Williamson*? What was the state’s *end*? Why was its *means* adequately fitted to achieving that end? Do you agree with the Court’s conclusion?

2. Although *Williamson* did not categorically reject substantive due process, it reflected that the doctrine had virtually no force.

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Consider how the decline of substantive due process influenced the Court’s resolution of our next case, *Skinner v. Oklahoma* (1942). The case involved a challenge to a state law that required sterilization of certain habitual criminals, much like the challenge in *Buck v. Bell* (1927). Why did the Court in *Skinner* resolve the case under the Equal Protection Clause rather than simply overturning *Buck*?

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## Skinner v. Oklahoma (1942)

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

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. . . .

The statute involved is Oklahoma’s Habitual Criminal Sterilization Act. That Act defines an “habitual criminal” as a person who, having been convicted two or more times for crimes “amounting to felonies involving moral turpitude” . . . is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. . . . [The law further] provides that “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.”

Petitioner was convicted [of robbery]. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. . . .

It was stated in *Buck v. Bell* (1927), that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is “the usual last resort of constitutional arguments.” Under our constitutional system the States in determining the reach and scope of particular legislation need not provide “abstract symmetry.” They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co. v. Pinson* (1931) stated, “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” . . .

But the instant legislation runs afoul of the equal protection clause . . . . We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of “equal protection of the laws is a pledge of the protection of equal laws.” *Yick Wo v. Hopkins* (1886). When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. . . . We have not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

**Chief Justice Stone, concurring.**

... I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

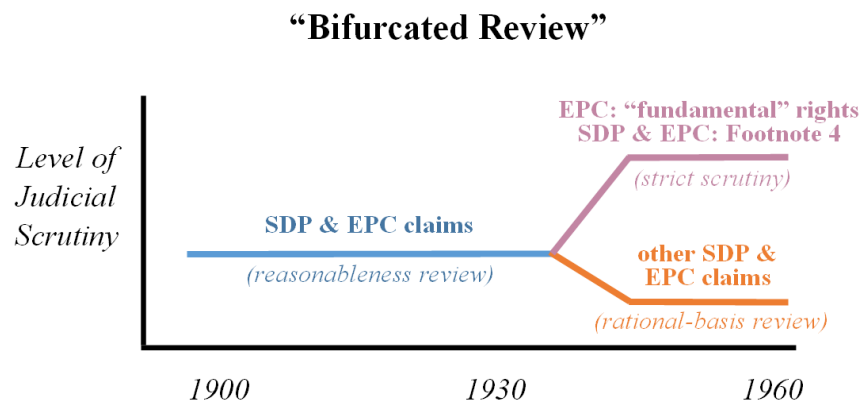
There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned, *see United States v. Carolene Products Co.* n.4 (1938), and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type. Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. *Buck v. Bell* (1927). But until now we have not been called upon to say that it may do so without giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure.

**[The concurring opinion of Justice Jackson is omitted.]**

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### Notes and Questions

1. What was the rationale of the decision in *Skinner*? What source of law did the Court interpret? Was *Skinner* consistent with precedent, including *Buck v. Bell*?
2. What about Chief Justice Stone's concurring opinion? How did his approach differ from the majority's approach?
3. During the *Lochner* Era, the Court generally evaluated equal-protection claims and due-process claims under a nominally deferential "reasonableness" standard. As you've seen in this Unit, however, a new framework of "bifurcated review" emerged in the late 1930s and early 1940s, with judicial review *relaxed* in most cases under a highly deferential "rational basis" standard but elevated in other cases involving the three categories identified in Footnote 4 of *Carolene Products*—certain enumerated rights, restrictions of the political process, discrimination involving discrete and insular minorities—along with equal-protection claims involving "fundamental rights," as in *Skinner*. Here is a diagram:





## 2.2. Desegregation, Part I

Footnote 4 in *Carolene Products* was, of course, just *dicta*. It did not resolve any legal questions necessary to decide the case. But the Court soon began to invoke the idea articulated in Footnote 4 that not all types of legal classifications would receive the same level of scrutiny. In *Thornhill v. Alabama* (1940), for example, the Court said the following about speech and press freedoms:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. *Compare United States v. Carolene Products Co.* n.4. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should “weigh the circumstances” and “appraise the substantiality of the reasons advanced” in support of the challenged regulations. *Schneider v. State* (1939).

As *Thornhill* illustrates, Footnote 4 was on the Justices’ minds. But how influential would it be?

In *Hirabayashi v. United States* (1943) and *Korematsu v. United States* (1944), the Supreme Court upheld federal orders singling out Japanese Americans on the basis of their heritage, not their citizenship. The order in *Hirabayashi* involved a curfew, and the order in *Korematsu* prohibited Japanese Americans from remaining along the West Coast. Both cases claimed to recognize that racial restrictions were constitutionally suspect. In *Hirabayashi*, Chief Justice Stone wrote that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” And writing for the majority in *Korematsu*, Justice Black “noted, to begin with, that legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” Interestingly, however, neither opinion cited *Carolene Products*, which had proposed more rigorous judicial scrutiny in cases involving discrimination against “national” or “racial minorities.” Why might Chief Justice Stone and Justice Black have avoided relying explicitly on the logic of Footnote 4?

Although the Court claimed that racial classifications were constitutionally suspect, the Justices did not say that they were categorically prohibited. As Justice Black explained in *Korematsu*, “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.” Applying this standard, Justice Black explained:

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.

What did Justice Black mean when he said that “Korematsu was not excluded . . . because of hostility to him or his race”?

Justices Roberts, Murphy, and Jackson dissented. According to Justice Murphy:

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.

Finally, here is an excerpt from Justice Jackson’s dissent:

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen . . . . No claim is made that he is not loyal to this country. . . . 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.

Even more unusual is the series of military orders which made this conduct a crime. They forbid [Korematsu] to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

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. . . . 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. . . .

*Korematsu* is, of course, among the most infamous decisions in American constitutional history. But what constitutional provision or principle did Justice Black misconstrue? The Court grounded its decision principally in the executive power to defend the nation during a time of war. Assuming that the Court was correct in its views of federal power, what about Fred Korematsu's rights? Which right(s) did the government violate? How?

By the time of *Korematsu*, the earlier distinctions between "civil rights," "political rights," and other types of personal interests (including receipt of public benefits) was already starting to give way. Although the earlier distinction between "private rights" and "public privileges" did not disappear entirely, the shift toward a more "realistic" jurisprudence gave that distinction far less importance. In some ways, that broadened the scope and strength of constitutional rights. *Korematsu*, however, illustrates how the abandonment of older categories also had potential to *diminish* the strength of certain rights, making them more amenable to governmental restraint. Even under the logic of *Plessy*, the government had to maintain *formal equality* with respect to civil rights. In *Korematsu*, however, the Court was no longer differentiating "civil rights" from other rights, and formal racial equality was treated only as a strong constitutional presumption.

While *Korematsu* illustrates how the abandonment of older ways of thinking about rights reduced their strength with respect to what had previously been considered "civil rights," the Supreme Court's public-school desegregation cases illustrate how that same shift led to stronger protection in relation to cases involving public benefits.

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## Brown v. Board of Education (1954)

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

. . . In each of the cases, minors of the Negro race . . . seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. . . .

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.<sup>4</sup> 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. . . . 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.<sup>5</sup> 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 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. *Missouri ex rel. Gaines v. Canada* (1938); *Sipuel v. Oklahoma* (1948); *Sweatt v. Painter* (1950); *McLaurin v. Oklahoma State Regents* (1950). 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

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<sup>4</sup> . . . Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. . . . Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states.

<sup>5</sup> *Slaughter-House Cases* (1873); *Strauder v. West Virginia* (1880):

It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. . . .

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.<sup>11</sup> Any language in *Plessy* 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

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<sup>11</sup> 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).

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. [*The Court then ordered reargument about proper remedies.*]

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### Bolling v. Sharpe (1954)

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#### **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. They sought the aid of the District Court for the District of Columbia in obtaining admission. . . .

We have this day 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. *Korematsu v. United States* (1944); *Hirabayashi v. United States* (1943). 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.” *Gibson v. Mississippi* (1896). And in *Buchanan v. Warley* (1917), 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. . . .

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## Notes and Questions

1. What was the source of law in *Brown*? What exactly was the holding? Did the Court purport to overrule *Plessy*? If not, what did it hold?

2. In considering the questions in the previous note, it is worth considering *why* Chief Justice Warren might have framed the *Brown* opinion as he did. When circulating the draft opinions in *Brown* and *Bolling* to his colleagues, Warren commented that he had prepared them “on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.” Does that quotation help make sense of the legal framing of the opinions? If so, how? And what do you think of the notion that opinions attempting to dismantle facets of the Jim Crow laws should be “above all, non-accusatory”? Is there any virtue in that approach? And at what cost?

3. Was *Brown* a “non-originalist” opinion? How might you argue “yes”? How might you argue “no”?

4. Chief Justice Warren’s opinion in *Brown* was unanimous, without garnering even a concurring opinion. But it elicited plenty of controversy, even on the Supreme Court. Consider, for instance, the following memorandum, titled “A Random Thought on the Segregation Cases,” that law clerk William Rehnquist wrote to Justice Robert Jackson while *Brown* was under consideration:

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. *Marbury v. Madison*. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to inter-departmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the first Ten and the fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. *Fletcher v. Peck*, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. *Scott v. Sanford* was the result of Taney’s effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting the majority opinion in that case, Holmes replied that the fourteenth Amendment did not enact Herbert Spencer’s *Social Statics*. Other cases coming later in a similar vein were *Adkins v. Children’s Hospital*, *Hammer v. Dagenhart*, *Tyson v. Banton*, *Ribnik v. McBride*. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is . . . being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed. If the fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrddahl's *American Dilemma*.

5. Justice Jackson apparently did not agree with his law clerk—who later, during his own Supreme Court confirmation hearings in 1971 and 1986, dubiously claimed under oath that the memo did not reflect his own views. (Rehnquist likely perjured himself, but a document that might prove it—a letter that he wrote in 1955 to Justice Frankfurter after Jackson's death—was among the cache of documents stolen from the Library of Congress shortly after Justice Frankfurter's papers became public in the late 1960s. See Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, Bost. College L. Rev. (2012).)

Jackson firmly believed that segregated schooling must end, but he struggled to write a judicial decision saying that—writing and rewriting at least six drafts as the Court considered *Brown*. As one scholar puts it, Justice Jackson's opinions represent a conversation "with himself about anxieties over constitutional justifications for the ruling, the limits of judicial power in American politics, and, as he correctly foresaw, the problem of remedies and inexorable conflicts that could undermine compliance." David O'Brien, *Justice Robert H. Jackson's Unpublished Opinion in Brown v. Board* (2017). Ultimately, Jackson never issued any opinion at all, partly because he thought it was important for the Court to speak with a unanimous voice, and partly because his health took a serious turn for the worse—and although he rejoined the bench for the announcement of the decision, he died only a few months later. But the draft is well worth reading and pondering. (Remember, as noted above, the arguments don't all fit together in a polished way.)

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### Justice Jackson's draft opinion in *Brown*

#### I.

Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so. But it is not only established in the law of seventeen states and the national capital; it is deeply imbedded in social custom in a large part of this



country. Its eradication involves nothing less than a substantial reconstruction of legal institution and of society. It persists because of fears, prides and prejudices which this Court cannot eradicate, which even in the North are latent, and occasionally ignite where the ratio of colored population to white passes a point of where the latter vaguely, and perhaps unreasonably, feel themselves insecure.

However sympathetic we may be with the resentments of those who are coerced into segregation, we cannot, in considering a recasting of society by judicial fiat, ignore the claims of those who are to be coerced out of it. We cannot deny the sincerity and passion with which many feel that their blood, lineage and culture are worth of protection by enforce separatism of races and feel they have built their segregated institutions for many years on an almost universal understanding that segregation is not constitutionally forbidden. . . .

## II. Does Existing Law Condemn Segregation?

Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved. He must further speculate as to how this reversal of its meaning by the branch of the Government supposed not to make new law but only to declare existing law and which has exactly the same constitutional materials that so far as the states are concerned have existed since 1868 and in the case of the District of Columbia since 1791. Can we honestly say that the states which have maintained segregated schools have not, until today, been justified in understanding their practice to be constitutional? . . .

The Fourteenth Amendment contemplated denial of the vote and provided a reduction of congressional representation for states which do not allow the Negro to exercise the franchise. It was nearly two years later (1870) when the Fifteenth Amendment was added to assure equal voting rights; but, even then, with the shortcomings of the Fourteenth Amendment obvious, nothing was included as to either segregation or education. Thus, there is no explicit prohibition of segregated schools and it can only be supplied by interpretation.

It is customary to turn to the original will and purpose of those responsible for adoption of a constitutional document as a basis for its subsequent interpretation. So much is implied by the questions we have asked of counsel. Their exhaustive research to uncover the original will and purpose expressed in the Fourteenth Amendment yields for me only one sure conclusion: it was a passionate, confused and deplorable era. Like most legislative history, that of the Amendment is misleading because its sponsors played down its consequences in order to quiet fears which might cause opposition, while its opponents exaggerated the consequence to frighten away support. Among its supporters may be found a few who hoped that it would bring about complete social equality . . . . The majority was composed of more moderate men who appeared to be thinking in terms of ending all questions as to constitutionality of the contemporaneous statutes conferring upon the freed man certain limited civil rights. It is hard to find an indication that any influential body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the Amendments were designed to be a solution.

If we turn from words to deeds as evidence of purpose, we find nothing to show that the Congress which submitted these Amendments understood or intended to prohibit the practice here in question. The very Congress that proposed the Fourteenth Amendment, and every Congress from that day to this, established or maintained segregated schools in the District of Columbia . . . .

Turning from Congress to look to the behavior of the States, we find that equally impossible to reconcile with any understanding that the Amendment would prohibit segregation in schools [*given the pervasiveness of racial segregation in public schooling*]. . . . Plainly, there was no consensus among state

legislators or educators ratifying the Amendment any more than in Congress that it was to end segregation. . . .

Almost a century of decisional law rendered by judges . . . is almost unanimous in the view that the Amendment tolerated segregation by state action, at least in the absence of congressional action to the contrary.

The custom of a people has always been recognized as a powerful lawmaker. Widespread usage has reinforced the view of legislators and educators and the opinions of the courts. . . . Today's decision is to uproot a custom deeply embedded not only in state statutes but in the habit and usage of people in their local communities.

Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.

### **III. Does the Amendment Contemplate Changed Conditions?**

. . . [I]n embarking upon a widespread reform of social customs and habits of countless communities we must face the limitations on the nature and effectiveness of the judicial process.

The futility of effective reform of our society by judicial decree is demonstrated by the history of this very matter. For many years this Court has pronounced the doctrine that, while separate facilities for each race are permissible, they must be equal. Our pronouncement to that effect has remained a dead letter in a large part of the country. Why has the separate-but-equal doctrine declared by this Court so long been a mere promise to the colored ear to be broken to the hope?

It has remained an empty pronouncement because the courts have no power to enforce general declarations of law by applying sanction against any persons not before them in a particular litigation. Contempt proceedings as to those who disobey the court's order may be available, but only against those who were parties to the action.

I see no reason to expect a pronouncement that segregation is unconstitutional will be any more self-executing or any more efficiently executed than our pronouncement that unequal facilities are unconstitutional. A law suit must be maintained in every school district which shows persistent recalcitrance to lay the basis for a contempt charge. That is an effective sanction in a private controversy, but it is a weak reed to rely on in initiating a change in the social system of a large part of the United States. With no machinery except that of the courts to put the power of the Government behind it, it seems likely to result in a failure that will bring the court into contempt and the judicial process into discredit.

The Court can strike down legislation which supports educational segregation, but any constructive policy for abolishing it must come from Congress. Only Congress can enact a policy binding on all states and districts, and it can delegate its supervision to some administrative body provided with standards for determining the conditions under which sanctions should apply. It can make provisions for federal funds where changes required are beyond the means of the community, for mixing the races will require extensive changes in physical plants and will impose the largest burden on some of the nation's lowest income regions. Moreover, Congress can lift the heavy burden of private litigation from disadvantaged people and make the investigation and administrative proceedings against recalcitrant districts the function of some public agency that would secure enforcement of the policy. . . .

Our decision may end segregation in Delaware and Kansas, because there it lingers by a tenuous lease of life. But where the practice really is entrenched, it exists independently of any statute or decision as a local usage and deep-seated custom sustained by the prevailing sentiment of the

community. School districts, from habit and conviction, will carry it along without aid of state statutes. To eradicate segregation by judicial action means two generations of litigation. . . .

The Department of Justice concedes that uniform and immediate enforcement of a Court decree condemning segregation is impossible. It points out that school districts may have to be consolidated or divided, or their boundaries revised, and the teachers and pupils may have to be transferred. The Government points out that an essential part of the plan will involve placing white children under colored teachers, unless colored teachers are to be dismissed in some areas where they have been hired in substantial numbers. This is one of the most controversial problems of adjustment. Financial problems also obviously are involved. In some regions, the white schools are good, the Negro schools poor. If both classes are to be accommodated in both schools, it would require white pupils to shift to the Negro schools, a measure not likely to be accepted without strong local opposition. New facilities are necessarily to be provided, and that involves taxation, the sale of bonds, and the votes of taxpayers and affirmative actions by public bodies. It is impossible now to anticipate all of the difficulties or to determine the time necessary in any particular area to overcome them. While our decision may invalidate existing laws and regulations governing the school, the Court cannot substitute constructive laws and regulations for their governance. Local or state or federal action will have to build the integrated school systems if they are to exist. A gigantic administrative job has to be undertaken.

The Government advises that the courts assume this task and that we remand these cases to the District Courts under instructions to proceed with enforcement as rapidly as conditions make it appear practicable. . . .

I will not be a party to thus casting upon the lower courts a burden of continued litigation under circumstances which subject district judges to local pressures and provide them with no standards to justify their decisions to their neighbors, whose opinions they must resist. The Department offers us no standards, and none exist in the law, to determine when and how the school system should be revamped. For the courts to supervise the educational authorities with the aid of town meetings seems to me manifestly beyond judicial power or functions. Our sole authority is to decide an existing case or controversy between the parties. Nothing has raised more doubt in my mind as to the wisdom of our decision than the character of the decree which the Government conceives to be necessary to its success. We are urged, however, to supply means to supervise transition of the country from segregated to nonsegregated schools upon the basis that Congress may or probably will refuse to act. That assumes nothing less than that we must act because our representative system has failed. The premise is not a sound basis for judicial action.

#### **IV. The Limits and Basis of Judicial Action**

[As to the] fundamental premise that the requirement of equal protection does not disable the state from making reasonable classifications of its inhabitants nor impose the obligation to accord identical treatment to all, there can be no quarrel. We still agree that it only requires that the classifications of different groups rest upon real and not upon feigned distinctions, that the distinction have some rational relation to the subject matter for which the classification is adopted, and that the differences in treatment between classes shall not go beyond what is reasonable in the light of the relevant differences. These legal premises are not being changed today. . . .

[M]ere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual must be rated on his own merit. Retarded or subnormal ones, like the same kind in whites, may be accorded separate educational treatment. All that is required is that they be classified as individuals and not as a race for their learning, aptitude and discipline. . . .

Nor can we ignore the fact that the concept of the place of public education has markedly changed. Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.

It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions, and those held to be good in one state of facts may be held to be bad in another. A multitude of cases, going back far into judicial history, attest to this doctrine. In recent times, the practical result of several of our decisions has been to nullify the racial classification for many of the purposes as to which it was originally held valid.

I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood. . . .

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6. Although the correctness of *Brown v. Board of Education* (1954) is now an axiom of modern constitutional law, *Bolling* has not enjoyed the same status. John Hart Ely described the decision as “gibberish both syntactically and historically.” John Hart Ely, *Democracy and Distrust* (1980). Robert Bork offered an even more scathing appraisal in *The Tempting of America* (1990):

At the same time it decided *Brown*, the Court decided a companion case, *Bolling v. Sharpe*, in which plaintiffs challenged the school segregation laws of the District of Columbia. That posed a problem since the equal protection clause, under which *Brown* had been decided, applied on to the states; no similar clause applied to the federal government, which governed the District of Columbia. Had the Court been guided by the Constitution, it would have had to rule that it had no power to strike down the District’s laws. Instead, it seized upon the due process clause of the fifth amendment, which does apply to the federal government, and announced that this due process clause included the same equal protection of the laws concept as the equal protection clause of the fourteenth amendment. This rested on no precedent or history. In fact, history compels the opposite conclusion. The framers of the fourteenth amendment adopted the due process clause of the fifth amendment but thought it necessary to add the equal protection clause, obviously understanding that due process, the requirement of fair procedures, did not include the requirement of equal protection in the substance of state law. *Bolling*, then, was a clear rewriting of the Constitution by the Warren Court. . . . This was not law but social engineering from the bench.

Were Ely and Bork correct? Are there any counterarguments?

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### 2.3. Desegregation, Part II

Nobody doubts that *Brown* and *Bolling* were pathbreaking opinions, but what legal principle did they stand for? What does “equality” require in the context of the Equal Protection Clause?

Shortly after *Brown*, a federal judge in South Carolina offered his view in *Briggs v. Elliott* (D. S.C. 1955):

What [the Supreme Court] has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing

in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

Was this an accurate reading of the Supreme Court's decision in *Brown*?

Although the Supreme Court overturned explicitly discriminatory laws in the wake of *Brown* (i.e., “de jure segregation”), it did not initially clarify what states could and couldn't do that might maintain de facto segregation. A full ten years after *Brown*, however, the Court finally stepped back into the fore in the following case involving the decision of the school board in Prince Edward County, Virginia, to privatize the school system (and offer tuition vouchers) rather than desegregate its public schools. What does the Court's unanimous opinion indicate about how the justices viewed the requirements of the Equal Protection Clause?

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### Griffin v. School Board (1964)

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

. . . Virginia law, as here applied, unquestionably treats the school children of Prince Edward differently from the way it treats the school children of all other Virginia counties. Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools. Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. Apart from this expedient, the result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support.

A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties . . . . But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. . . .

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Shortly after *Griffin*, the Supreme Court took another case out of Virginia, this time challenging the state's ban on interracial marriage. Once again, consider how the Supreme Court conceptualized the requirement of equality under the Equal Protection Clause.

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## Loving v. Virginia (1967)

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### Chief Justice Warren delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

After their convictions, the Lovings took up residence in the District of Columbia. [In] 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. . . .

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person" . . . .

### I

[Virginia courts declared that the anti-miscegenation law was meant] "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. . . .

[T]he State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State

argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. [In cases] involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. . . . While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources “cast some light” they are not sufficient to resolve the problem; “[a]t best, they are inconclusive. . . .” *Brown v. Board of Education* (1954); see also *Strauder v. West Virginia* (1880). . . .

The State finds support for its “equal application” theory in the decision of the Court in *Pace v. Alabama* (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated “*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.” *McLaughlin v. Florida* (1964). As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases* (1873); *Strauder v. West Virginia* (1880).

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.” *Hirabayashi v. United States* (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” *Korematsu v. United States* (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they “cannot conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense.” *McLaughlin v. Florida* (1964) (Stewart, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as

measures designed to maintain White Supremacy.<sup>11</sup> We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

## II

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. *Skinner v. Oklahoma* (1942). 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 Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

### Justice Stewart, concurring.

I have previously expressed the belief that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.” *McLaughlin v. Florida* (1964) (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

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## Notes and Questions

1. How did the Supreme Court interpret the Equal Protection Clause in *Loving*? What did that provision mean? Why, specifically, did the Virginia statute violate that Clause?
2. Think about the different definitions of equality that we have explored. Which notion(s) of equality does *Loving* embrace? Why might the Court have framed its opinion in the way that it did? What is problematic about that framing?
3. Notice that *Loving* also signaled the justices’ renewed willingness in the late 1960s to rely on “substantive” due process. That topic is addressed further in Unit 3.
4. In addition to race-based classifications, the Supreme Court has also recognized “ethnicity” and “national origin” as suspect classifications that generally trigger strict scrutiny. See *Hernandez v. Texas* (1954). An exception is that the federal government *can* pass immigration laws that discriminate based on national origin.
5. The doctrines that apply to discrimination based on *citizenship* (or its opposite, *alienage*) are trickier. State governments generally may not discriminate between citizens and lawful-resident aliens;

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<sup>11</sup> Appellants point out that the State’s concern in these statutes, as expressed in the words of the 1924 Act’s title, “An Act to Preserve Racial Integrity,” extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia’s miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve “racial integrity.” We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the “integrity” of all races.



doing so usually triggers strict scrutiny. See *Graham v. Richardson* (1971). But “the *Graham* doctrine—while ostensibly clear when issued—has been, in fact, riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult.” *Korab v. Fink* (9th Cir. 2014) (Bybee, J., concurring). Voting rights, of course, can be limited to citizens. The Court has also recognized an exception for so-called “public functions,” like being a public-school teacher or police officer, in which case state and local governments may limit these jobs to citizens without having to satisfy strict scrutiny. And strict scrutiny generally does not apply to *federal* discrimination based on citizenship status. See *Nyquist v. Mauclet* (1977). Nor do the same principles apply to undocumented immigrants. See *Plyler v. Doe* (1982).

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### The “Tiers of Scrutiny”

*Loving* was decided when the Supreme Court was beginning to converge around a “tiers of scrutiny” framework for deciding a wide variety of constitutional cases. See Richard H. Fallon, Jr., *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* (2019). The “tiers of scrutiny” refer to the different levels of judicial scrutiny that the Supreme Court uses to evaluate many constitutional claims. As a general matter, the Court has articulated three types of scrutiny:

- *Strict scrutiny* presumes that the governmental action is *unconstitutional*, and the government can prevail only if it (1) offers a compelling justification for its action and (2) shows that the use of the constitutionally suspect classification was the least restrictive means of achieving that end. In other words, *strict scrutiny* requires a really compelling *end* and a really tight *ends/means* fit.
- *Intermediate scrutiny* presumes that the governmental action is *unconstitutional*, and the government can only prevail if it (1) offers a substantial justification for its action and (2) shows that the use of the constitutionally suspect classification was narrowly tailored to achieving that end. In other words, *intermediate scrutiny* requires a somewhat compelling *end* and a somewhat tight *ends/means* fit.
- *Rational-basis scrutiny* (or, more commonly, “rational-basis review”) presumes that the governmental action is *constitutional*, and the government can prevail so long as (1) there’s a rational basis for its action, supported by a legitimate government interest, based on any conceivable facts, and (2) the classification is rationally related to achieving that end, again based on any conceivable facts. In other words, *rational-basis review* requires a rational *end* and a rational *ends/means* fit.

Each of these tests thus requires a sufficiently important governmental interest and a sufficiently tight ends/means fit. Logically, there could be countless levels of scrutiny. One could, for instance, have (1) *really low scrutiny*, (2) *sort-of-low scrutiny*, (3) *lower-intermediate scrutiny*, (4) *intermediate scrutiny*, (5) *higher-intermediate scrutiny*, (6) *strict scrutiny*, and (7) *super-strict scrutiny*. Indeed, the justices themselves have indicated that there are additional gradations of scrutiny that don’t fall neatly into the three types of scrutiny mentioned above. We will encounter a couple of those later in this course. (Responding to the proliferation of different types of scrutiny, Michael Paulsen once wrote a tongue-in-cheek article titled “Medium Rare Scrutiny.”) And some justices have even advocated a *sliding scale* of scrutiny, depending on the degree of the burden and/or the importance of the individual interest. Justice Thurgood Marshall, for example, embraced this approach in cases interpreting the Equal Protection Clause. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.* (1985) (Marshall, J., concurring in part and dissenting in part).

Throughout the remainder of these materials, we will encounter cases applying strict and intermediate scrutiny. These encounters should help hone your understanding of what these tests require. At the outset, though, here is some advice: Don't try to understand the levels of scrutiny in a mathematically precise way. Assessing the degree to which an interest is compelling, or the tightness of the ends/means fit, for example, can't be reduced to entirely logical or quantifiable terms. Rather, the relevant "test" simply gives judges a basic framework for analysis, without reducing judicial decision-making to rigid, mathematical terms.

*Terminology:* As lawyers, you should develop a habit of quoting the appropriate test in your briefs and oral arguments. In trying to *understand* the tiers of scrutiny, however, don't get too focused on the precise language of these tests. For instance, sometimes the justices use the term "narrow tailoring" to describe the required ends/means fit in cases applying strict scrutiny, and then sometimes they use the same term in cases applying intermediate scrutiny. But this does not mean that these ends/means fit requirements are the same! Strict scrutiny requires a *really tight* ends/means fit, whereas intermediate scrutiny only requires a *somewhat tight* ends/means fit. As a lawyer, you might be able to find a small advantage by quoting language that seems more beneficial to your clients. For the most part, though, judges are familiar with the "tiers of scrutiny" framework and realize that the various tests are not precise.

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A year after *Loving*, the justices decided yet another case out of Virginia dealing with the requirement of racial equality in public education.

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### Green v. School Board (1968)

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

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis . . . ." *Brown v. Board of Education* (1955) (*Brown II*).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education. These provisions were held to violate the Federal Constitution in *Davis v. County School Board of Prince Edward County*, decided with *Brown v. Board of Education* (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority

of several statutes enacted by Virginia in resistance to those decisions. . . . One statute . . . automatically reassigned [students] to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

[O]n August 2, 1965, five months after the suit was brought, respondent School Board . . . adopted a “freedom-of-choice” plan for desegregating the schools. Under that plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. . . .

The pattern of separate “white” and “Negro” schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system’s schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part “white” and part “Negro.”

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* “to effectuate a transition to a racially nondiscriminatory school system.” It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the “white” schools. *See, e.g., Cooper v. Aaron* (1958). Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the “complexities arising from the transition to a system of public education freed of racial discrimination” that we provided for “all deliberate speed” in the implementation of the principles of *Brown I*. Thus we recognized the task would necessarily involve solution of “varied local school problems.” In referring to the “personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,” we also noted that “[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . . .” Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner “is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.” We charged the district courts in their review of particular situations to

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.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board’s “freedom-of-choice” plan to achieve that end.

The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may “freely” choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its “freedom-of-choice” plan may be faulted only by reading the Fourteenth Amendment as universally requiring “compulsory integration,” a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the “racially nondiscriminatory school system” *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former “white” school to Negro children and of the “Negro” school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.

In determining whether respondent School Board met that command by adopting its “freedom-of-choice” plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a “prompt and reasonable start.” This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for “the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.” *Watson v. City of Memphis* (1963). Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. “The time for mere ‘deliberate speed’ has run out.” *Griffin v. County Sch. Board* (1964). . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system “at the earliest practicable date,” then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

We do not hold that “freedom of choice” can have no place in such a plan. We do not hold that a “freedom-of-choice” plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing “freedom of choice” is not an end in itself. As Judge Sobeloff has put it,

“Freedom of choice” is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it

is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a “unitary, non-racial system.”

Although the general experience under “freedom of choice” to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, “freedom of choice” must be held unacceptable.

The New Kent School Board’s “freedom-of-choice” plan cannot be accepted as a sufficient step to “effectuate a transition” to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a “white” school and a “Negro” school, but just schools. . . .

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### Notes and Questions

1. How did the Supreme Court interpret the Equal Protection Clause in *Green*? Why, specifically, was the freedom-of-choice plan invalid?

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## 2.4. Disparate Impact

The legal and political debate over the central meaning of *Brown* crescendoed in the 1970s as federal courts orchestrated broader desegregation measures, particularly in the realm of public education. Here is an excerpt from Reva B. Siegel, *Equality Divided*, Harv. L. Rev. (2013), to help set the stage for the Court’s decision in *Washington v. Davis* (1976).

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In 1970, in a speech against busing, President Richard Nixon called upon federal courts to restrict equal protection liability to cases where there was discriminatory intent. . . . [Up to that point,] Supreme Court decisions determining when formerly segregated Southern school districts were unitary within the meaning of the Equal Protection Clause often looked to the consequences and effects of state action in determining its constitutionality. Several other prominent Supreme Court decisions of the era suggested that the racial impact of a law was crucial in determining whether the Equal Protection Clause was violated. For example, in *Hunter v. Erickson* (1969), the Court invalidated a city charter amendment that would have subjected antidiscrimination ordinances to special popular referenda. The Court observed that “although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.” . . . [And t]here

were numerous decisions of the federal courts of appeals in the early 1970s that held that the racial impact of state action would play a central role in determining its constitutionality under the Equal Protection Clause—a stream of cases making their way to the Court for review. . . .

Here judges drew on concepts of discrimination that the Burger Court set forth in its first decision interpreting Title VII, *Griggs v. Duke Power Co.* (1971), and extended the statutory concept of disparate impact to equal protection claims arising in public-sector employment relations.

*Griggs* allowed employees to challenge facially neutral business practices that had a racially exclusionary impact. The disparate impact standard required no proof of intent, though the record in the *Griggs* case suggested that the impact standard might probe for covert bad purpose and remedy structural discrimination (decisions that perpetuate the effects of an organization’s own past discrimination or discrimination by actors in related domains). The Supreme Court ruled, “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” . . .

Inquiry into the foreseeable racial effects of challenged government action was a common feature of school desegregation litigation in the mid-1970s. In *Keyes v. School District No. 1* (1973), the first school desegregation decision outside the South, the Court indicated that “segregative intent” of some kind was needed to make out an equal protection violation: “We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.” Many courts of appeals evaluating challenges to school segregation after *Keyes* inferred segregative intent from the foreseeable effects of districting policy, as judges repeated that “a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation.”

But the federal courts gradually began to shift course, as a President who appealed to voters deeply critical of the Court’s desegregation initiatives in education and housing began to appoint new judges to the federal bench, and as popular objections to the desegregation decisions of the Warren Court mounted.

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### Washington v. Davis (1976)

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

#### **I**

[T]wo 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 . . . alleg[ing] that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. [They asserted] 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. . . .

[Each] 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.” . . . 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 . . .

[On appeal, the Court of Appeals ruled] 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. . . .

## II

. . . 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* (1954). 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. . . .

The rule is the same in other contexts. . . . The school desegregation cases . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is “a current condition of segregation resulting from intentional state action.” *Keyes v. Sch. Dist. No. 1* (1973). . . .

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* (1886). 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.” *Akins v. Texas* (1945). 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, 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* (1971), the city of Jackson, Mississippi, 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 council-men were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences. . . .

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. . . .

**[The concurring opinion of Justice Stevens and the dissenting opinion of Justice Brennan (addressing Title VII) are omitted.]**

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### Notes and Questions

1. *Washington v. Davis* was a compromise opinion. On the one hand, it *expanded* the scope of equal-protection claims by holding that *intentional* discrimination on the basis of race triggers heightened scrutiny, regardless of whether the law is facially neutral, overturning cases like *Palmer v.*



*Thompson* (1971). See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, Sup. Ct. Rev. (1971) (criticizing the Supreme Court's decision not to consider intentional-discrimination claims). On the other hand, *Washington v. Davis* rejected an approach taken by numerous Courts of Appeals that would apply heightened scrutiny—or at least a presumption of heightened scrutiny—whenever laws had a sufficiently disproportionate racially disparate impact.

2. A point of terminology: The first type of claim—an *intentional discrimination* claim—is often called a “disparate treatment” claim, whereas the second type of claim—a *discriminatory effects* claim—is often called a “disparate impact” claim. The decision in *Washington v. Davis* clearly embraces the former and rejects the latter. The government must, as the Court noted in *Personnel Administrator of Massachusetts v. Feeney* (1979), undertake “a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”

3. What reasons might have led the Court to reject the viability of “disparate impact” claims under the Equal Protection Clause?

Notably, a disparate-impact theory of discrimination is viable in some areas of law. The dormant Commerce Clause, for instance, “prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. v. Limbach* (1998). But this principle applies not just to laws that *expressly* discriminate against out-of-state commerce. “A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose or discriminatory effect.” *Bacchus Imports, Ltd. v. Dias* (1984); see also *Pike v. Bruce Church, Inc.* (1970) (applying a balancing test to *nondiscriminatory* state laws that place significant burdens on interstate commerce).

4. By overturning *Palmer v. Thompson* (1971), *Washington v. Davis* raised a host of questions about what types of intentional discrimination trigger strict scrutiny. One problem was what to do with cases of “mixed motives”—that is, cases where the governmental actor had several reasons for acting. Another was precisely how to prove discriminatory treatment. The Court addressed these problems just a year later in *Arlington Heights v. Metropolitan Housing Development Corp.* (1977):

Our decision last Term in *Washington v. Davis* (1976) made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . .

*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another,” *Washington v. Davis*—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even

when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins* (1886); *Gomillion v. Lightfoot* (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

*Arlington Heights* makes clear that race need only be a *motivating* factor, not the *only* reason or *primary* reason for the governmental decision.

5. The *motivating factor* test is *not* applicable in racial-discrimination challenges to electoral district lines. In those cases, plaintiffs must “show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district.” *Miller v. Johnson* (1995) (emphasis added). Just as with other aspects of Equal Protection law, however, the touchstone of this analysis is the *intent* of the legislature, not racially disproportionate *effects*. See, e.g., *Bethune-Hill v. State Bd. of Elections* (2017). If the court concludes that race was the predominant factor, then strict scrutiny applies. See *Shaw v. Reno* (1993).

6. Although disparate impact is not *sufficient* to trigger strict scrutiny, it may still be *necessary* to show disparate effects when bringing a disparate treatment claim. In the context of partisan gerrymandering, for instance, *Davis v. Bandemer* (1986) said that plaintiffs must “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” (Note: The Court later held that partisan-gerrymandering claims are nonjusticiable.) And there are some other suggestions in the Equal Protection Clause context that there is a “discriminatory effect element” in equal-protection claims. *United States v. Armstrong* (1996). But from a practical standpoint, this usually isn't a sticking point in disparate treatment cases.

7. After *Washington v. Davis*, courts also faced the question of what to do when governmental officials—although not themselves harboring any discriminatory animus—use discriminatory criteria in their decisions. In *Palmore v. Sidoti* (1984), for example, a state judge awarded child custody to a father because the mother was in an interracial relationship that would make the child “more vulnerable to peer pressures [and] suffer from the social stigmatization that is sure to come.” In other words, the judge concluded that the best interests of the child favored the father *not* because interracial relationships are inherently wrongful but rather because *other members of society* harbor discriminatory views in ways that would harm the child.

The Supreme Court overturned the state court's ruling under the Equal Protection Clause. "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns," the Court explained. And the state judge's incorporation of discriminatory attitudes sufficed to make his ruling a form of racial classification:

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

What does this ruling tell us about how constitutional law now mediates the relationship between "the law" and "society"?

Is the Court's approach in *Palmore* sustainable? Suppose, for instance, that racial disparities exist in the educational system and that those disparities are traceable to countless acts of private discrimination. Would that make it unconstitutional for the government to use academic achievement as a criterion for governmental hiring decisions? If not, what distinguishes this hypothetical from *Palmore*? For further discussion of this tricky problem, see Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, Mich. L. Rev. (2006).

8. *Washington v. Davis, Arlington Heights*, and *Palmore* all involved *facially neutral* decisions—that is, decisions that did not *expressly* classify based on race (even if the decisionmaker expressed a race-based rationale prior to making the decision). What should happen, though, if the government *does* facially discriminate based on race but nonetheless seeks to prove that the *true motive* behind the decision was not racial discrimination. That issue arose in *Johnson v. California* (2005):

The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy. . . .

We have held that "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña* (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Id.*

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J. A. Croson Co.* (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* . . .

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to

*incite racial hostility.*” *Shaw v. Reno* (1993) (emphasis added). Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. . . .

Justice Thomas dissented, joined by Justice Scalia, arguing that strict scrutiny was inappropriate because of a separate line of decisions recognizing that courts should defer to prison officials in “all circumstances in which the needs of prison administration implicate constitutional rights.” What do you think of that argument? Based on the principles that we have learned so far, how would you best *defend* it? How would you best *attack* it?

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### Practice Question

A municipality creates a recreation center that is only accessible to residents of a neighborhood. Compelling evidence shows that the membership policy will effectively exclude nearly all Black people and that the municipality’s leaders knew that when they decided on the location and created the access policy. Based on these facts, what level of scrutiny would apply to an equal-protection claim?

- A. No scrutiny
- B. Rational-basis scrutiny
- C. Intermediate scrutiny
- D. Strict scrutiny

*Follow-up question:* What alterations in the fact pattern would cause your answer to change? Why?

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## 2.5. Affirmative Action

In the following case, the Supreme Court confronted how to evaluate Equal Protection challenges to “affirmative action” admissions policies that employed race-based criteria in ways that benefited minority applicants. Justice Powell’s opinion remains deeply controversial—both in construing the Equal Protection Clause to *permit* affirmative action and in invoking that Clause to *limit* it. Nonetheless, for nearly half a century—up until the Court’s recent decision in *Students for Fair Admission v. Harvard* (2023)—Powell’s opinion supplied the governing principles for affirmative-action cases.

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### University of California Regents v. Bakke (1978)

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#### **Justice Powell announced the judgment of the Court.**

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. . . .

I believe that so much of the judgment of the California court as holds petitioner’s special admissions program unlawful and directs that respondent be admitted to the Medical School must be

affirmed. For the reasons expressed in a separate opinion, my Brothers The Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist, and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.

### I<sup>†</sup>

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

[T]he regular admissions process used a variety of factors—including test scores, grades, and interview scores—to arrive at each candidate's "benchmark" score. . . . The full committee then reviewed . . . each applica[ti]on and made offers of admission on a "rolling" basis. . . .

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." . . . [These] applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. . . . [S]pecial applicants [were eligible for] a number [of slots] prescribed by faculty vote . . . . [In 1973 and 1974, the faculty created 16 of these lots.]

[Between 1971 and 1974,] the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students. Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process. . . .

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the general admissions program, and . . . [d]espite a strong benchmark score . . . was rejected. . . . In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's. . . . [*He then sued.*]

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<sup>†</sup> Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun join Parts I and V-C of this opinion. Mr. Justice White also joins Part III-A of this opinion. [*The other four justices did not join any part of Justice Powell's opinion because they ruled for Bakke entirely on statutory grounds.*]

## II

[Justice Powell began by addressing *Bakke's* claim under § 601 of Title IV of the Civil Rights Act of 1964.] The language of § 601, like that of the Equal Protection Clause, is majestic in its sweep:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The concept of “discrimination,” like the phrase “equal protection of the laws,” is susceptible of varying interpretations, for as Mr. Justice Holmes declared, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner* (1918). . . . Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

[After reviewing legislative history, Justice Powell concluded:] Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

## III

## A

. . . Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage “discrete and insular minorities.” See *United States v. Carolene Products Co.* n.4 (1938). . . .

The special admissions program is undeniably a classification based on race and ethnic background. . . . [The scheme uses] a line drawn on the basis of race and ethnic status.<sup>27</sup>

The guarantees of the Fourteenth Amendment extend to all persons. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a “discrete and insular minority” requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.* n.4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination. See, e.g., *Mass. Bd. of Retirement v. Murgia* (1976) (age); *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) (wealth); *Graham v. Richardson* (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

<sup>27</sup> . . . This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977); *Washington v. Davis* (1976); see *Yick Wo v. Hopkins* (1886).

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. *Hirabayashi*.

[A]ll 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. *Korematsu*.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

## B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases* (1873). The Equal Protection Clause, however, . . . was relegated to decades of relative desuetude . . . . [T]he Fourteenth Amendment's "one pervading purpose" was displaced. *See, e.g., Plessy v. Ferguson* (1896). It was only as the era of substantive due process came to a close, that the Equal Protection Clause began to attain a genuine measure of vitality. *See, e.g., United States v. Carolene Products* (1938); *Skinner v. Oklahoma* (1942).

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. *See Strauder v. West Virginia* (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins* (1886) (Chinese); *Truax v. Raich* (1915) (Austrian resident aliens); *Korematsu* (Japanese); *Hernandez v. Texas* (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases*, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. . . . Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation.

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws," *Yick Wo*, in a Nation confronting a legacy of slavery and racial discrimination. *See, e.g., Shelley v. Kraemer* (1948); *Brown v. Board of Education* (1954); *Hills v. Gautreaux* (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between

citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’” *Loving v. Virginia* (1967), quoting *Hirabayashi*.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white “majority” cannot be suspect if its purpose can be characterized as “benign.”<sup>34</sup> The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education* (1954); accord *Loving v. Virginia* (1967). It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. “The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.” *Hernandez v. Texas* (1954).

Once the artificial line of a “two-class theory” of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived “preferred” status of a particular racial or ethnic minority are intractable. The concepts of “majority” and “minority” necessarily reflect temporary arrangements and political judgments. As observed above, the white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only “majority” left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. . . . Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on

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<sup>34</sup> In the view of Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun, the pliable notion of “stigma” is the crucial element in analyzing racial classifications. The Equal Protection Clause is not framed in terms of “stigma.” Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.



racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. . . .

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States* (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. . . .

### C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. . . . Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.* (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary “to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.” The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. But we have never approved preferential classifications in the absence of proved constitutional or statutory violations. . . .

### IV

We have held that in “order to justify the use of a suspect classification, a State must show 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 or the safeguarding of its interest.” *In re Griffiths* (1973); *Loving v. Virginia* (1967); *McLaughlin v. Florida* (1964). The special admissions program purports to serve the purposes of: (i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse

student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

### A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E.g.*, *Loving v. Virginia* (1967); *McLaughlin v. Florida* (1964); *Brown v. Board of Education* (1954).

### B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. . . . Without such findings of constitutional or statutory violations,<sup>44</sup> it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. . . .

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

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<sup>44</sup> Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. . . . [D]isparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity" or "lacks "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.* (1971). Nothing in this record . . . even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from . . . disparate test scores and grades . . . is without educational justification.

## C

Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. The court below addressed this failure of proof:

The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. . . .

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.

## D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. . . . Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. . . . As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.

## V

[P]etitioner's argument that [reserved slots for minority applicants are] the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument

misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity . . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity. . . .

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . .

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . [T]he Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

In such an admissions program, race or ethnic background may be deemed a “plus” in a particular applicant’s file . . . . The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive . . . .

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. . . . And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. *See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp.* (1977); *Washington v. Davis* (1976).

**Opinion of Justices Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part.**

... [W]e conclude that the affirmative admissions program at the Davis Medical School is constitutional ... in all respects. ...

**I**

Our Nation was founded on the principle that “all Men are created equal.” Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our promise are well known and have aptly been called our “American Dilemma.” Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the “last resort of constitutional arguments.” *Buck v. Bell* (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a “separate but equal” status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown v. Board of Education* (1954) (*Brown I*), and its progeny . . . . And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be “color-blind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many “created equal” have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

**II**

*[The joint dissent agreed with Justice Powell’s conclusion that Title VI bans “only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.”]*

**III**

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be “constitutionally an irrelevance,” *Edwards v. California* (1941) (Jackson, J., concurring), summed up by the shorthand phrase “[o]ur Constitution is color-blind,” *Plessy v. Ferguson* (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an “overriding statutory purpose,” *McLaughlin v. Florida* (1964), could be found that would justify racial classifications. *See, e.g., Loving v. Virginia* (1967); *Korematsu v. United States* (1944); *Hirabayashi v. United States* (1943). . . . [R]acial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race. . . .

[W]e have held that a government practice or statute which restricts “fundamental rights” or which contains “suspect classifications” is to be subjected to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. But no fundamental right is involved here. Nor do whites as a class have any 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.” *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973); *see United States v. Carolene Products Co.* n.4 (1938).

Moreover, if the University’s representations are credited, this is not a case where racial classifications are “irrelevant and therefore prohibited.” *Hirabayashi*. Nor has anyone suggested that the University’s purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. *See Yick Wo v. Hopkins* (1886).

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases. . . . Instead, a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig v. Boren* (1976).

First, race, like, “gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.” *Kahn v. Shevin* (1974) (Brennan, J., dissenting). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. . . .

Second, race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, . . . such divisions are contrary to our deep belief [in individual treatment and individual responsibility]. . . .

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be strict—not “strict in theory and fatal in fact,” because it is stigma that causes fatality—but strict and searching nonetheless.

## IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

## A

At least since *Green v. County School Board* (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. . . . [R]acially neutral remedies for past discrimination [are] inadequate where consequences of past discriminatory acts influence or control present decisions. . . .

[T]he conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. . . .

These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would . . . severely undermine efforts to achieve voluntary compliance with the requirements of law. . . .

Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. . . . [O]ur cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. . . .

Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment.<sup>43</sup> Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions . . . implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to

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<sup>43</sup> "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo* (1976) (per curiam).

victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. . . .

### B

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test. . . .

*[The opinion then discusses underrepresentation of minority groups in medicine and argued that the university "could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally, as well as in the medical profession."]*

### C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. . . . True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—less than their proportion of the California population—of otherwise underrepresented qualified minority applicants.

Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro school children in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. . . .

### D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socio-economic level. . . .



Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. . . . [O]nly minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; . . . [but] [w]hen individual measurement is impossible or extremely impractical, there is nothing to prevent a State from using categorical means to achieve its ends, at least where the category is closely related to the goal. . . .

## E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. . . . There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

The "Harvard" program, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." . . . [T]here is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public. . . .

### **Justice Marshall.**

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

## I

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave. . . .

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit

of life, liberty, and property to such an extent that their freedom was of little value.” *Slaughter-House Cases* (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen’s Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. . . . [*Justice Marshall then summarized subsequent developments, including Plessy v. Ferguson (1896) and the spread of systematic discrimination at the federal and state levels.*]

## II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. . . . At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

## III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society’s discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

This Court long ago remarked that “in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . .” *Slaughter-House Cases* (1873). It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation’s past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen’s Bureau Act, an Act that provided many of its benefits only to Negroes. . . . The bill’s supporters defended it—not by rebutting the claim of special treatment—but by pointing to the need for such treatment. . . .

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. . . .

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. . . . As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi* (1971). . . . Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination. . . . There is . . . ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

#### IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. . . .

#### **Justice Blackmun.**

. . . It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind. I add these only as additional components on the edges of the central question . . . .

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said: “In considering this question, then, we must never forget, that it is a *constitution* we are expounding.” *McCulloch v. Maryland* (1819) . . . [P]ercepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a Constitution. The same principles that governed *McCulloch*’s case in 1819 govern *Bakke*’s case in 1978. There can be no other answer.

**[The opinions of Justice White and Justice Stevens are omitted.]**

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### Notes and Questions

1. Only five justices—the ones whose opinions are excerpted above—addressed the constitutional issues. The other four ruled on statutory grounds. Consequently, the level of scrutiny in equal-protection cases remained in flux for over a decade. In *Richmond v. J. A. Croson Co.* (1989), five justices settled on strict scrutiny as the proper standard. For a brief time, the Court gave broader latitude to *federal* affirmative-action programs. See *Metro Broad., Inc. v. FCC* (1990). But that ended with the decision in *Adarand Constructors, Inc. v. Peña* (1995). Subsequent cases have focused on assessing whether specific policies can be sustained under that level of scrutiny—not what level of scrutiny should apply in the first place.

2. In a passage on page 116, Justice Powell states: “It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference.” Is his response to this critique persuasive?

In her dissenting opinion in *Gratz v. Bollinger* (2003), Justice Ginsburg restated this critique. The majority in *Gratz* held that the University of Michigan had violated the Equal Protection Clause by—as part of a point-based admissions scheme—allocating a specific number of points for underrepresented minorities, rather than considering race as a “plus” factor in a more individualized assessment. Justice Ginsburg responded:

One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished. If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.

Is there any merit to Justice Powell’s contrary view that less overt or heavy-handed uses of race are preferable? What if a university adopted an admissions scheme that did not consider race at all but the underlying *motivation* for adopting such a policy was to increase racial diversity?

3. You may have noticed that the dissent was *co-authored* by all four dissenting justices, rather than the much more common practice of having an opinion written by a single justice with the other justices “joining” that opinion. A co-authored opinion of this sort is often called a “joint opinion,” and it typically happens only in very important and controversial cases where the justices are trying to

signal the strength of their views. *See, e.g., N.F.I.B. v. Sebelius* (2012) (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

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Justice Powell’s opinion in *Bakke* continued to guide the Court’s approach to affirmative-action cases until the following decision.

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## Students for Fair Admission v. Harvard (2023)

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

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

#### I

*[The Court began by summarizing Harvard’s and UNC’s admissions criteria, both of which included consideration of race as one of many factors.]*

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization . . . . In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.<sup>2</sup> The District Courts in both cases held bench trials to evaluate SFFA’s claims. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard’s admissions program comported with our precedents on the use of race in college admissions. The First Circuit affirmed that determination. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC’s admissions program was permissible under the Equal Protection Clause.

We granted certiorari . . . .

#### III

#### A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall “deny to any person . . . the equal protection of the laws.” Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a “foundation[al] principle”—“the absolute equality of all citizens of the United States politically and civilly before their own laws.” Cong. Globe (1866) (statement of Rep. Bingham). The Constitution, they were determined, “should not permit any distinctions of law based on race or color,” Supp. Brief for United States on

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<sup>2</sup> Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. “We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” *Gratz v. Bollinger* (2003). Although Justice Gorsuch questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard’s admissions program under the standards of the Equal Protection Clause itself.

Reargument in *Brown v. Board of Education*, because any “law which operates upon one man [should] operate *equally* upon all,” Cong. Globe (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold “over every American citizen, without regard to color, the protecting shield of law.” . . .

At first, this Court embraced the transcendent aims of the Equal Protection Clause. “What is this,” we said of the Clause in 1880, “but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?” *Strauder v. West Virginia* (1880). “[T]he broad and benign provisions of the Fourteenth Amendment” apply “to all persons,” we unanimously declared six years later; it is “hostility to . . . race and nationality” “which in the eye of the law is not justified.” *Yick Wo v. Hopkins* (1886).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause’s core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* (1896) the separate but equal regime that would come to deface much of America. . . .

[I]n *Brown v. Board of Education* (1954) . . . we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. . . .

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education “must be made available to all on equal terms.” As the plaintiffs had argued, “no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” Tr. of Oral Arg. in *Brown*; see also Supp. Brief for Appellants on Reargument in *Brown* (“That the Constitution is color blind is our dedicated belief.”). The Court reiterated that rule just one year later, holding that “full compliance” with *Brown* required schools to admit students “on a racially nondiscriminatory basis.” *Brown v. Board of Education* (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, “declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional.” *Id.* . . .

In the decades that followed, this Court continued to vindicate the Constitution’s pledge of racial equality. . . . As we recounted in striking down the State of Virginia’s ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment “proscri[bes] . . . all invidious racial discriminations.” *Loving v. Virginia* (1967). Our cases had thus “consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.” *Id.* . . .

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies “without regard to any differences of race, of color, or of nationality”—it is “universal in [its] application.” *Yick Wo*. For “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” *Regents of Univ. of Cal. v. Bakke* (1978) (opinion of Powell, J.). “If both are not accorded the same protection, then it is not equal.” *Id.*

Any exception to the Constitution’s demand for equal protection must survive a daunting two-step examination known in our cases as “strict scrutiny.” *Adarand Constructors, Inc. v. Peña* (1995). Under that standard we ask, first, whether the racial classification is used to “further compelling governmental interests.” *Grutter v. Bollinger* (2003). Second, if so, we ask whether the government’s use of race is “narrowly tailored”—meaning “necessary”—to achieve that interest. *Fisher v. University of Texas* (2013) (*Fisher I*).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified

instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California* (2005). . . .

## B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California v. Bakke* (1978), which involved a set-aside admissions program used by the University of California, Davis, medical school. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause. . . .

Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to “serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies.” *Grutter*.

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of “reducing the historic deficit of traditionally disfavored minorities in medical schools,” he wrote, was akin to “[p]referring members of any one group for no reason other than race or ethnic origin.” Yet that was “discrimination for its own sake,” which “the Constitution forbids.” Justice Powell next observed that the goal of “remedying . . . the effects of ‘societal discrimination’” was also insufficient because it was “an amorphous concept of injury that may be ageless in its reach into the past.” Finally, Justice Powell found there was “virtually no evidence in the record indicating that [the school's] special admissions program” would, as the school had argued, increase the number of doctors working in underserved areas.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was “a constitutionally permissible goal for an institution of higher education.” And that was so, he opined, because a university was entitled as a matter of academic freedom “to make its own judgments as to . . . the selection of its student body.”

But a university's freedom was not unlimited. “Racial and ethnic distinctions of any sort are inherently suspect,” Justice Powell explained, and antipathy toward them was deeply “rooted in our Nation's constitutional and demographic history.” A university could not employ a quota system, for example, reserving “a specified number of seats in each class for individuals from the preferred ethnic groups.” Nor could it impose a “multitrack program with a prescribed number of seats set aside for each identifiable category of applicants.” And neither still could it use race to foreclose an individual “from all consideration . . . simply because he was not the right color.”

The role of race had to be cabined. It could operate only as “a ‘plus’ in a particular applicant's file.” And even then, race was to be weighed in a manner “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” Justice Powell derived this approach from what he called the “illuminating example” of the admissions system then used by Harvard College. . . .

## C

... [In] *Grutter v. Bollinger* (2003), which concerned the admissions system used by the University of Michigan law school . . . , the Court for the first time “endorse[d] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”

The Court’s analysis tracked Justice Powell’s in many respects. As for compelling interest, the Court held that “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.” In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not “establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.” Neither could it “insulate applicants who belong to certain racial or ethnic groups from the competition for admission.” Nor still could it desire “some specified percentage of a particular group merely because of its race or ethnic origin.”

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into “illegitimate . . . stereotyp[ing].” *Richmond v. J. A. Croson Co.* (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” *Grutter*. The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university’s use of race, accordingly, could not occur in a manner that “unduly harm[ed] nonminority applicants.”

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. . . . It observed that all “racial classifications, however compelling their goals,” were “dangerous.” And it cautioned that all “race-based governmental action” should “remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.”

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. . . .

*Grutter* thus concluded with the following caution: “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

## IV

Twenty years later, no end is in sight. . . . [B]oth [Harvard and UNC] insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents’ admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup>

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<sup>4</sup> The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation’s military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.



## A

Because “[r]acial discrimination [is] invidious in all contexts,” *Edmonson v. Leesville Concrete Co.* (1991), we have required that universities operate their race-based admissions programs in a manner that is “sufficiently measurable to permit judicial [review]” under the rubric of strict scrutiny, *Fisher v. Univ. of Tex. at Austin* (2016) (*Fisher II*). “Classifying and assigning” students based on their race “requires more than . . . an amorphous end to justify it.” *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1* (2007).

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) “training future leaders in the public and private sectors”; (2) preparing graduates to “adapt to an increasingly pluralistic society”; (3) “better educating its students through diversity”; and (4) “producing new knowledge stemming from diverse outlooks.” UNC points to similar benefits . . . .

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately “train[ed]” . . . or whether “new knowledge” is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? . . .

Comparing respondents’ asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. *See Johnson*. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class “whole for [the] injuries [they] suffered.” *Franks v. Bowman Transp. Co.* (1976). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students “compar[able] to what it would have been in the absence of such constitutional violations.” *Dayton Bd. of Educ. v. Brinkman* (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces “engaged and productive citizens,” sufficiently “enhance[s] appreciation, respect, and empathy,” or effectively “train[s] future leaders” is standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents’ admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. . . . [T]he universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. . . .

[These] categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as “Hispanic,” are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument “how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt,” UNC’s counsel responded, “[I] do not know the answer to that question.”

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents’ goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply

because the former contains more Hispanic students than the latter. Yet “[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is broadly diverse.” . . .

The universities’ main response to these criticisms is, essentially, “trust us.” None of the questions recited above need answering, they say, because universities are “owed deference” when using race to benefit some applicants but not others. It is true that our cases have recognized a “tradition of giving a degree of deference to a university’s academic decisions.” *Grutter*. But we have been unmistakably clear that any deference must exist “within constitutionally prescribed limits,” *id.*, and that “deference does not imply abandonment or abdication of judicial review,” *Miller–El v. Cockrell* (2003). . . . Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. . . .

## B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a “negative” and that it may not operate as a stereotype.

First, our cases have stressed that an individual’s race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard’s consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard’s “policy of considering applicants’ race . . . overall results in fewer Asian American and white students being admitted.”

Respondents nonetheless contend that an individual’s race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. . . . College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter. . . .

Respondents’ admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” *Grutter*. . . .

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents’ programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents’ admissions programs is that there is an inherent benefit in race *qua* race—in race for race’s sake. Respondents admit as much. Harvard’s admissions process rests on the pernicious stereotype that “a black student can usually bring something that a white person cannot offer.” *Bakke* (opinion of Powell, J.). . . .

## C

If all this were not enough, respondents’ admissions programs also lack a “logical end point.” *Grutter*.

Respondents and the Government first suggest that respondents’ race-based admissions programs will end when, in their absence, there is “meaningful representation and meaningful diversity” on college campuses. The metric of meaningful representation, respondents assert, does not involve any “strict numerical benchmark” or “precise number or percentage” or “specified percentage.” So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of “how the breakdown of the class compares to the prior year in terms of racial identities.” . . .

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

**Share of Students Admitted to Harvard by Race**

<u>Class</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Asian-American</u>
2009	11%	8%	18%
2010	10%	10%	18%
2011	10%	10%	19%
2012	10%	9%	19%
2013	10%	11%	17%
2014	11%	9%	20%
2015	12%	11%	19%
2016	10%	9%	20%
2017	11%	10%	20%
2018	12%	12%	19%

Harvard’s focus on numbers is obvious.

UNC’s admissions program operates similarly. . . .

The problem with these approaches is well established. “[O]utright racial balancing” is “patently unconstitutional.” *Fisher I*. . . .

Respondents’ second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or “productive citizens and leaders” have been created. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. . . .

V

The dissenting opinions resist these conclusions. They would instead uphold respondents’ admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents’ interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. *Bakke* (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. . . .

In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. “[A]n effort to alleviate the effects of societal discrimination is not a compelling interest,” we said plainly in *Shaw v. Hunt* (1996) . . . . Permitting “past societal discrimination” to “serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.” *Crosby*. Opening that door would shutter another—“[t]he dream of a Nation of equal citizens . . . would be lost,” we observed, “in a mosaic of shifting preferences based on inherently unmeasurable claims of

past wrongs.” “[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.” *Id.* . . .

## VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent’s assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race. . . .

### Justice Thomas, concurring.

. . . I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution . . . and to emphasize the pernicious effects of all [racial] discrimination.

## I

. . . As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. . . .

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment’s overall goal. “The available materials . . . show,” however, “that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color.” U.S. *Brown* Reargument Brief. For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law “what justice is represented to be, blind” to the “color of [one’s] skin.” Pa. Leg. Record (1867) (Rep. Mann). . . .

In the period closely following the Fourteenth Amendment’s ratification, Congress passed several statutes designed to enforce its terms . . . .

For example, [Congressional proponents of the Civil Rights Act of 1875] asserted that “free government demands the abolition of all distinctions founded on color and race.” Cong. Rec. (1874). . . . Leading Republican Senator Charles Sumner compellingly argued that “any rule excluding a man on account of his color is an indignity, an insult, and a wrong.” . . .

Others echoed this view. Representative John Lynch declared that “[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned.” Senator John Sherman believed that the route to peace was to

“[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white.” And, Senator Henry Wilson sought to “make illegal all distinctions on account of color” because “there should be no distinction recognized by the laws of the land.” . . .

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an “antisubordination” view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice Sotomayor’s dissent argues that several of these statutes evidence the ratifiers’ understanding that the Equal Protection Clause “permits consideration of race to achieve its goal.” Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen’s Bureau Act. That Act . . . applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. . . .

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of “colored” servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. At the time, however, Congress believed that many “black servicemen were significantly overpaying for these agents’ services in part because [the servicemen] did not understand how the payment system operated.” Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute’s racial classifications may well have survived strict scrutiny. . . .

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action “undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race,” even though they had “a racially disproportionate impact.” *Richmond v. J. A. Croson Co.* (1989) (Scalia, J., concurring in judgment). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. . . .

### III

. . . Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. “Affirmative action” policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. *See* Thomas Sowell, *Affirmative Action Around the World* (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. . . .<sup>8</sup>

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<sup>8</sup> Justice Sotomayor rejects this mismatch theory as “debunked long ago,” citing an *amicus* brief. But, in 2016, the *Journal of Economic Literature* published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was “fairly convincing.” Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, *J. Econ. Lit.* (2016). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. *See* Brief for Richard Sander as *Amicus Curiae* (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes).

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions “stamp [blacks and Hispanics] with a badge of inferiority.” *Adarand* (opinion of Thomas, J.). They thus “tain[t] the accomplishments of all those who are admitted as a result of racial discrimination” as well as “all those who are the same race as those admitted as a result of racial discrimination” because “no one can distinguish those students from the ones whose race played a role in their admission.” *Fisher I* (opinion of Thomas, J.). . . .

[U]niversities’ affirmative action programs . . . are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. . . .

#### IV

. . . Justice Jackson has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. . . . I strongly disagree. . . .

Justice Jackson’s statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups [do not] prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice Jackson supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. What it cannot do is use the applicant’s skin color as a heuristic, assuming that because the applicant checks the box for “black” he therefore conforms to the university’s monolithic and reductionist view of an abstract, average black person.

Accordingly, Justice Jackson’s race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals’ skin color to the total exclusion of their personal choices is nothing short of racial determinism. . . .

In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal. . . .

\* \* \*

. . . The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. . . .

#### **Justice Sotomayor, with whom Justices Kagan and Jackson join, dissenting.**

. . . Today, this Court . . . cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The

Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

## I

### A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. . . . Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

[After the Civil War, the United States ratified] the Fourteenth Amendment. . . .

Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." Andrew Kull, *The Color-Blind Constitution* (1992); see also, e.g., Cong. Globe (1866) (rejecting proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. . . .

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, Va. L. Rev. (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities. . . .

[C]ontemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, e.g., Cong. Globe (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. See, e.g., Cong. Globe (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"); *id.* (statement of Rep. Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," but Congress overrode his veto. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education. . . .

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for "the relief of destitute colored women and children," without regard to prior enslavement. Several times during and after the passage of the Fourteenth

Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to “colored soldiers and sailors” of the Union Army. In doing so, it rebuffed objections to these measures as “class legislation” “applicable to colored people and not . . . to the white people.” Cong. Globe (1867) (statement of Sen. Grimes). This history makes it “inconceivable” that race-conscious college admissions are unconstitutional. *Bakke* (opinion of Marshall, J.).

## B

. . . [*Brown v. Board of Education* (1954)] was a race-conscious decision that emphasized the importance of education in our society. Central to the Court’s holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities “solely because of their race,” denoting “inferiority as to their status in the community.” Moreover, because education is “the very foundation of good citizenship,” segregation in public education harms “our democratic society” more broadly as well. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is “available to all on equal terms.”

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green v. Sch. Board of New Kent County* (1968), for example, the Court held that the New Kent County School Board’s “freedom of choice” plan . . . was insufficient to effectuate “the command of [*Brown*].” That command, the Court explained, was that schools dismantle “well-entrenched dual systems” and transition “to a unitary, nonracial system of public education.” . . .

In so holding, this Court’s post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that “restor[ing] race as a criterion in the operation of the public schools” was at odds with “the *Brown* decisions.” Brief for Respondents in *Green*. . . This Court rejected that characterization of “the thrust of *Brown*.” *Green*. It made clear that indifference to race “is not an end in itself” under that watershed decision. The ultimate goal is racial equality of opportunity. . . .

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who . . . “rejected the hollow, race-ignorant conception of equal protection” endorsed by the Court’s ruling today. . . . The Court’s recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

## C

. . . Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. . . .

Those decisions recognize that “experience lend[s] support to the view that the contribution of diversity is substantial.” *Grutter* (quoting *Bakke*). Racially integrated schools improve cross-racial understanding, “break down racial stereotypes,” and ensure that students obtain “the skills needed in today’s increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* More broadly, inclusive institutions that are “visibly open to talented and qualified individuals of every race and ethnicity” instill public confidence in the “legitimacy” and “integrity” of those institutions and the diverse set of graduates that they cultivate. . . . It is thus an objective of the highest order, a “compelling interest” indeed, that universities pursue the benefits of racial diversity and ensure that “the diffusion of knowledge and opportunity” is available to students of all races. *Id.*



This compelling interest in student body diversity is grounded not only in the Court’s equal protection jurisprudence but also in principles of “academic freedom,” which “long [have] been viewed as a special concern of the First Amendment.” *Id.* (quoting *Bakke*). . . .

In short, for more than four decades, it has been this Court’s settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court’s cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment’s vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

[Justice Sotomayor then discussed systemic inequality, which is addressed below in Justice Jackson’s dissenting opinion.] . . .

## II

. . . It is a disturbing feature of today’s decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. [Justice Sotomayor then explained why Harvard’s and UNC’s programs comported with earlier precedents. That discussion is mostly omitted.] . . .

[T]he majority is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA’s brief . . . .

[T]he chart is misleading and ignores “the broader context” of the underlying data that it purports to summarize. . . . [T]he racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is “the opposite of what one would expect if Harvard imposed a quota.” . . .<sup>29</sup>

## III

### . . . A

. . . The majority does not dispute that some uses of race are constitutionally permissible. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the Court exempts military academies from its ruling in light of “the potentially distinct interests” they may present. To the extent the Court suggests national security interests are “distinct,” those interests cannot explain the Court’s narrow exemption, as national security interests are also implicated at civilian universities. . . .

[W]hat the Court actually lands on is an understanding of the Constitution that is “colorblind” *sometimes*, when the Court so chooses. Behind those choices lie the Court’s own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures. . . .

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<sup>29</sup> . . . The Court’s conclusion that such racial preferences must be responsible for an “unyielding demographic composition of [the] class” misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same “unyielding demographic composition of [the] class.” That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court’s inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court’s precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the “intangible” interest in preserving “public confidence in judicial integrity,” an interest that “does not easily reduce to precise definition.” *Williams-Yulee v. Florida Bar* (2015) (Roberts, C.J., for the Court). . . . Thus, although the Members of this majority pay lip service to respondents’ “commendable” and “worthy” racial diversity goals, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. “Today, the proclivities of individuals rule.” *Dobbs v. Jackson Women’s Health Org.* (2022) (dissenting opinion). . . .

## B

. . . In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society. The Court’s course reflects its inability to recognize that racial identity informs some students’ viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*’s recognition that Black Americans can offer different perspectives than white people amounts to a “stereotype.”

It is not a stereotype to acknowledge the basic truth that young people’s experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. “For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” *Utah v. Strieff* (2016) (Sotomayor, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student’s self-identification. . . .

The absence of racial diversity, by contrast, actually contributes to stereotyping. . . . When there is an increase in underrepresented minority students on campus, “racial stereotypes lose their force” because diversity allows students to “learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” *Grutter*. . . .

To be clear, today’s decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court’s opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not “interchangeable” with race. At SFFA’s own urging, those efforts remain constitutionally permissible. *See* Brief for Petitioner (emphasizing “race-neutral” alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools). . . .

## 2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents’ objectives are not sufficiently “measurable,” “focused,” “concrete,” and “coherent.” How much more precision is required or how universities are supposed to meet the Court’s measurability requirement, the Court’s opinion does not say. That is exactly the point. The Court is not

interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious plans fail. . . .

### 3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." . . .

Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. To the extent students need to convey additional information, students can select subcategories or provide more detail in their personal statements or essays. . . .

### 4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. . . .

By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. . . .

### 5

Justice Thomas, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities . . . . The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice Thomas relies have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae*. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch." *Id.* This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. . . .

Citing nothing but his own long-held belief, Justice Thomas also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.'" Studies disprove this sentiment . . . . Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. . . .

## IV

... Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. . . .

At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

\* \* \*

... Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King, "Our God is Marching On!" (1965).

**Justice Jackson, with whom Justices Sotomayor and Kagan join, dissenting.**

*[Note: Justice Jackson was recused from Harvard case, so this opinion only refers to UNC.]*

... Our country has never been colorblind. . . .

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

## I

## A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner* (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

*[Justice Jackson began by discussing slavery, the Civil War, and the Reconstruction Amendments. She then turned to historical examples of racial inequality.]*

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the progress and prosperity of Black people. Vagrancy laws criminalized free Black

men who failed to work for White landlords. Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers. A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere. And when statutes did not ensure compliance, state-sanctioned (and private) violence did.

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery’s form of comprehensive economic exploitation. . . .

Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War. Like clockwork, American cities responded with racially exclusionary zoning (and similar policies). As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing. . . .

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets. . . .

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. . . .

## B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families’ median wealth was approximately \$24,000. For White families, that number was approximately eight times as much (about \$188,000). . . .

These financial gaps are unsurprising in light of the link between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points. Moreover, Black Americans’ homes (relative to White Americans’) constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State. Black Americans in their late twenties are about half as likely as their White counterparts to have college degrees. And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about \$50,000 in student debt—nearly twice as much as their White compatriots.

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers. Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of 2022, only six are Black). . . .

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—“irreversible” contamination working irremediable harm on developing

brains. Black (and Latino) children with heart conditions are more likely to die than their White counterparts. Race-linked mortality-rate disparity has also persisted, and is highest among infants. . . .

## C

We return to John and James now, with history in hand. It is hardly John’s fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James’s (or his family’s) fault that he would be the first. And UNC ought to be able to consider why. . . .

These stories are not every student’s story. But they are many students’ stories. To demand that colleges ignore race in today’s admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who “merits” admission. . . .

## II

. . . Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual’s resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race). . . .

## III

### A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race. . . .

To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better. But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA’s complaint about the “indefinite” use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems. . . .

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients’ pain tolerance and treat them accordingly (including, for example, prescribing them appropriate amounts of pain medication). For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die. Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC’s—which, beyond diversifying the medical

profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well. . . .

## B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment’s Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court’s idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter. . . .

The best that can be said of the majority’s perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.<sup>103</sup>

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish. . . .

**[The concurring opinions of Justices Gorsuch and Kavanaugh are omitted.]**

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## Notes and Questions

1. What exactly did the majority in *SSFA* hold? Did it overturn earlier decisions? Did it recognize the invalidity of all forms of affirmative action in collegiate admissions (at least outside of the context of military academies)? Why or why not?
2. What do you think of the historical fight between Justice Thomas and Justice Sotomayor over the consistency of race-based policies with the original meaning of the Fourteenth Amendment? What

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<sup>103</sup> Justice Thomas’s prolonged attack responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of “individual achievement.” Justice Thomas’s opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC’s holistic understanding that race can be a factor that affects applicants’ unique life experiences. How else can one explain his detection of “an organizing principle based on race,” a claim that our society is “fundamentally racist,” and a desire for Black “victimhood” or racial “silo[s],” in this dissent’s approval of an admissions program that advances all Americans’ shared pursuit of true equality by treating race “on par with” other aspects of identity? Justice Thomas ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation’s full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of “social racism” and “government-imposed racism,” thereby deterring our collective progression toward becoming a society where race no longer matters.

are their strongest and weakest arguments? Based on what you learned earlier in the course, were there any points that the Justices missed?

3. One of the notable features of *SFFA*—reflective of affirmative-action debates over the past half century—is how much the dispute often turns on the legacy of *Brown* as much as (if not more than) the Fourteenth Amendment’s original meaning. *Brown* is the quintessential example of a “canonical case”—a decision whose correctness is broadly accepted and which has a preeminent position in our constitutional consciousness. In fighting over the legacy of *Brown*, which side has the better argument? What are the strongest and weakest arguments on each side?

4. The majority and dissenting justices have very different views on the level of generality at which the government may consider race in college admissions. According to the majority, race can be considered insofar as it particularly bears on the experiences and qualifications of *particular applicants*. The dissenting justices, by contrast, are more willing to consider *systemic* racial dynamics, including the ways that governmental and nongovernmental discrimination across centuries has shaped, and continues to shape, social conditions. Although the dissenters do not abandon “diversity” as a compelling interest, they put far more emphasis on broader systemic inequality than did Justice Powell’s controlling opinion in *Bakke*. What do you think about this development? What are the benefits and drawbacks of focusing on diversity rather than on the historical and contemporary forms of inequality that permeate society? If the dissenters are right to focus on systemic inequality, are there any limits on universities’ ability to consider race in admissions decisions? Should there be?

5. “*Race-Neutral*” *Affirmative Action*. When Justice Kennedy’s vote determined the outcome of affirmative-action cases, the Court generally distinguished between affirmative-action policies that expressly took account of race (*e.g.*, the admissions policies in *Bakke* and *SFFA*) and facially race-neutral policies that were adopted, at least in part, because they were likely to enhance minority opportunities (*e.g.*, an admissions policy favoring lower-income applicants that was adopted in part because of a desire to achieve racial diversity). Although the latter policies were not always lawful, *see Ricci v. Destefano* (2009) (recognizing limits on efforts to avoid disparate effects under the Civil Rights Act of 1964), they generally did not trigger strict scrutiny under the Equal Protection Clause. Notice the tension with the general rule that strict scrutiny applies when an intent to discriminate based on race is a “motivating factor” for the adoption of a race-neutral rule.

It is unclear how the Supreme Court will address this issue after *SFFA*. The current black-letter law is that the government can adopt policies that seek to mitigate racially disparate impacts without triggering strict scrutiny. But those holdings are more vulnerable now.

## 2.6. Sex and Gender

Recall that *Bradwell v. Illinois* and *Minor v. Happersett*—claims by women for equality in bar licensing and voting, respectively—were *not* litigated under the Equal Protection Clause because they had nothing to do with “protection of law.” Since the early twentieth century, though, judges have usually decided constitutional equality claims of all sorts—including sex-discrimination claims—under the Equal Protection Clause (or the “equal protection component” of the Fifth Amendment).

Before addressing the modern cases, though, think about how the different theories of the Fourteenth Amendment and of judicial review that we have already encountered might map onto sex discrimination. If someone interpreted the Fourteenth Amendment as requiring states to treat everyone *impartially*, for instance, how might that person approach a sex-discrimination claim? What if the



Amendment was focused on racial discrimination? And under either view, what doctrinal tools might best enforce those constitutional principles?

For much of American constitutional history, the Supreme Court recognized the legitimacy of governmental use of sex classifications. *Bradwell* and *Minor* are good examples. So is *Muller v. Oregon* (1908), in which the Court upheld a labor regulation that limited the factory working hours for women (but not men), emphasizing the “inherent difference between the two sexes.”

The Court started to reverse course in *Adkins v. Children’s Hospital* (1923), ruling that a sex-specific labor regulation unreasonably interfered with “the right to contract about one’s affairs.” Observing that “great—not to say revolutionary—changes” had taken place “in the contractual, political and civil status of women,” the justices concluded:

In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.

This opinion, however, recognized only the presumptive invalidity of sex-specific *labor regulations*—not an overarching principle of sex equality applicable to any context.

Outside of court, however, broader reform efforts were gaining steam. On the heels of the Nineteenth Amendment’s passage, activists introduced a constitutional amendment that “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.” This measure eventually made its way into the Republican Party platform in 1940 and later culminated in the Equal Rights Amendment, which passed both houses of Congress in 1972 and barely missed the requisite number of states for constitutional ratification (garnering 35 state approvals, with 38 required for ratification). By this time, the Supreme Court also was becoming more active in the sex-equality arena.

*Reed v. Reed* (1971) was the Court’s first decision invalidating a sex-discriminatory law under the Equal Protection Clause. The Idaho law at issue in *Reed* specified that “males must be preferred to females” when selecting estate administrators. Writing for the majority, Justice Burger noted that the Equal Protection Clause “does not deny to States the power to treat different classes of persons in different ways.” But, he explained, the differential treatment must not be “on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Because the prospective female administrator in *Reed* was “similarly situated” to her male counterpart with respect to other criteria, the Court ruled that denying her the administrator position because of her sex violated the Equal Protection Clause.

Two years later, in *Frontiero v. Richardson* (1973), the Court considered a challenge to a federal law that gave female military members fewer opportunities to claim spouses as dependents for benefits purposes. A plurality opinion (authored by Justice Brennan and joined by Justices Douglas, White, and Marshall) argued for a stricter standard when reviewing sex-based classifications. The justices began by noting “a long and unfortunate history of sex discrimination” and emphasizing that “women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job

market and, perhaps most conspicuously, in the political arena.” Moreover, Justice Brennan continued, “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,” and imposing legal disabilities on that basis would thus “violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.” Finally, he concluded, “what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”

Justices Powell, Burger, and Blackmun agreed with the Court’s ultimate conclusion that the law was unconstitutional, but they protested that the plurality had reached out to decide an issue that was unnecessary to its decision. Additionally, Justice Powell insisted:

The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Only three years later, however, with the Equal Rights Amendment still being considered, a majority of justices settled on a heightened standard of review (“intermediate scrutiny”) in *Craig v. Boren* (1976).

Interestingly, however, Justice Brennan’s majority opinion in *Craig* simply took for granted that sex discrimination triggers heightened scrutiny, rather than treating that issue as one requiring explanation:

Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are “subject to scrutiny under the Equal Protection Clause.” To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed v. Reed* (1971), the objectives “reducing the workload on probate courts,” and “avoiding intra-family controversy,” were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents’ estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. . . .

*Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. . . . [I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the “marketplace and world of idea” [have been] rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. . . .

In a concurring opinion, Justice Stevens criticized the majority for distinguishing between different forms of “suspect classifications”:

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

Meanwhile, a dissenting opinion by then-Justice Rehnquist criticized the majority for coming up with an intermediate standard of scrutiny “out of thin air.” According to Rehnquist:

The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of “rational basis,” and the “compelling state interest” required where a “suspect classification” is involved—so as to counsel weightily against the insertion of still another “standard” between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is “substantially” related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at “important” objectives or, whether the relationship to those objectives is “substantial” enough.

What do you think about these criticisms by Stevens and Rehnquist? Is the absence of any textual support for different “tiers of scrutiny” a valid objection to their use? If you were in the majority, how might you try to respond to the Stevens and Rehnquist critiques?

As a doctrinal matter, the same methods for identifying racial classifications are also available for identifying other suspect classifications, like sex. *See, e.g., J.E.B. v. Alabama* (1994). Thus, although subjective-motive analysis is generally *not* used in evaluating claims under rational-basis review, it is okay to consider whether other suspect means of classification, like sex discrimination, were a “motivating factor” behind certain decisions. And, just as with race-based classifications, a facially neutral rule that merely has a disparate impact along sex-based lines does not trigger heightened scrutiny under the Equal Protection Clause.

As with affirmative-action cases, controversies about sex equality have often arisen in the context of public education. Consider the Court’s treatment of that issue in the following case.

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## United States v. Virginia (1996)

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### **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.

### I

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.

## II

### A

. . . VMI today enrolls about 1,300 men as cadets. . . . 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”; “[o]nly about 15% of VMI cadets enter career military service.” [*Note: Quotations are from the lower-court decision.*] . . .

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.” “[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI].”

### B

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. . . .

[The district court concluded] 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. . . . The District Court reasoned that education in “a single-gender environment, be it male or female,” yields substantial benefits. . . . “[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”; “[p]hysical 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. . . . Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. In May 1993, this Court denied certiorari.

## C

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. . . .

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program . . . . [T]he 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 \$5.4625 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.

## D

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. . . .

A divided Court of Appeals affirmed the District Court’s judgment. . . .

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.” . . .

## III

The cross-petitions in this suit 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, . . . what is the remedial requirement?

## IV

. . . Parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action. *J. E. B. v. Alabama ex rel. T. B.* (1994).

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.

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* (1971) (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* (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. *See Mississippi Univ. for Women* (1982). 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.” *Id.* 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. See *Weinberger v. Wiesenfeld* (1975); *Califano v. Goldfarb* (1977) (Stevens, J., concurring in judgment).

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia* (1967). Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” *Ballard v. United States* (1946).

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” *Califano v. Webster* (1977) (per curiam), to “promot[e] equal employment opportunity,” see *California Fed. Sav. & Loan Assn. v. Guerra* (1987), to advance full development of the talent and capacities of our Nation’s people.<sup>7</sup> 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.

## V

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination “to afford VMI’s unique type of program to men and not to women.” Virginia challenges that “liability” ruling and asserts two justifications in defense of VMI’s exclusion of women. First, the Commonwealth contends, “single-sex education provides important educational benefits,” 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.

## A

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,

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<sup>7</sup> Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools “to dissipate, rather than perpetuate, traditional gender classifications.” See Brief for Twenty-six Private Women’s Colleges as *Amici Curiae*. We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as “unique,” an opportunity available only at Virginia’s premier military institute, the Commonwealth’s sole single-sex public university or college.

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 University 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 “compensat[ing] 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 . . . admitted only men. . . .

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. . . .

Ultimately, in 1970 . . . the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. . . .

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. . . .

Our 1982 decision in *Mississippi University 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 focuse[d] on anticipated difficulties in attracting females to VMI,” and the report, overall, supplied “very little indication of how th[e] 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.” . . .

## B

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 “eliminat[e] 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. “[S]ome 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, . . . 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, “[m]ales tend to need an atmosphere of adversativeness,” while “[f]emales 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* (1971), 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. . . .

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 University 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 . . . 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.<sup>16</sup> . . .

## VI

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 "afford[ed] 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

. . . Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d] to" the violation, *see Milliken v. Bradley* (1977), *i.e.*, the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. . . . 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. . . .

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. *See* Dist. Ct. Op. ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); *id.* (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, *id.*, and uses a "cooperative method" of education "which reinforces self-esteem," *id.*

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 schoolday. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." "[T]he 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 "[p]hysical 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,

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<sup>16</sup> VMI has successfully managed another notable change. The school admitted its first African-American cadets in 1968. *See The VMI Story* (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission."

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 . . . “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, 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 “[o]nly 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.<sup>19</sup> . . .

## B

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. . . .

For physical training, Mary Baldwin has “two multipurpose fields” and “[o]ne 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

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<sup>19</sup> Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. *Cf.* note following 10 U.S.C. § 4342 (academic and other standards for women admitted to the Military, Naval, and Air Force Academies “shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals”). Experience shows such adjustments are manageable. . . .

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 \$5.4625 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.” . . .

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 . . . black law students. . . .

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. . . .

### **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. Closedminded 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 countermajoritarian 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

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. . . .

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Rutan v. Republican Party of Ill.* (1990) (Scalia, J., dissenting). The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment. *See, e.g., Burnham v. Superior Court of Cal., County of Marin* (1990) (plurality opinion of Scalia, J.) (Due Process Clause); *J. E. B. v. Alabama ex rel. T. B.* (1994) (Scalia, J., dissenting) (Equal Protection Clause); *Planned Parenthood of Southeastern Pa. v. Casey* (1992) (Scalia, J., dissenting) (various alleged "penumbras").

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges—West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954—admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies) 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 *non*-military educational institutions for the two sexes have until very recently also been part of our national tradition. “[It is] [c]oeducation, 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.

## II

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. . . . We have denominated this standard “intermediate scrutiny” and under it have inquired whether the statutory classification is “substantially related to an important governmental objective.” . . .

[T]he 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” . . . . 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 . . . 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 [our] 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. (Emphasis added). . . .

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* (1977) (per curiam), we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women *on the average* received lower retirement benefits than men." 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* (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." . . . 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. . . .

The Court's intimations [of higher scrutiny] 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.* (1938), 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." *Id.*, n.4. It is hard to consider women a "discrete and insular minorit[y]" 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.

### III

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."

#### A

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. . . . 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. . . . It is thus significant that, whereas there are “four all-female private [colleges] in Virginia,” there is only “one private all-male college” . . . . 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.

## B

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.

1. I have already pointed out the Court’s most fundamental error, which is its reasoning that VMI’s all-male composition is unconstitutional because “some women are capable of all of the individual activities required of VMI cadets,” and would prefer military training on the adversative model. This



unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution—its asserted interest in promoting diversity of educational options—is not “genuin[e],” 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 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. . . .

3. 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 “[t]hese 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 “[t]he 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, “[t]he evidence in the case . . . is *virtually uncontradicted*.” (Emphasis added). . . .

4. The Court contends that Virginia, and the District Court, erred, and “misperceived our precedent,” by “train[ing] 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. . . . 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.

5. 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 . . . 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. . . . 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.” . . .

6. Finally, the absence of a precise “all-women’s analogue” to VMI is irrelevant. In *Mississippi Univ. for Women v. Hogan* (1982), we attached no constitutional significance to the absence of an all-male nursing school. . . .

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. . . . 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.” . . .

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.” . . .

\* \* \*

Justice Brandeis said it is “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann* (1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a “more perfect Union,” (a criterion only slightly more restrictive than a “more perfect world”), can impose its own favored social and economic dispositions nationwide. . . . The sphere of self-government reserved to the people of the Republic is progressively narrowed. . . .

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

**[The concurring opinion of Chief Justice Rehnquist is omitted.]**

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### Notes and Questions

1. Although the Supreme Court did not purport to apply strict scrutiny to sex-based classifications, it did apply a particularly rigorous ends/means analysis under intermediate scrutiny. What were the government’s purported justifications for applying a sex-based means of classification? What did the Court say about each of them?

2. Are women likely to be better off under the Court’s approach? What if it turned out that after Virginia integrated V.M.I., fewer women attended that program than had attended the program at Mary

Baldwin College? Would that be a “victory” for sex equality? Why or why not? Should that matter for resolution of the equal-protection claim?

3. How did the majority’s method of deciding this case differ from the dissent’s method? What are the strengths and weaknesses of each approach?

4. Notice that the government’s ability to discriminate based on sex is broader than its ability to discriminate based on race, in large part because of *biological* differences between men and women. Nonetheless, the Court’s decision in *United States v. Virginia* indicates that the government’s ability to take notice of *socialized* differences between men and women is much narrower. But it is often hard to draw a distinction between biological and socialized differences. Consider that topic as you think about how a judge should respond to the following factual scenario:

A woman supports “a right to go topless in public, just like men can.” One day, she participates in “Bare Breasts Day,” walking around topless in public. She is then fined under a statute that bars “fully or partially revealing one’s private parts in public.” The statute defines “private parts” as including “buttocks, anus, penis, vulva, and female breasts at or below the areola.”

Does the statute violate the Equal Protection Clause insofar as it treats men and women differently with respect to their ability to go topless in public? What are the best arguments on the other side?

5. *Multiple Classifications and Intersectional Discrimination.* If the government imposes a race-based *and* sex-based classification, what level of scrutiny applies? Under current doctrine, claimants should bring a claim for racial discrimination (which might trigger strict scrutiny) and then, separately, a claim for sex discrimination (which might trigger intermediate scrutiny). It would thus be possible for a court to uphold the sex-based classification while holding that the race-based classification is unconstitutional, or vice versa. But at present, the Court does not recognize a hybrid, “intersectional”-discrimination claim. For a critique of this approach and an emphasis of the distinctive features of intersectional discrimination, see Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. Chi. Legal F. (1989).

## Pregnancy

Given that only persons who are biologically female can become pregnant, does a state’s decision to discriminate against pregnant persons constitute sex discrimination?

Under current doctrine, the answer is *no*. Discrimination on the basis of *pregnancy* does not constitute sex discrimination. The Court reached this conclusion when evaluating a state insurance program that treated pregnancy differently from other medical conditions. See *Geduldig v. Aiello* (1974). According to the Court: “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.”

Consider Justice Ginsburg’s criticism of *Geduldig* in *Coleman v. Court of Appeals* (2012) (Ginsburg, J., dissenting):

First, “[a]s an abstract statement,” it is “simply false” that “a classification based on pregnancy is gender neutral.” *Bray v. Alexandria Women’s Health Clinic* (1993) (Stevens, J., dissenting). Rather, discriminating on the basis of pregnancy “[b]y definition . . . discriminates

on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.” *General Elec. Co. v. Gilbert* (1976) (Stevens, J., dissenting).

This reality is well illustrated by the facts of [*Geduldig v. Aiello*]. The California disability-insurance program at issue granted disability benefits for virtually any conceivable work disability, including those arising from cosmetic surgery, skiing accidents, and alcoholism. It also compensated men for disabilities caused by ailments and procedures that affected men alone: for example, vasectomies, circumcision, and prostatectomies. As Justice Brennan insightfully concluded in dissent, “a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered. . . . Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.”

Second, pregnancy provided a central justification for the historic discrimination against women . . . . See *Muller v. Oregon* (1908) (“[A] proper discharge of [a woman’s] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man.”). See also Reva Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, Yale L.J. (1985) (Pregnancy is “a biological difference central to the definition of gender roles, one traditionally believed to render women unfit for employment.”). Relatedly, discrimination against pregnant employees was often “based not on the pregnancy itself but on predictions concerning the future behavior of the pregnant woman when her child was born or on views about what her behavior should be.” Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, N.Y.U. Rev. L. & Soc. Change (1984-1985); see also S. Rep. (1977) (“[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”).

In sum, childbearing is not only a biological function unique to women. It is also inextricably intertwined with employers’ “stereotypical views about women’s commitment to work and their value as employees.” *Nevada Dep’t of Human Resources v. Hibbs* (2003). Because pregnancy discrimination is inevitably sex discrimination, and because discrimination against women is tightly interwoven with society’s beliefs about pregnancy and motherhood, I would hold that *Aiello* was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex.

What do you think of this argument? What are possible counterarguments?

*Geduldig* is a controversial decision, but it has never been overruled. Congress did, however, subsequently amend federal anti-discrimination law to include pregnancy as a protected status.

## Gender

The Supreme Court has generally treated “sex” and “gender” as interchangeable terms. And this maps onto conventional terminology—“men and women,” “boys and girls,” etc.—which rarely distinguishes between the concepts of sex and gender.

The terms “sex” and “gender,” however, sometimes have distinct meanings, with “sex” referring to *biological* characteristics and “gender” referring to a culturally thicker idea. To say “that woman has got balls,” or “that guy needs to grow a pair,” for example, trades on exactly this distinction—an ostensible reference to male biology (“sex”) but actually understood as a reference to a deeply gendered conception of masculinity.

For purposes of equal-protection law, the distinction between “sex” and “gender” is usually irrelevant. But sometimes perhaps not. How, for instance, should courts consider a claim that the government is discriminating against men or women who do not conform to some social expectation of gender, like their expressions of gender identity or sexual orientation? Would those trigger intermediate scrutiny?

At present, the answer is somewhat unclear. As a matter of *statutory* interpretation, however, the Supreme Court held in *Bostock v. Clayton County* (2020) that a federal ban on sex discrimination in employment-related decisions makes it unlawful for employers to discriminate on the basis of gender identity and sexual orientation.

Writing for the *Bostock* majority, Justice Gorsuch relied on longstanding precedents holding that Title VII—which prohibits adverse employment decisions made “because of” sex—applied whenever sex is a “but for” cause of the employer’s decision. The statute’s text, along with the Court’s precedents, Gorsuch continued, pointed to one conclusion:

[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.

In dissent, Justice Alito disputed this conclusion:

Contrary to the Court’s contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: “We do not hire gays, lesbians, or transgender individuals.” And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants.

One potential weakness of Alito’s view is its apparent inconsistency with the reasoning of *Loving*. After all, one could argue (as Virginia did) that bans on interracial marriage do not single out the spouses on the basis of race. Alito responded to this argument by arguing that “history tells us [that banning interracial marriage] is a core form of race discrimination.” Such bans, he pointed out, were “grounded in bigotry against a particular race and [were] an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.” (quoting the lower-court dissent). By contrast,

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or

women. An employer who discriminates on this ground might be called “homophobic” or “transphobic,” but not sexist.

Is this a persuasive distinction? For one thing, should it matter *why* certain types of racial classifications are disfavored, or was it the mere use of racial classifications that *Loving* deemed odious? How might the answer to that question matter for considering the constitutionality of affirmative action?

Moreover, is the evidence of linguistic patterns that Alito offers enough to distinguish the treatment of interracial marriage? He is obviously right, of course, that bans on interracial marriage in the United States aimed to entrench white supremacy. But does the existence of separate terms—sexism, transphobia, homophobia—show that attitudes about gender identity and sexual orientation are historically and culturally distinct from attitudes about sex and gender?

As mentioned above, this is still an unresolved area of equal-protection law. Some lower courts have held that discrimination based on gender identity and/or sexual orientation is a form of sex discrimination, thus triggering intermediate scrutiny. Others have held that gender identity and/or sexual orientation should be recognized as freestanding “suspect” classifications for purposes of equal-protection analysis. And others have simply applied rational-basis review. So stay tuned. (And we will return to discrimination on the basis of sexual orientation in the next Unit.)

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## 2.7. Other Classifications

My hope is that—in addition to learning the core features of modern doctrine—you’re starting to better appreciate *how* and *why* equal-protection law has developed. We will continue that conversation with an interesting set of cases regarding what types of discrimination count as “suspect classifications.” How do the Justices construe the *meaning* of the Equal Protection Clause? What *doctrines* do they use to give this meaning practical effect? Do the Justices identify the level of scrutiny based on an interpretation of the Fourteenth Amendment itself? Or do they interpret the Equal Protection Clause as a rule of impartiality (or something else) and then vary the degree of scrutiny based on some theory of judicial review? If so, what is that theory?

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### City of Cleburne v. Cleburne Living Center, Inc. (1985)

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

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a “quasi-suspect” classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

#### **I**

[*Cleburne Living Center (CLC)* wanted to “house 13 retarded men and women, who would be under the constant supervision of CLC staff members.” *The City denied the zoning application under*

*a law that singled out “[h]ospitals for the insane or feeble-minded, or alcoholic[s] or drug addicts, or penal or correctional institutions” for particularly onerous permit rules.]*

## II

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that 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. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. . . .

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. . . .

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

## III

Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.

First, . . . mentally retarded [people are] different, immutably so, in relevant respects, and the States’ interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. [*The Court then mentioned various disability-rights statutes at the state and federal levels.*] . . .

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. . . . It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. . . . The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. . . .

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course . . . .

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. . . .

#### IV

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. . . .

The city does not require a special use permit in an R-3 zone for [other high-occupancy facilities.] . . . It is true . . . that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case. . . .

#### **Justice Stevens, with whom Chief Justice Burger joins, concurring.**

[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process. . . .

In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word



“rational”—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen’s willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply “strict scrutiny,” or even “heightened scrutiny,” to decide such cases. . . .

The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent’s home. . . .

**Justice Marshall, with whom Justices Brennan and Blackmun join, concurring in the judgment in part and dissenting in part.**

. . . I share the Court’s criticisms of the overly broad lines that Cleburne’s zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters. . . .

I have long believed the level of scrutiny employed in an equal protection case should vary with “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.” . . . When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes.

First, the interest of the retarded in establishing group homes is substantial. The right to “establish a home” has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. . . .

Second, the mentally retarded have been subject to a lengthy and tragic history of segregation and discrimination that can only be called grotesque. . . .

In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne’s zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation. . . .

[T]he Court offers several justifications as to why the retarded do not warrant heightened judicial solicitude. These justifications, however, find no support in our heightened-scrutiny precedents and cannot withstand logical analysis.

The Court downplays the lengthy “history of purposeful unequal treatment” of the retarded by pointing to recent legislative action that is said to “beli[e] a continuing antipathy or prejudice.” . . . [I]t seems . . . that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see. Once society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny.

Courts, however, do not sit or act in a social vacuum. . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon

which American society rests . . . . It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality. . . . The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject. . . .

Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. . . . The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens. . . .

Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate.<sup>1</sup> . . .

In light of the scrutiny that should be applied here, Cleburne’s ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. . . .

To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face. . . .

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<sup>1</sup> No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The “political powerlessness” of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances.

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a “more searching judicial inquiry,” *United States v. Carolene Products Co.* n.4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, “a page of history is worth a volume of logic.” *N.Y. Trust Co. v. Eisner* (1921) (Holmes, J.).

### Notes and Questions

1. How does the majority identify which types of classifications should be deemed “suspect” for purposes of equal-protection law? Is this method consistent with the one suggested in footnote 4 of *Carolene Products*? What are the benefits and drawbacks of the Court’s approach in *Cleburne*?

2. Should historical time and socio-political progress matter for purposes of evaluating the level of scrutiny? Should the “tiers of scrutiny” be timeless, or should they reflect (as best possible) the Court’s estimation of current conditions?

3. Along similar lines, should courts consider regional variances when evaluating equal-protection challenges? Early decisions indicated the answer might be “yes.” Here’s an excerpt from *Hernandez v. Texas* (1954):

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a “two-class theory”—that is, based upon differences between “white” and Negro. . . .

The petitioner’s initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from “whites.” One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between “white” and “Mexican.” . . . Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing “No Mexicans Served.” On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked “Colored Men” and “Hombres Aqui” (“Men Here”). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

In current doctrine, however, the Court has identified suspect means of classification on a *nationwide* basis. Context can still matter when identifying *intentional* discrimination under *Washington v. Davis* and related cases, but there is no regional variation in terms of which types of classifications are considered “suspect” (other than incidental variation produced by having different Courts of Appeals for different regions).

4. How did Justice Marshall’s approach to equal-protection doctrine depart from the majority’s view? What does Marshall mean in the footnote when he talks about discreteness and insularity being “viewed from a social and culture perspective as well as a political one”? What are the strengths and weaknesses of his preferred approach?

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## Romer v. Evans (1996)

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### **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* (1896) (Harlan, J., dissenting). 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.

### I

The enactment challenged in this case is an amendment [“Amendment 2”] to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. . . . 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 [including Aspen, Boulder, and Denver] . . . 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.” . . .

### II

. . . The change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern antidiscrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. “At common law, innkeepers, smiths, and others who ‘made profession of a public employment,’ were prohibited from refusing, without good reason, to serve a customer.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.* (1995). 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* (1883). 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.”

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 . . . providing specific protection for gays or lesbians from discrimination by every level of Colorado government. . . .

[W]e 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. . . .

### III

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. . . . 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.

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. . . .

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." *Dep't of Ag. v. Moreno* (1973). 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. . . .

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. . . .

**Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas join, dissenting.**

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, *see Bowers v. Hardwick* (1986), 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.

**I**

The only denial of equal treatment [the majority] 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’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.

## II

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* (1986), 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. . . .

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. . . . And *a fortiori* . . . a State [may] adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct. . . .

[Justice Scalia then addressed whether it made a difference that the Colorado law discriminated based on sexual orientation rather than conduct.] But assuming that, in Amendment 2, a person of homosexual “orientation” is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. . . . A State “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” *Dandridge v. Williams* (1970). Just as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because some methadone users pose no threat to passenger safety, and just as a mandatory retirement age of 50 for police officers does not violate equal protection even though it prematurely ends the careers of many policemen over 50 who still have the capacity to do the job, Amendment 2 is not constitutionally invalid simply because it could have been drawn more

precisely so as to withdraw special antidiscrimination protections only from those of homosexual “orientation” who actually engage in homosexual conduct.

### III

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*. . . .

Amendment 2 . . . 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.

### IV

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. 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. . . .

\* \* \*

Today’s opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. . . . Striking it down is an act, not of judicial judgment, but of political will. . . .



### Notes and Questions

1. What exactly was the holding of *Romer*? After *Romer*, do states have to include homosexuality and bisexuality as “protected classes” in their anti-discrimination laws? Why or why not? Was the majority correct to say that the referendum imposed a “special disability” on gay people?
2. Suppose the following facts:
  - In 1965, Las Vegas passed an ordinance that requires businesses serving the public not to discriminate on the basis of race and religion. The ordinance does not prevent those businesses from discriminating against people who cheat on their romantic partner.
  - In 1995, Las Vegas revised its ordinance to require businesses serving the public not to discriminate on the basis of whether someone has cheated on their romantic partner.
  - In 1996, Nevada voters passed a referendum that overrides any local ordinance that attempts to provide anti-discrimination for persons who have cheated on their romantic partner.

Is the referendum *rational*? Does it reflect likely *animus* toward persons who have cheated on their romantic partner? Are there any plausible distinctions between this hypothetical and the facts in *Romer*? If so, are the two situations distinguishable according to the reasoning in *Romer*? If not, what does that suggest about the Court’s reasoning in *Romer*?

3. Justice Scalia criticized the majority opinion as something that “barely pretends to” be an exercise in constitutional law. Was he right? Reading the majority opinion in the most charitable way possible, what did it describe as the *meaning* of the Equal Protection Clause, and how did it then *apply* that meaning to the case at hand? Where exactly in that chain of reasoning did Justice Scalia disagree?

4. How do the different approaches to equal-protection law that we’ve previously considered map onto this case?

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### Practice Questions

#### Question 1.

A state statute requires hair stylists to get an expensive cosmetology degree and cosmetology license before being able to cut and style hair within the state. Compelling evidence shows that the statute was passed because licensed cosmetologists, who wanted to cut down on their competition, engaged in an extensive lobbying campaign to get the law changed. Based on these facts, what level of scrutiny applies if a claimant challenges the statute under the Equal Protection Clause?

- A. No scrutiny
- B. Rational-basis review
- C. Intermediate scrutiny
- D. Strict scrutiny

*Follow-up question:* What if, in addition to the facts stated above, it turns out that (1) the unlicensed cosmetologists working in the state are nearly all Black women, and (2) legislators knew that fact when voting on the legislation?

**Question 2.**

A governmental spousal-benefits program provides benefits to female widows over 55 (but not male widowers). A Black man who has a physical disability brings an equal-protection claim. What's the *best* argument that he can make under current equal-protection doctrine?

- A. Sex/gender discrimination.
- B. Race discrimination.
- C. Disability discrimination.
- D. Age discrimination.

**Question 3.**

A group of Irish male teenagers has been creating disturbances at night. The town passes an ordinance imposing a 10pm curfew for anyone under 18 years of age.

What level of scrutiny applies if there's an equal-protection challenge?

- A. No scrutiny.
  - B. Rational-basis review.
  - C. Intermediate scrutiny.
  - D. Strict scrutiny.
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## 3. Fundamental Rights

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### 3.1. Procedural Due Process

Although *substantive* due process doctrine had waned by mid-century, the Supreme Court continued to apply the Due Process Clause in the *procedural* realm. This unit considers two issues in turn: the *scope* of procedural due process and the *degree of protection* it offers (*i.e.*, “strength”).

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#### The Scope of Due Process

When does the protection of the Due Process Clauses apply? The text seems to supply an answer: The government may not “*deprive any person of life, liberty, or property, without due process of law.*”<sup>\*</sup> Two issues then arise: What counts as a “depriv[ation]”? And what are included in “life, liberty, or property”?

On the first issue, the short answer is that the Supreme Court has construed the Due Process Clauses as *not* applying when a governmental official only *negligently* takes away someone’s life, liberty, or property. *See Daniels v. Williams* (1986). An ordinary traffic accident caused by the driver of a government vehicle, for example, is not covered by the Due Process Clause at all. (Of course, this would not prevent the injured party from suing the driver, or perhaps even the government, using some *other* legal theory.)

And another point is briefly worth highlighting: The domain of the Due Process Clauses includes deprivations of life, liberty, or property effected not only by the executive branch (through criminal proceedings or civil forfeiture or condemnation proceedings) but also by other branches. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) (“The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.”); *see also, e.g., Pennoyer v. Neff* (1878) (grounding the notion of personal jurisdiction, in a civil case between private parties, on the Due Process Clause).

Now let’s turn to the second issue: What counts as “life, liberty, or property”? Often this inquiry is straightforward. Criminal prosecutions plainly seek to deprive individuals of their “life, liberty, or property,” thus implicating the Due Process Clauses. So do civil forfeiture actions and civil detainment proceedings. But what if the government withholds a public *benefit*, like public employment or welfare payments? Do the Due Process Clauses even apply? What does the term “life, liberty, or property” refer to?

You’re in a good position to know the historical answer. Think back to social-contract theory! In an imagined state of nature, individuals had *natural rights* that they decided to *retain* upon creating a political society in a social contract. The people then created a government in order to help *protect* these rights, but the government did not *create* these rights. Rather, these rights were retained by the people even before the government was formed. And what was a four-word term for these retained natural rights? (Hint: The answer appears in the previous paragraph.)

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<sup>\*</sup> The quoted text is from the Fourteenth Amendment. The Fifth Amendment uses the passive voice—“No person shall . . . be deprived of life, liberty, or property, without due process of law.”

By contrast to these *retained natural rights*, which were *not* created by the government, and which the government could regulate only pursuant to law and only with due process, there were other types of legal benefits that were better understood as government-bestowed *privileges*—not *rights*. If the government withheld “poor relief,” for example, the requirements of due process did not apply.

The legal realists mercilessly attacked the rights/privileges distinction. To be sure, their arguments had little if anything to do with the procedural dimensions of due process. Rather, they were focused on the Court’s repeated overturning of progressive legislation. Nonetheless, the demise of any strict distinction between *rights* and *privileges* had far-reaching ramifications.

One consequence was something now known as “unconstitutional conditions” doctrine. We will return to that topic soon. But for now, the crucial point is that the demise of the distinction between natural rights and public benefits profoundly affected the scope of *procedural* due process. Perhaps public-benefit determinations might be subject to some constitutionally determined amount of process. Perhaps public benefits could be construed as a form of “property.”

In advancing this argument in *The New Property*—a famous and influential article published in 1964—law professor Charles Reich also emphasized the dramatic increase in the scope of governmental authority:<sup>1</sup>

One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in earlier times it was minor, today’s distribution of largess is on a vast, imperial scale.

With this shift came a radical change in the way that governmental benefits affected the lives of Americans. As law professor William Van Alstyne noted, “Public sector jobs, public sector licenses, public sector housing, public sector education, etc., pervade the country. The personal security of these connections with government has come to occupy in the lives of many individuals much the same position that the security of old property (land and chattels) previously held.”<sup>2</sup> As governmental benefits expanded tremendously in the twentieth century, the limited scope of the Due Process Clauses came under strain.

The Supreme Court partly adopted this type of reasoning, extending the reach of procedural due process to welfare benefits in *Goldberg v. Kelly* (1970). But the justices were also apprehensive about extending procedural protections to any and every governmental action. Without a rights/privileges distinction, what principle would limit the reach of due process?

The Court responded to this concern in *Board of Regents v. Roth* (1972), which involved a pre-tenure university professor who had only a year-to-year contract. When the university decided not to renew his contract, he brought a due-process challenge. The Court responded:

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. . . . Undeniably, the

<sup>1</sup> Charles A. Reich, *The New Property*, Yale L.J. (1964).

<sup>2</sup> William Van Alstyne, *Cracks in “The New Property”*: *Adjudicative Due Process in the Administrative State*, Cornell L. Rev. (1977). See generally William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, Harv. L. Rev. (1968).

respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. . . . But, to determine whether due process requirements apply in the first place, we must look not to the “weight” but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

“Liberty” and “property” are broad and majestic terms . . . “purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” *Nat'l Ins. Co. v. Tidewater Co.* (1949) (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between “rights” and “privileges” that once seemed to govern the applicability of procedural due process rights.<sup>9</sup> The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words “liberty” and “property” in the Due Process Clause of the Fourteenth Amendment must be given some meaning. . . .

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . It stretches the concept too far to suggest that a person is deprived of “liberty” when he simply is not rehired in one job but remains as free as before to seek another.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly* (1970). Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions and college professors and staff members dismissed during the terms of their contracts have interests in continued employment that are safeguarded by due process. . . .

Certain attributes of “property” interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than

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<sup>9</sup> In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a “privilege,” not a “right,” and that procedural due process guarantees therefore were inapplicable. *Baily v. Richardson* (D.C. Cir. 1950), *aff'd by an equally divided Supreme Court*. The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, “this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’” *Graham v. Richardson* (1971); *see, e.g., Sherbert v. Verner* (1963).

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.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so. . . .

[In this case, by contrast, the contractual terms] made no provision for renewal whatsoever. . . . In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

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*Roth* decelerated the expansion of procedural due process. Indeed, four years later the Court held that mere abridgments of personal reputation were not covered by the due process clause, at least when unaccompanied by some other injury, notwithstanding the fact that personal reputation was well understood as a retained natural right at common law. *See Paul v. Davis* (1976). Nonetheless, the scope of “life, liberty, and property” had already extended beyond their traditional meanings.

### The Strength of Due Process

If the Due Process Clauses apply, what amount of process is required?

Originally, “due process” entailed the traditional protections of the common law—including a right to a trial, a right to a jury verdict, and so on. *See Murray’s Lessee v. Hoboken Land & Improvement Co.* (1856). But the increased *scope* of procedural due process made it nearly impossible to sustain the high degree of *protection* that this right had classically guaranteed. The government could hardly provide a jury trial every time it made a decision about public benefits. As it turns out, however, the Court had already decoupled the guarantee of “due process” from common law procedures well before the “new property” cases of the 1960s and 70s.

The shift came, instead, as the justices debated the extent to which the Due Process Clause of the Fourteenth Amendment “incorporated” the rights guaranteed against the federal government by the Bill of Rights. In the view of Justice Frankfurter, “due process” and the specific procedural guarantees of the Fourth, Fifth, and Sixth Amendments were distinct. Here’s what he wrote in *Adamson v. California* (1947) (Frankfurter, J., concurring):

It would be extraordinarily strange for a Constitution to convey such specific commands in such a round-about and inexplicit way. . . . [T]hose conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the

Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution.

Notice how Frankfurter—although framing his argument in terms of original meaning—clearly had present-minded concerns about unduly interfering with state power and not hamstringing modern governments to antiquated ideas. Instead, he argued, the constitutional requirement of due process “neither comprehends the specific provisions by which the founders deemed it appropriate to restrict by federal government nor is it confined to them.” Rather, it “has an independent potency.”

Consequently, the federal government was constrained by principles of due process *and* the specific procedural guarantees of the Bill of Rights, whereas state governments were bound only by principles of due process. *Sometimes* these principles might happen to include (that is, “incorporate”) the specific procedural protections guaranteed by the Bill of Rights. But under the prevailing approach at that time, this inquiry turned on due-process analysis—not a freestanding notion of “incorporation.”

But what was that due-process analysis? What sorts of procedures violated the Due Process Clauses? The justices considered this question in the following case, *Rochin v. California* (1952). The case arose after several local police officers forced Richard Rochin to vomit in order to extract morphine capsules that he had swallowed. For two separate reasons, *Adamson* barred any claim that Rochin might try to bring under the Fifth Amendment right against self-incrimination: first, the right against self-incrimination extended only to compelled statements *at trial*—not being forced to provide evidence beforehand; and, second, the Court in *Adamson* declined to “incorporate” that right against the states. Consequently, Rochin’s best hope was to argue that the police had violated his procedural due process rights under the Fourteenth Amendment.

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### Rochin v. California (1952)

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

. . . Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings resulting in a conviction in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Snyder v. Massachusetts* (1934), or are “implicit in the concept of ordered liberty.” *Palko v. Connecticut* (1937).

The Court’s function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of “jury”—a body of twelve men who

must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. . . . [But] [w]e may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of “natural law.” To believe that this judicial exercise of judgment could be avoided by freezing “due process of law” at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges . . . . But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a sense of justice. It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach. . . .

Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community’s sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. . . .



**Justice Black, concurring.**

*Adamson v. California* (1947) (Black, J., dissenting) sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person . . . shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. California convicted this petitioner by using against him evidence obtained in this manner, and I agree with Mr. Justice Douglas that the case should be reversed on this ground.

In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that "we may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples." These canons are made necessary, it is said, because of "interests of society pushing in opposite directions."

If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts."

Some constitutional provisions are stated in absolute and unqualified language such, for illustration, as the First Amendment stating that no law shall be passed prohibiting the free exercise of religion or abridging the freedom of speech or press. Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an "unreasonable" search or seizure. There is, however, no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the majority has, in the past, been used to deny a state the right to fix the price of gasoline, and even the right to prevent bakers from palming off smaller for larger loaves of bread. These cases, and others, show the extent to which the evanescent standards of the majority's philosophy have been used to nullify state legislative programs passed to suppress evil economic practices. What paralyzing role this same philosophy will play in the future economic affairs of this country is impossible to predict. Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.

Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

**Justice Douglas, concurring.**

The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised. So far as the reported cases reveal, the only states which would probably exclude the evidence would be Arkansas, Iowa, Michigan, and Missouri. Yet the Court now says that the rule which the majority of the states have fashioned violates the "decencies of civilized conduct." To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration.

As an original matter it might be debatable whether the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse. . . .

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### Notes and Questions

1. Justice Frankfurter—the author of the majority opinion in *Rochin*—was one of the most prominent critics of the Court's *Lochner*-Era substantive due process decisions. Are these positions reconcilable? More generally, how do decisions like *Lochner* and *Pierce* compare to the procedural due process decision in *Rochin*?

2. How did Justice Black and Justice Douglas disagree with the majority? How, if at all, did they disagree with each other?

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As mentioned above, *Rochin* was part of a broader fight over the "incorporation" of the Bill of Rights against the state governments, with Frankfurter taking the view that those rights did not apply wholesale against the states but rather applied selectively (thus the term "selective incorporation"). For Justice Frankfurter, the regulation of state criminal process was largely a question of *due process*, not one of interpreting the Fourth, Fifth, or Sixth Amendments.

Frankfurter initially prevailed, and for a time the Court defined the requirements of due process mostly in terms of fundamental fairness rather than based on the text and history of the criminal-procedure amendments. The *procedures* guaranteed by the Due Process Clauses were, as *Adamson* noted, those that would "give [defendants] a fair trial."

This understanding of due process survives to some extent. That is, procedural due process remains available as a backstop if criminal processes are not barred by other constitutional provisions yet "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York* (1977). Suppose, for instance, that a defendant is accused of assaulting someone who happens to be a trial judge. Could that judge preside over the defendant's criminal trial? None of the specific rights in the Fourth, Fifth, or Sixth Amendments forbid it. (The Sixth Amendment mentions a right to an "impartial jury" but not a right to an impartial judge.) But having the accuser serve as judge clearly violates a "fundamental" principle of justice.

Moreover, some important branches of constitutional criminal procedure continue to be founded on procedural due process, since that was the principal source of criminal-procedure doctrine when these doctrines were identified. *See, e.g., Brady v. Maryland* (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); *Connally v. General Constr. Co.* (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

Nonetheless, Justice Black—who dissented in *Rochin* and *Adamson*—eventually prevailed in his quest for grounding constitutional criminal procedure mostly on the Fourth, Fifth, and Sixth Amendments rather than the more abstract notion of due process. “The Bill of Rights speaks in explicit terms to many aspects of criminal procedure,” the Court explained in *Medina v. California* (1992), “and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.” *See also Dowling v. United States* (1990) (“Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”)

When the Court recognized that states must provide arrestees with a timely preliminary hearing on probable cause, for example, it rested its decision on the Fourth Amendment (as incorporated through the Fourteenth Amendment)—not on the more abstract principles of procedural due process. “The Fourth Amendment was tailored explicitly for the criminal justice system,” the Court explained, “and its balance between individual and public interests always has been thought to define the ‘process that is due’ for seizures of person or property in criminal cases, including the detention of suspects pending trial.” *Gerstein v. Pugh* (1975). Similarly, when a criminal suspect challenged Maryland’s practice of forcing certain detainees to provide DNA samples—similar to, albeit less graphic than, the forced extraction of evidence in *Rochin*—the Court considered case under the Fourth Amendment, without ever mentioning due process. *See Maryland v. King* (2013).

At the same time, however, the Court never reversed its prior holdings that “due process” is a flexible concept—not one that merely incorporates common law rules. And although that definition of “due process” quickly became less important in criminal cases—cases in which the Court shifted its analysis to the Bill of Rights—its implications for *civil* deprivations of life, liberty, and property were profound.

The most famous summation of this “flexible” inquiry came in *Mathews v. Eldridge* (1976), in which the Court rejected the claimant’s argument that he should be entitled to a full evidentiary hearing prior to the suspension (but not a final termination decision) of his disability benefit payments. The parties had agreed that federal disability benefits under the Social Security Act constituted a “legal entitlement,” thus triggering the procedural protections of the Due Process Clause. The only question was how much process was due. Here is the Court’s response:

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer* (1972). Accordingly, . . . our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Having announced these factors, the Court considered each in turn.

First, the Court characterized the claimant's interest as being merely the *temporary* deprivation of money: "Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim." Moreover, the Court reasoned, "[e]ligibility for disability benefits, in contrast [to the welfare payments at issue in *Goldberg v. Kelly*], is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources." To be sure, "there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss" to his or her disability. But if a particular recipient was in dire financial condition, the Court reasoned, other welfare programs would kick in. "In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

In considering the second factor—"the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards"—the Court concluded that "the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists," without requiring a hearing. Again, the justices emphasized the difference between disability determinations and welfare eligibility. "[In] the typical determination of welfare entitlement[,] . . . issues of witness credibility and veracity often are critical to the decisionmaking process." Such issues *could* crop up in disability-related decisions, too, the Court acknowledged. "But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing . . . is substantially less in this context than in *Goldberg*."

Finally, the Court considered the last factor, "the public interest," which "includes the administrative burden and other societal costs that would be associated with requiring . . . an evidentiary hearing upon demand in all cases prior to the termination of disability benefits." In other words, how burdensome and costly would it be to provide additional process? Here, the Court noted its uncertainty: "The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."

The Court concluded by emphasizing that the Due Process Clauses provided only a minimally adequate level of process so that the putative beneficiaries of legal entitlements "are given a meaningful opportunity to present their case." The Clauses did not, the Court emphasized, require a "judicial model" of procedure for administrative decisionmaking. And "[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."

Courts continue to use the so-called "*Mathews* balancing test" to resolve due process claims relating to civil matters. It is absolutely crucial, however, to recognize that this test provides only a basis for challenging the *procedures* used to determine whether the government has accurately applied the law. It is *not* a method for assessing the *substantive* validity of the law. That is worth repeating: *Procedural due process is not a method for assessing the substantive validity of laws.* For example, suppose a law imposes a \$1 million fine on people who park overnight in a municipal lot. And then suppose that someone challenged his fine under the Due Process Clause, arguing that his interest in not being fined \$1 million outweighed the governmental interest in keeping the lot free of cars overnight. How should a court respond?

The court should reject the procedural due process claim! We can all agree that the fine is grossly disproportionate to the governmental interest. But the *Mathews* test is only about the *procedures* used to determine whether the law applies (*i.e.*, figuring out whether the person parked overnight in the

municipal lot)—not the substantive reasonableness of the parking ban or the attendant penalty. In *Mathews*, for instance, the claim only challenged the adequacy of the *procedures* used to determine eligibility—not whether the law had drawn those eligibility criteria too narrowly. The latter type of claim is not viable as a *procedural* due process claim.

The *Mathews* test applies only in *civil* matters. As the Supreme Court has stated, “the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process.” *Medina v. California* (1992).

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### Practice Questions

#### Question 1.

Suppose that a local government imposes a tax on cars that emit over 100 units of pollution per mile. The government taxes Terry Taxpayer, who brings a procedural due process claim. Which of the following statements is *true*?

- A. Procedural due process does not apply to taxes.
- B. Procedural due process does not apply to local ordinances.
- C. A court should consider the procedures by which the government determined the emissions produced by Taxpayer’s car.
- D. A court should consider whether the benefits of the 100-unit pollution limit outweigh the costs.

#### Question 2.

A state statute imposes a \$100,000 fine for driving 30 miles per hour in a school zone, which has a mandatory speed limit of 25 miles per hour. Daria Driver is caught speeding. At trial, she challenges the fine as violating her right to procedural due process. How should a court rule on this claim?

- A. Driver should prevail, because the individual interest clearly outweighs the governmental interest.
- B. Driver should prevail, because there is a substantial likelihood that she was not speeding.
- C. Driver should lose, because the government is providing her a chance at trial to contest the charges and the applicability of the fine.
- D. Driver should lose, because the Due Process Clause does not apply to fines.

#### Question 3.

Andy Andrews is denied Social Security disability benefits based on one doctor’s medical evaluation of his back condition. Based on these facts, is it *legally plausible* that his procedural due process claim might succeed?

- A. Yes, because the government may not delegate this eligibility decision to a doctor.
- B. Yes, because the individual interest and the risk of error may outweigh the benefits of the existing procedure.
- C. No, because the government is not constitutionally required to provide Social Security benefits.
- D. No, because medical doctors are trained and licensed to diagnose patient conditions.

**Question 4.**

A public-school teacher has “tenure” (*i.e.*, she can only be fired “for cause” and is protected against at-will termination) and is fired by the school for voicing her political opinions outside of school. She brings a speech claim and a procedural due process claim.

Which of the following is true?

- A. Her procedural due process claim will fail because public employment is a privilege, not a right.
  - B. Her procedural due process claim will fail if the governmental interest in restricting speech outweighs the individual liberty interest.
  - C. Her procedural due process claim will fail if the school used adequate procedures when firing her.
  - D. Her procedural due process claim will fail because the court proceedings provide adequate process for deciding her free-speech claim.
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### 3.2. The Reemergence of Substantive Due Process

The Supreme Court’s longstanding struggle in the procedural realm over the relationship between enumerated rights and more abstract constitutional principles soon began to play out in evaluating the *substantive* constitutionality of laws.

The following case, *Griswold v. Connecticut* (1965), has a lot of opinions! Four opinions conclude that the Connecticut statute was unconstitutional: Justice Douglas delivered the majority opinion, joined by Chief Justice Warren and Justices Clark, Brennan, and Goldberg. But Justice Goldberg also wrote separately, joined by Chief Justice Warren and Justice Brennan. And then Justices White and Harlan each concurred separately. Finally, Justices Black and Stewart dissented. What are the differences between these opinions? What are their strengths and weaknesses?

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#### Griswold v. Connecticut (1965)

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**Justice Douglas delivered the opinion of the Court.**

Appellant [Estelle] Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant [Lee] Buxton is a licensed physician and a professor at the Yale Medical School . . . They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception [and were arrested and convicted for aiding and abetting the violation of a Connecticut law banning use of “any drug, medicinal article or instrument for the purpose of preventing conception.”] . . .

[W]e 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* (1905) should be our guide. But we decline that invitation . . . 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* (1925), 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* (1923), 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 and freedom of inquiry, freedom of thought, and freedom to teach . . . 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* (1958), we protected the “freedom to associate and privacy in one's associations,” noting that freedom of association was a peripheral First Amendment right. . . . In other words, the First Amendment has a penumbra where privacy [of a group's membership data] is protected from governmental intrusion. . . . [W]hile [the associational right] 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. 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* (1886) 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* (1961) to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.” . . .

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* (1958). 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.

**Justice Goldberg, whom Chief Justice Rehnquist and 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, 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. . . .

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.<sup>2</sup> 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 . . . 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. . . .

[T]he 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. . . .

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. . . . [The point is not that the Ninth Amendment applies to the states. Rather,] 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* (1934). 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* (1932). "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v. Ullman* (1961) (Douglas, J., dissenting).

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<sup>2</sup> 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. See, e.g., *Bolling v. Sharpe* (1954); *Pierce v. Soc'y of Sisters* (1925). . . .



[After making a variety of arguments, Justice Goldberg concluded:] 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. . . .

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. . . .

The State . . . says that preventing the use of birth-control devices by married persons helps prevent . . . 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 . . . . 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. . . .

**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." *Palko v. Connecticut* (1937). . . . 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. . . .

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, 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?

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. *Adamson v. California* (1947) (Frankfurter, J., concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

**Justice White, concurring in the judgment.**

. . . [T]his is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right “to marry, establish a home and bring up children,” *Meyer v. Nebraska* (1923), and “the liberty . . . to direct the upbringing and education of children,” *Pierce v. Soc’y of Sisters* (1925) . . . . These decisions affirm that there is a “realm of family life which the state cannot enter” without substantial justification. *Prince v. Massachusetts* (1944). 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* (1949) (Frankfurter, J.). . . .

[T]he 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 . . . . *Yick Wo v. Hopkins* (1886).

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require “strict scrutiny.” . . . But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause.\* . . .

I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State’s ban on illicit sexual relationships. Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. *Cf. Yick Wo v. Hopkins* (1886). . . .

A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posted by Connecticut . . . .

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\* 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. . . . [Justice White then cited a variety of cases, including *Pierce v. Society of Sisters*.]

**Justice Black, with whom Justice Stewart joins, dissenting.**

. . . 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.” . . .

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term “right of privacy” as a comprehensive substitute for the Fourth Amendment’s guarantee against “unreasonable searches and seizures.” “Privacy” is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. . . . I 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. . . .

[M]y 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,<sup>4</sup> 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. . . . While I completely subscribe to the holding of *Marbury v. Madison* (1803) 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

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<sup>4</sup> A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which “shocks the conscience,” *Rochin v. California* (1952), sufficiently to “shock itself into the protective arms of the Constitution,” *Irvine v. California* (1954) (Clark, J., concurring). It has been urged that States may not run counter to the “decencies of civilized conduct,” *Rochin*, or “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Snyder v. Massachusetts* (1934), or to “those canons of decency and fairness which express the notions of justice of English-speaking peoples,” *Malinski v. New York* (1945) (Frankfurter, J., concurring), or to “the community’s sense of fair play and decency,” *Rochin*. It has been said that we must decide whether a state law is “fair, reasonable and appropriate,” or is rather “an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts,” *Lochner v. New York* (1905). States, under this philosophy, cannot act in conflict with “deeply rooted feelings of the community,” *Haley v. Ohio* (1948) (Frankfurter, J., concurring), or with “fundamental notions of fairness and justice,” *id.* . . . Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can “not tolerate.” *Linkletter v. Walker* (1965).

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 Due Process Clause with an “arbitrary and capricious” or “shocking to the conscience” formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. *See, e.g., Lochner v. New York* (1905). 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* (1937). . . .

### **Justice Stewart, whom 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. . . . [A]s 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. . . .

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. . . .

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 . . . 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. . . .

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.

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### Notes and Questions

1. How did each of the Justices resolve the dispute in *Griswold*? What *source of law* did they invoke? Why? How does this relate to broader debates about “incorporation”? And what doctrine rules applied when considering the constitutionality of the Connecticut restriction?
  2. How did the majority opinion identify the right at issue? What were the boundaries of that right?
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## 3.3. Abortion Rights, Part I

Abortion rights are, of course, a tremendously contested area of constitutional law. Throughout these assignments, it is essential to think *critically*. In particular, try to identify potential weaknesses in the Court’s approach, both from the standpoint of those who *favor* abortion rights and those who *oppose* these rights.

### The Constitutional Basis for Abortion Rights

*Roe*, like every case, emerged in a particular context. From a societal standpoint, the women’s rights movement was gaining steam—many states were liberalizing their abortion laws, and Congress had just passed the Equal Rights Amendment. But entrenched obstacles remained, and courts offered hope of accelerated progress. Indeed, constitutional rights had grown considerably during the Warren Court (1953 to 1969), raising the possibility that a host of disfavored laws, including abortion restrictions, might be judicially overruled.

But what shape would constitutional challenges to abortion laws take? For the most part, pregnancy is a condition that uniquely affects women, and so we might wonder whether the Equal Protection Clause could support abortion rights. In *Reed v. Reed* (1971), however, a unanimous Court had applied only rational-basis scrutiny to review a gender-discriminatory law, and it was not until 1973—after *Roe* was argued—that some justices began advocating a more rigorous standard of review in sex-discrimination cases.

Consequently, the challengers in *Roe* drew support for abortion rights from another source: *Griswold v. Connecticut* (1965). As we have seen, *Griswold* recognized a constitutional right to *privacy*. But what, precisely, was the essence of that right? In particular, had the Court focused on sexual *intimacy*—the privacy of having consensual sex without state intervention—or had it located a broader constitutional right to sexual *autonomy*—a right that might extend beyond the bedroom?

During the oral argument in *Griswold*, the challenger’s lawyer sought to distinguish contraception from abortion:

**Justice Black:** Would your argument concerning these things you’ve been talking about, relating to privacy, invalidate all laws that punish people for bringing about abortions?

**Counsel:** No, I think it would not cover the abortion laws or the sterilization laws, Your Honor. Those—that conduct does not occur in the privacy of the home.

**Justice Black:** There is some privacy, as a rule, and the individual doesn't usually want it made known. It's a private thing.

**Counsel:** Well, that aspect of it is true, Your Honor, but those are offenses which do not involve the type of enforcement apparatus as to what goes on in the home.

**Justice Black:** Part of it goes on in the home, undoubtedly.

**Counsel:** Part of it does, Your Honor, but the conduct that is being prohibited in the abortion cases takes place outside of the home, normally. There is no violation of the sanctity of the home.

**Justice Brennan:** Well, apart from that, [counsel], I take it abortion involves killing a life in being, doesn't it? Isn't that a rather different problem from contraception?

**Counsel:** Oh, yes, of course.

**Justice Brennan:** And isn't it different in the sense of the State's power to deal with it?

**Counsel:** Oh, yes. Of course, the substantive offense is quite different here.

**Justice Black:** Are you saying that all abortions involve killing—murder?

**Counsel:** Well, I don't know whether you need characterize it that way, but it involves taking what has begun to be a life.

Undeterred, a 26-year-old law professor named Roy Lucas wrote an article in 1968 that emphasized ambiguities—and thus possibilities—in the Court's reasoning:<sup>1</sup>

Utilizing a necessarily vague “privacy” formulation[,] the Court has carved out . . . areas of human activity into which government is forbidden to probe. . . . The applicability of these principles to state abortion legislation will be at the heart of any effort by the medical profession to achieve abortion reform by challenging a state's authority to prohibit the termination of pregnancy when a woman so desires and her physician finds it necessary in his sound medical judgment. . . . The values implicit in the Bill of Rights suggest that the decision to bear or not bear a child is a fundamental individual right not subject to legislative abridgement—particularly in light of *Griswold v. Connecticut*. Several clauses in the first amendment suggest underlying policies which open to question the validity of abortion statutes. While the guarantees of free speech and free exercise of religion primarily protect the expression of ideas and beliefs, they provide substantial protection for the acting out of personal ideas and beliefs. . . . A fourth amendment right of marital privacy, partially relied on in the *Griswold* case, also appears in the abortion controversy. If the right of the parents to plan the size and time of arrival of children is within the scope of this marital privacy, the state's threat of prosecution in cases of pregnancy terminated by abortion is an intrusion into that privacy. . . . *Griswold*, on its facts, protected a general interest in planning a family without state interference.

Using these arguments, Lucas (quite the enterprising law professor) brought a series of cases challenging state abortion laws. The first of these was filed within the Second Circuit, and Judge Henry

<sup>1</sup> Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, N.C. L. Rev. (1968).

Friendly—one of the most widely acclaimed federal judges—drafted the opinion on appeal.<sup>2</sup> Lucas's arguments went nowhere with Judge Friendly:

[T]he *Griswold* decision would not seem to afford even a slender foundation. . . . A holding that the privacy of sexual intercourse is protected against governmental intrusion scarcely carries as a corollary that when this has resulted in conception, government may not forbid destruction of the fetus. The type of abortion the plaintiffs particularly wish to protect against governmental sanction is the antithesis of privacy. The woman consents to intervention in the uterus by a physician, with the usual retinue of assistants, nurses, and other paramedical personnel. . . .

Plaintiffs say that to confine *Griswold* to the protection of marital privacy is to read the case too narrowly. They regard it as having established a principle that a person has a constitutionally protected right to do as he pleases with his—in this instance, her—own body so long as no harm is done to others.

Apart from our inability to find all this in *Griswold*, the principle would have a disturbing sweep. Seemingly it would invalidate a great variety of criminal statutes which existed generally when the 14th Amendment was adopted and the validity of which has long been assumed, whatever debate there has been about their wisdom. Examples are statutes against attempted suicide, homosexual conduct (at least when this is between consenting unmarried adults), bestiality, and drunkenness unaccompanied by threatened breach of the peace. Much legislation against the use of drugs might also come under the ban. . . . Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer's *Social Statics*. No more did it enact J. S. Mill's views on the proper limits of law-making.

When New York changed its abortion law in 1970, however, the case was mooted, and Judge Friendly never issued the opinion.

Very soon, however, another case—*Roe v. Wade*—reached the Supreme Court. While *Roe* was under consideration, *Eisenstadt v. Baird* (1972) held that the Equal Protection Clause prohibits states from banning *unmarried* persons, but not married persons, from using contraception. In a revealing passage, the Court offered the following interpretation of *Griswold*:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the 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.

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### Roe v. Wade (1973)

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

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones

<sup>2</sup> A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, Harv. J. L. & Pub. Pol'y (2006).

of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. . . .

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. . . .

[A]ppellant 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. . . . The Court’s decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . State[s] 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. . . .

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. . . . Where certain “fundamental rights” are involved, . . . 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. . . .

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. . . .

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 nonresident 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 . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. . . .

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.

**[The other opinions are omitted.]**

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### Notes and Questions

1. What was the constitutional provision at issue? In terms of *interpretation* (not getting to implementation), what did that provision *mean*? Did it impose a ban on arbitrary or partial laws? Something else? And what *implementation* rules did the Court use, and why? In particular, how did the Court justify its “trimester” approach to abortion rights? What rules applied to abortion restrictions within each trimester?

2. *Roe* claims to be grounded on a certain type of neutrality, under which the state may not defend restrictions on a woman’s fundamental right by making a constable moral claim about the need to preserve the life of the fetus. Where does that obligation of neutrality come from? Do the justices succeed in maintaining it themselves?

3. At the time of *Roe*, social awareness and acceptance of non-cisgender identities was low. Today there is more recognition of trans and non-binary gender identities—that is, that some persons have a gender identity that does not match their sex at birth. Although it remains true that only persons with a female reproductive system can bear children—and that the vast majority of such persons identify as women—conventional claims about the rights of “women” are thus problematic. Consequently, some people now refer to abortion rights in terms of the rights of “pregnant persons.”

At the same time, however, it is also problematic to use terminology that glosses over the gendered dynamics of abortion regulation. For a historical discussion, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, Stan. L. Rev. (1992), which is excerpted below.

In my own view, it is fine to refer to abortion rights either in terms of the rights of “women” or in terms of the rights of “persons”—recognizing that people disagree in good faith on which terminology to use. At the same time, it is also important to acknowledge that both terms are problematic in certain respects.

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### An Alternative Justification

*Roe* proved highly controversial across the political spectrum. John Hart Ely described *Roe* as “a very bad decision,” not because of any disagreement with *Roe*’s outcome—a pro-choice policy that Ely personally favored—but rather “because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”<sup>1</sup>

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<sup>1</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, Yale. L.J. (1973).

But what about alternative justifications for recognizing constitutional abortion rights? By far the most prominent of these is the notion that abortion restrictions are a form of gender discrimination. Here's what then-Judge Ruth Bader Ginsburg wrote in 1984:<sup>2</sup>

I believe the Court presented an incomplete justification for its action. Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention. Professor [Kenneth] Karst's commentary is indicative of the perspective not developed in the High Court's opinion; he solidly linked abortion prohibitions with discrimination against women. The issue in *Roe*, he wrote, deeply touched and concerned "women's position in society in relation to men." . . .

For a counter-argument, consider what Professor Ely had to say:

In his famous *Carolene Products* footnote, Justice Stone suggested that the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of "discrete and insular minorities" unable to form effective political alliances. There can be little doubt that such considerations have influenced the direction, if only occasionally the rhetoric, of the recent Courts. . . .

[But] *Roe* is not an appropriate case for their invocation. Compared with men, very few women sit in our legislatures, a fact I believe should bear some relevance . . . to the appropriate standard of review for legislation that favors men over women. But *no* fetuses sit in our legislatures. Of course they have their champions, but so have women. . . . [T]he proposal in *Carolene Products* was clearly intended and should be reserved for those interests which, as compared with the interests to which they have been subordinated, constitute minorities unusually incapable of protecting themselves. Compared with men, women may constitute such a "minority"; compared with the unborn, they do not.

Which view is more persuasive? A possible weakness in Ely's analysis is his treatment of fetuses as deserving protection within the rubric of Footnote 4. Is that a viable premise? Analysis within the *Carolene Products* framework, Professor David Strauss has argued,<sup>4</sup> should favor heightened scrutiny for abortion restrictions because:

the interests of the fetus and the interests of women are not symmetrical. The argument that women are systematically subordinated now, and therefore would be at risk of further subordination if the abortion decision were made by society, does not depend on any claims about radically uncertain matters. . . . The argument that fetuses are subordinated depends on a premise about the status of fetal life, a radically uncertain matter.

Is it relevant whether abortion regulations, as a historical matter, emerged in a culture permeated by retrograde views about gender roles? Consider Reva Siegel's argument for a gender-based approach to abortion rights:<sup>5</sup>

Restricting women's access to abortion implicates constitutional values of equality as well as privacy. . . . A growing number of commentators have begun to address abortion regulation as an issue of sexual equality, articulating concerns scarcely recognized in prevailing accounts

<sup>2</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, N.C. L. Rev. (1985).

<sup>4</sup> David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, Sup. Ct. Rev. (1992).

<sup>5</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, Stan. L. Rev. (1992).

of abortion as a right of privacy. Properly understood, constitutional limitations on antiabortion laws, like constitutional limitations on antimiscegenation laws, have moorings in both privacy and equal protection.

There are, however, substantial impediments to analyzing abortion-restrictive regulation in an equal protection framework, which few proponents of the claim have confronted. The Court has yet to characterize laws governing pregnancy as sex-based state action for purposes of equal protection review; but, even if it did so, a deeper jurisprudential problem remains. The Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender. . . .

Abortion-restrictive regulation can be analyzed as an expression of sex discrimination: as legislation that reflects traditional sex-role assumptions about women and presents problems of gender bias discernible in other forms of sex-based state action. But to perform this analysis, it is necessary to break out of the physiological paradigms in which the Court reasons about reproductive regulation in *both* privacy and equal protection law. More than any doctrinal factor, it is the physiological framework in which the Court reasons about reproductive regulation that obscures the gender-based judgments that may animate such regulations and the gender-based injuries they can inflict on women. When abortion-restrictive regulation is analyzed in physiological paradigms, as past cases have shown, the inquiry focuses on questions concerning gestation. By contrast, if restrictions on abortion are analyzed in a social framework, they present questions concerning the regulation of motherhood, and, thus, value judgments concerning women's roles. . . .

Those who advocated restricting women's access to abortion in the nineteenth century were interested in enforcing women's roles, an objective they justified with arguments concerning women's bodies. Analyzing the historical record reveals how social discourses concerning women's roles have converged with physiological discourses concerning women's bodies, as two distinct but compatible ways of reasoning about women's obligations as mothers. When issues which we habitually conceptualize in terms of women's bodies are reconsidered in light of this history, it is possible to see that they in fact involve questions concerning women's roles. Considered from this perspective, abortion-restrictive regulation presents many of the concerns that have traditionally triggered heightened equal protection scrutiny.

How does Siegel's analysis relate to the competing understandings of equality that we studied in our exploration of equal protection?

These debates will continue to swirl in academic circles. On the Court, however, doctrine on this issue has been stable for decades. Taking a gender-discrimination approach to abortion would likely require overturning *Geduldig v. Aiello* (1974).

### A Note on Standing

*Roe* relied heavily on the notion that women should make reproductive decisions *in consultation with their doctors*. And many legal challenges to abortion laws have been suits by doctors, not patients. This type of legal challenge was accepted early on by the Court using the theory of *jus tertii* standing:

The closeness of the relationship is patent. . . . A woman cannot safely secure an abortion without the aid of a physician. . . . The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade*. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision. As

to the woman's assertion of her own rights, there are several obstacles. For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim [because litigation takes a lot longer than pregnancy]. . . . For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.

*Singleton v. Wulff* (1976) (plurality opinion). This principle remains good law. And it is an important aspect of abortion-rights litigation, since individual women might not be able or willing to litigate cases that involve abortion rights, whereas doctors are more likely to have the resources to litigate these cases more quickly and perhaps more effectively.

Putting aside the issue of standing, however, the Court has moved away—at least in some respects—from its doctor-oriented approach to abortion rights. The shift came in the famous case of *Planned Parenthood v. Casey* (1992), which involved a challenge to a slew of abortion-restricting provisions in Pennsylvania. One of the issues presented was whether to overturn *Roe*. As you read, consider the same questions mentioned in the notes following *Roe*.

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## Planned Parenthood v. Casey (1992)

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**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.**

### I

. . . 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.

### II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . 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. . . .

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* (1967). . . . 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. . . .

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . 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. . . .

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. . . .

### III

[In Part III, the Court assessed *stare decisis* at length. Because this topic is covered in most introductory constitutional law courses, and discussed further in *Dobbs*, it is omitted here.]

### IV

[C]riticism . . . 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. . . .

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*. . . . 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. . . . [T]here 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, but this is an imprecision within tolerable limits. . . . 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. . . .

On the other side of the equation is the interest of the State in the protection of potential life. . . . 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. . . .

[However, the trimester framework] was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers. . . . We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. . . . 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*. . . .

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. . . .

[T]he 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. . . . 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. . . . 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.

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. . . .

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. . . .

## V

We now consider the separate statutory sections at issue.

## A

[W]e begin with the statute’s definition of medical emergency. . . . [T]he 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 Court then interpreted the Pennsylvania statute in a way that avoided any conflict with this principle.*]

## B

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.” . . .

[M]ost 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. . . . [W]e 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. . . .

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[,] . . . [and] 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. . . . [A]s 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. . . . [W]e 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. . . .

## C

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.

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 . . . [and] may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. . . . 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. . . .

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. . . . We disagree with respondents' basic method of analysis. . . . 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. 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. . . . [I]n 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. . . .

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." *Planned Parenthood v. Danforth* (1976). . . . Before birth, however, . . . [i]t 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. . . .

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. *Hoyt v. Florida* (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution. . . .

## D

. . . 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. . . .

## E

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. . . .

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.

[*The dissents are only briefly excerpted to highlight particular points.*]



**Chief Justice Rehnquist, with whom Justices White, Scalia, and Thomas join, concurring in the judgment in part and dissenting in part.**

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. . . .

[W]hile 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. . . .

Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision “might operate unconstitutionally under some conceivable set of circumstances.” *United States v. Salerno* (1987). 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.<sup>2</sup>

**Justice Scalia, with whom Chief Justice Rehnquist, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part.**

[T]he 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

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<sup>2</sup> The joint opinion . . . appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision. In most instances the notification requirement operates without difficulty. . . . In other instances [like pregnancies resulting from sexual assault] where a woman does not want to notify her husband, the Act provides exceptions. . . .

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a “large fraction” of those cases, the notification provision operates as a substantial obstacle, and that the provision is therefore invalid. . . .

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 joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, *see R. A. V. v. St. Paul* (1992); *Employment Div., Dep't of Human Resources of Ore. v. Smith* (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory. . . .

[T]he 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 standard-less nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. . . .

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. . . . 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. . . .

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. . . .

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### Notes and Questions

1. What did *Casey* retain from *Roe*? What did it reject or change?
2. What did the plurality in *Casey* mean by an “undue burden”? Did the plurality call for a particular level of scrutiny? Or did it replace a tiers-of-scrutiny approach to abortion rights with something else?
3. The *Casey* plurality opinion reaffirmed that laws restricting abortions *after* fetal viability must “contain[ ] exceptions for pregnancies which endanger the woman’s life or health.” But what about the interest in maternal life and health *before* that point? Based on concerns about maternal health, could doctors employ any abortion procedure they deemed safest? Or did states have authority, based on moral concerns, to limit *how* abortions were performed?

Initially, in *Stenberg v. Carhart* (2000), the Supreme Court held that *Casey* provides the doctor with substantial (but not “unfettered”) discretion to select the abortion procedure best suited to safeguarding maternal life and health. “[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,” Justice Breyer explained, “*Casey* requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”

After Justice O’Connor retired, Justice Kennedy became the “swing vote” in abortion cases, and the Court quickly reconsidered *Stenberg*. In *Gonzales v. Carhart* (2007), the Court upheld the federal Partial-Birth Abortion Ban Act of 2003, which prohibited a type of abortion procedure commonly known as a “partial birth” abortion. Justice Kennedy—who had dissented in *Stenberg*—wrote for the majority in *Carhart*, explaining that “the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” Later in the opinion, Justice Kennedy further explained that medical judgments were not ones wholly left to individual doctors, at least when considering the facial validity of a statute. “The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.” In other words, the Court in *Gonzales* used medical uncertainty as a basis for deferring to *legislative* judgment, thus departing from *Stenberg*, which held that in situations of medical uncertainty the choice of procedure had to be left to the judgment of each doctor.

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### Abortion and Unconstitutional Conditions

One of the trickiest parts of rights jurisprudence is “unconstitutional conditions.” The problem arises when the government withholds a public benefit that isn’t constitutionally required (*e.g.*, public transportation) based on a person’s exercise of a constitutional right. For instance, suppose the government provided public transportation to any person unless that person is traveling to church. Would that be constitutional? Or what if the government sets up a bus service to take people only to public schools (and not to church)?

For parts of American history, jurists addressed this problem by distinguishing between “rights” and “privileges.” For example, preventing communists from having access to government-subsidized mailing rates was okay under the First Amendment, even though directly punishing them for distributing pamphlets would not be. *See United States v. Burleson* (1921). As legal realism emerged in the early 1900s, however, the rights/privileges distinction came under sustained attack. *All* law, the realists insisted, was created by the government, and therefore even common-law protections were a

form of governmental benefit. Consequently, the baseline expanded. Mere privileges, the Court began to insist, could not be conditioned on the waiver of constitutional rights. “A state is without power to impose an unconstitutional requirement as a condition for granting a privilege,” Justice Sutherland wrote in *Frost v. Railroad Commission* (1926). Yet conditions that implicate constitutional rights are sometimes still okay.

Unconstitutional-conditions doctrine is an area of the law that often remains unclear. Unconstitutional-conditions cases, one scholar notes, have “manifested an inconsistency so marked as to make a legal realist of almost any reader.”<sup>1</sup> Indeed, upon close inspection, some important aspects of current doctrine simply don’t make sense.

To help simplify matters, however, we can split unconstitutional-conditions doctrine into two discrete steps: scope and strength.

### Scope Analysis

Here’s the usual test at the scope stage: Is the government *leveraging* the receipt of a benefit against the sacrifice of a constitutional right, or is the government simply *not subsidizing* the exercise of a constitutional right?

Leveraging occurs when something that the rights-holder is otherwise entitled to receive is withheld because of their decision to exercise a constitutional right. For instance, suppose that every child is entitled to a free public education. Then suppose that a statute says that “children who attend church are not eligible for public education.” It would be hard to argue that public education is a subsidy for church attendance. Rather, in this situation, the government is *leveraging* the child’s receipt of a benefit against the sacrifice of a constitutional right.

Leveraging the sacrifice of a right against the receipt of a benefit is *sometimes* constitutional. That is important: *Not all leveraging is unconstitutional!* Therefore, further analysis (in step two) is required if the government is engaged in leveraging.

By contrast, suppose the government provides health insurance for medically necessary procedures *except for* medically necessary abortions. In that circumstance, is the government leveraging the receipt of a benefit against the sacrifice of a right, or is it merely choosing not to subsidize the exercise of that right? The Supreme Court considered this issue in *Harris v. McRae* (1980). According to the majority, the government’s decision not to subsidize abortion did not violate the Due Process Clause because the government was not depriving anyone of “liberty” or “property” within the meaning of that Clause. The Court explained:

[I]t simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no

<sup>1</sup> Seth Kreimer, *Allocation Sanctions: The Problem of Negative Rights in a Positive State*, U. Pa. L. Rev. (1984).

health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.<sup>19</sup>

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.

Thus, if the government is merely deciding not to subsidize someone's activity, that scenario does not even implicate the Due Process Clause. The situation, in other words, is outside the scope of due-process doctrine.

Notice that if abortion rights were instead based on the Equal Protection Clause, then *Harris v. McRae* would be harder to resolve. That is because the *scope* of the Equal Protection Clause (covering all governmental classifications) is broader than the scope of due-process rights (covering only governmental deprivations of life, liberty, or property).

### Strength

Although leveraging is generally a *necessary* condition for identifying an unconstitutional condition, it is not a *sufficient* condition. Rather, if the government leverages the receipt of an otherwise available benefit against the recipient's sacrifice of a constitutional right, the government may still attempt to defend the condition in either (or both) of the following two ways:

First, the government can prevail if it could impose the condition directly, even without considering the recipient's (otherwise voluntary) decision to receive funds. (*Note*: The Court took this approach in a well-known speech and associational rights case, *Rumsfeld v. FAIR* (2006), that appears later in this casebook.)

Second, the government can prevail if it satisfies each of the three aspects of unconstitutional-conditions doctrine. Those are:

- a) *Germaneness*: Is the condition related to the benefit's purpose? In cases outside the First Amendment context, the Court has been very lenient about which conditions are "germane." See *South Dakota v. Dole* (1987) (holding that a condition that states raise the drinking age to 21 was germane to the purpose of federal highway funds, since raising the drinking age was related to highway safety).
- b) *Coercion*: Is the governmental benefit "too good to refuse"? In other words, does the rights holder lack any realistic choice not to accept the funds—and therefore effectively must accept the condition? See *N.F.I.B. v. Sebelius* (2012) (Roberts, C.J.) (holding that states lacked any realistic opportunity to decline all Medicaid funding).
- c) *Governmental purpose*: Some rights limit the *reasons* that the government may restrict the exercise of a right. In speech cases, for instance, this prong of the analysis usually asks whether the condition suppresses or compels the expression of certain *viewpoints*, since the Speech Clause is understood to disallow viewpoint discrimination. But not all constitutional rights

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<sup>19</sup> . . . A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. . . . But the Hyde Amendment . . . does not provide for such a broad disqualification from receipt of public benefits. . . . [It] represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

limit the range of interests that the government is allowed to pursue. Returning to *Harris v. McRae* (1980), for instance, the Court stated (in reference to the claimant’s equal-protection claim, since the due-process claim failed at the scope stage) that the government has a “legitimate interest in protecting the potential life of the fetus.” Thus, the structure of a constitutional right—and particularly whether it disallows certain governmental motives or instead immunizes certain forms of individual behavior—can have profound implications for unconstitutional-conditions analysis.

One note of caution: Unconstitutional-conditions doctrine is famously difficult and opaque. The three prongs outlined above are based on my own effort to synthesize current caselaw. And although I think that this synthesis is accurate, it is not widely recognized. Most judges won’t know what you mean if you refer to the “three prongs of unconstitutional-conditions analysis.” Rather, you will need to build the framework for the judge by explaining each prong and offering supportive cases.

Finally, although the prongs of unconstitutional-conditions analysis include “coercion”—asking essentially whether the benefit is “too good to refuse”—it is worth noting that the Court’s framing of this prong is deeply problematic. A few simple examples illustrate the point. If the government creates an *extremely good* public-schooling system, does that violate the Constitution by effectively coercing parents not to exercise their constitutional right to send their kids to private schools? Or if the government offers employment to persons in *dire financial straits*, does their effective inability to decline the offer indicate that the government’s condition—an agreement to work in exchange for money—violates the Thirteenth Amendment’s ban on involuntary labor? These questions answer themselves. And the basic point here is that, at least from a philosophical standpoint, one can’t properly identify what counts as “coercion” without taking account of whether it is *rightful* to make certain offers. At least for now, though, coercion in the “too good to refuse” sense remains one of the ways of identifying an unconstitutional condition.

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### Practice Questions

#### Question 1.

A state provides welfare benefits to anyone whose income is below a certain threshold “unless that person is married to someone of the same sex.” Is this law constitutional?

- A. Yes, because the state does not have a constitutional obligation to provide welfare benefits.
- B. Yes, because the government may protect traditional marriage.
- C. No, because the reasons for the denial of welfare benefits are unrelated to same-sex marriage.
- D. No, because the government may not establish any criteria for welfare other than income.

#### Question 2.

Suppose that while *Roe v. Wade* was still “good law,” a state passed a statute creating state funding for public and private hospitals to use for a doctor-training program, but the statute specified that the funding “may not be used for abortion-related training.” Was this statute constitutional?

- A. Yes, because the state does not have to provide funding at all.
  - B. Yes, because the government may stipulate how public funds are used.
  - C. No, because the reasons for the training program are unrelated to protecting fetal life.
  - D. No, because the government may not discriminate against abortion-related training.
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### 3.4. Identifying Fundamental Rights, Part I

The following four cases—*Bowers v. Hardwick* (1986), *Washington v. Glucksberg* (1997), *Lawrence v. Texas* (2003), and *Obergefell v. Hodges* (2015)—address recurring issues in substantive due process doctrine: How should courts identify fundamental rights? At what level of generality should courts recognize fundamental rights? Should fundamental rights turn on the judges’ own views? What roles do history and tradition play in this analysis? As you read, keep track of how the various justices would answer these questions. What are the strengths and weaknesses of the different approaches?

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#### Bowers v. Hardwick (1986)

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

In August 1982, respondent [Michael] Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent’s home. [*The prosecutor later decided not to pursue the case, and Hardwick then filed a civil suit to enjoin enforcement of the statute.*] . . .

Relying on our decisions in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Stanley v. Georgia* (1969); and *Roe v. Wade* (1973), the [Court of Appeals held] that the Georgia statute violated respondent’s fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. . . . [*The Supreme Court then granted certiorari.*]

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court’s role in carrying out its constitutional mandate. . . .

[N]one of the rights announced in [*Griswold, Roe, etc.*] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. . . .

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language . . . .

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia* (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an



inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.<sup>8</sup>

**Justice Blackmun, with whom Justices Brennan, Marshall, and Stevens join, dissenting.**

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, than *Stanley v. Georgia* (1969) was about a fundamental right to watch obscene movies, or *Katz v. United States* (1967) was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.” *Olmstead v. United States* (1928) (Brandeis, J., dissenting).

The statute at issue denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that [it] is valid essentially because “the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time.” . . . Like Justice Holmes, I believe that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Holmes, *The Path of the Law*, Harv. L. Rev. (1897). I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an “abominable crime not fit to be named among Christians.” *Herring v. State* (Ga. 1904).

**I**

. . . I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that [Georgia law] interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed.<sup>2</sup> . . .

<sup>8</sup> Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

<sup>2</sup> . . . Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a “disease” or disorder. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual’s personality. Consequently, . . . the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual’s ability to make constitutionally protected decisions concerning sexual relations is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause’s applicability . . . , I note that Georgia’s exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo v. Hopkins* (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend [the law] on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class.

## II

. . . In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. The case before us implicates both the decisional and the spatial aspects of the right to privacy.

### A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference “bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case.” While it is true that these cases may be characterized by their connection to protection of the family, the Court’s conclusion that they extend no further than this boundary ignores the warning in *Moore v. East Cleveland* (1977) (plurality opinion), against “clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause.” We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life. . . . And so we protect the decision whether to marry precisely because marriage “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” *Griswold v. Connecticut* (1965). We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . .

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: “There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.” *Wisconsin v. Yoder* (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

### B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court’s treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. . . .

The Court's interpretation of the pivotal case of *Stanley v. Georgia* (1969) is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. . . . "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." *Olmstead v. United States* (1928) (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. . . . Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

### III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. . . .

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Inasmuch as this case was dismissed by the District Court on the pleading, it is not surprising that the record before us is barren of any evidence to support petitioner's claim. In light of the state of the record, I see no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," to which *Stanley* refused to extend its protection. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless": drugs and weapons are inherently dangerous, and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by [the ban on sodomy] to be physically dangerous, either to the persons engaged in it or to others.<sup>4</sup>

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<sup>4</sup> Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest. . . .

The core of petitioner's defense . . . , however, is that respondent and others who engage in [sodomy] interfere with Georgia's exercise of the "right of the Nation and of the States to maintain a decent society." *Paris Adult Theater I v. Slaton* (1973). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in [the Georgia law] "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's security. *See, e.g., Roe v. Wade* (1973); *Loving v. Virginia* (1967); *Brown v. Board of Education* (1954). . . .

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved cannot provide an adequate justification . . . . That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. *See, e.g., McGowan v. Maryland* (1961); *Stone v. Graham* (1980). . . . A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. . . . *Palmore v. Sidoti* (1984). . . .

Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, *Immorality and Treason* (1959). . . . Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. . . .

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently. . . .

**[The concurring opinions of Chief Justice Burger and Justice White and the dissenting opinion of Justice Stevens are omitted.]**

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### Notes and Questions

1. *Bowers* was important not only for its specific holding but also what it said about the *method* for identifying fundamental rights under the rubric of substantive due process. What was the majority's methodological position? How did the majority define the right at issue? And how did it determine whether that right was fundamental? What was the dissenters' approach to these issues? What are the strengths and weaknesses of the respective methods?

2. Because the majority held that the right at issue was not fundamental, it applied only rational-basis review. What was the government's asserted interest? Why was it deemed legitimate?

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In the following case, the Court continued to consider the proper method for identifying fundamental rights for purposes of substantive-due-process doctrine.

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**Washington v. Glucksberg (1997)**

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

The question presented in this case is whether Washington’s prohibition against “caus[ing]” or “aid[ing]” a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington’s first Territorial Legislature outlawed “assisting another in the commission of self-murder.” Today, Washington law provides: “A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” “Promoting a suicide attempt” is a felony . . . . At the same time, Washington’s Natural Death Act, enacted in 1979, states that the “withholding or withdrawal of life-sustaining treatment” at a patient’s direction “shall not, for any purpose, constitute a suicide.” . . .

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. [R]espondents . . . sued in the United States District Court, seeking a declaration that [the statute banning assisted-suicide] is, on its face, unconstitutional.

**I**

We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices. *See, e.g., Planned Parenthood v. Casey* (1992); *Cruzan v. Dir., Mo. Dep’t of Health* (1990); *Moore v. East Cleveland* (1977) (plurality of opinion) (noting importance of “careful respect for the teachings of history”). In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. 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. . . .

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. [*Chief Justice Rehnquist then reviewed a variety of sources from England and the United States, noting that although American law had long since stopped harshly punishing individuals for committing suicide, it also did not accept the legality of suicide. “[R]ather, . . . this change reflected the growing consensus that it was unfair to punish the suicide’s family for his wrongdoing.”*]

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. 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. . . . 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 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 . . . .”

[I]n 1994, voters in Oregon enacted . . . through ballot initiative . . . [the] “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, . . . 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. . . .

[O]ur 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.

## II

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* (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson* (1942); to direct the education and upbringing of one’s children, *Meyer v. Nebraska* (1923); *Pierce v. Soc’y of Sisters* (1925); to marital privacy, *Griswold v. Connecticut* (1965); to use contraception, *id.*; *Eisenstadt v. Baird* (1972); to bodily integrity, *Rochin v. California* (1952); and to abortion, *Planned Parenthood v. Casey* (1992). We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted life saving medical treatment. *Cruzan v. Dir., Mo. Dep’t of Health* (1990).

But we “ha[ve] always been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this unchartered area are scarce and open-ended.” *Collins v. City of Harker Heights, Tex.* (1992). 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,” *id.*, 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,” *id.* (plurality opinion), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” *Palko v. Connecticut* (1937). 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 “guide posts for responsible decisionmaking,” *Collins*, that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores* (1993).

Justice Souter, relying on Justice Harlan’s dissenting opinion in *Poe v. Ullman* (1961), 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 . . . 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.” *Cruzan*. 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 . . . 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. . . .

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.” 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 persistive vegetative state, “ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment” at her parents’ request. We began with the observation that “[a]t common law, even the touching of one person by another without consent and without legal justification was a battery.” We then discussed the related rule that “informed consent is generally required for medical treatment.” After reviewing a long line of relevant state cases, we concluded that “the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.” Next, we reviewed our own cases on the subject, and stated that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.” Therefore, “for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse life saving 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. . . .

The right assumed in *Cruzan* . . . 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. . . .

Respondents also rely on *Casey*. . . [R]espondents 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*." *Casey* (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973), 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. . . . Washington's assisted-suicide ban implicates a number of state interests.

First, Washington has an "unqualified interest in the preservation of human life." *Cruzan*. . . . 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. 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. The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. . . .

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." . . .

Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. . . . 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.

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. . . . [W]hat 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. . . .

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. . . .

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. . . .

#### **Justice Souter, concurring in the judgment.**

. . . The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause of the Fourteenth Amendment. *Poe v. Ullman* (1961) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one. . . .

*[Justice Souter then reviewed the history of substantive due process cases, concluding with a lengthy discussion of Justice Harlan's dissenting opinion in Poe v. Ullman (1961). From this history, Justice Souter argued, first, that substantive due process is legitimate and, second, that it requires careful application. Judges should not look for "extratextual absolutes" but instead should recognize that these cases involve "clashing principles." "It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise." Consequently, judges should hold legislation unconstitutional only "when it falls outside the realm of the reasonable."]*

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See *Planned Parenthood v. Casey* (1992). That understanding begins with a concept of "ordered liberty," *Poe v. Ullman* (1961) (Harlan, J., dissenting); see also *Griswold v. Connecticut* (1965), comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," *Poe* (Harlan, J., dissenting). [*According to Justice Harlan:*]

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.

[T]his enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. *See, e.g., United States v. Carolene Products Co.* (1938) (economic legislation “not . . . unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis”). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on . . . interests in liberty sufficiently important to be judged “fundamental.” *Poe* (Harlan, J., dissenting). 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.”

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. . . .

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.” *Id.* Exact analysis and characterization of any due process claim are critical to the method and to the result. . . .

The same insistence on exactitude lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counterclaims, and the demand for fitness and proper tailoring of a restrictive statute is just another way of testing the legitimacy of the generality at which the government sets up its justification. . . . [H]ere 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. . . .

The argument supporting respondents’ position . . . 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* (Harlan, J., dissenting). . . . 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 . . . .

In my judgment, the importance of the individual interest here . . . 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 . . . 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. . . . 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. . . .

Legislatures . . . have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for fact finding than the Judiciary, but their mechanisms include the power to experiment . . . .

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.

**[The concurring opinions of Justice Stevens, Justice O'Connor, Justice Ginsburg, and Justice Breyer are omitted.]**

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### Notes and Questions

1. Although drawing on the reasoning in *Bowers*, the majority in *Glucksberg* was even more explicit about the proper *method* to use in identifying fundamental rights. What was its position? How did the majority define the right at issue? And how did it determine whether that right was fundamental?

2. Justice Souter's concurring opinion is challenging to understand, but it offers an interesting alternative to the majority's approach. What method does Souter embrace for identifying fundamental rights? What are the strengths and weaknesses of his approach compared to the majority's?

3. A curious aspect of *Bowers* and *Glucksberg* is the apparent agreement among the Justices about the existence of "substantive due process" rights. Do the opinions in these cases offer any clues about where these rights come from? If the *scope* of the right to "liberty" recognized in the Due Process Clauses includes fundamental and non-fundamental liberty, by what authority can judges distinguish (in terms of *strength*) between fundamental and non-fundamental liberty?

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## 3.5. Identifying Fundamental Rights, Part II

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### Lawrence v. Texas (2003)

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#### **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.

## I

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 [*i.e.*, *homosexual sodomy*]. . . .

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

## II

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 v. Hardwick* (1986).

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut* (1965).

In *Griswold*, the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

After *Griswold* it was established [in *Eisenstadt v. Baird* (1972)] that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. . . .

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade* (1973). . . . *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person. . . .

The facts in *Bowers* had some similarities to the instant case. . . . The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. . . .

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution

the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: “Proscriptions against that conduct have ancient roots.” In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy . . . [E]arly American sodomy laws were not directed at homosexuals . . . but instead sought to prohibit nonprocreative sexual activity more generally. . . .

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. . . . 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals. . . .

The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. . . .

It was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them.

In summary, the historical grounds relied upon in *Bowers* . . . are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.” *Planned Parenthood v. Casey* (1992).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. . . .” [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. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *County of Sacramento v. Lewis* (1998) (Kennedy, J., concurring). . . .

[A]most five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . The court held that the laws proscribing [consensual homosexual] 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 v. Casey* (1992), 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* (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. . . . 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. . . .

**Justice O’Connor, concurring in the judgment.**

The Court today overrules *Bowers v. Hardwick* (1986). 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.” *Cleburne v. Cleburne Living Center, Inc.* (1985). 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.” *Id.*

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.” *Id.* We have consistently held, however, that some objectives, such as “a bare . . . desire to harm a politically unpopular group,” are not legitimate state interests. *Dep’t of Ag. v. Moreno* (1973); see also *Cleburne*; *Romer v. Evans* (1996). 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. . . .

Texas . . . argu[es] 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. *See, e.g., Moreno; Romer*. 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.” *Romer*. 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.” *Id.* 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.” *Id.* . . . 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. . . .

In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals “for disfavored legal status.” The same is true here. The Equal Protection Clause “neither knows nor tolerates classes among citizens.” *Id.* (quoting *Plessy v. Ferguson* (1896) (Harlan, J., dissenting)).

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. . . .

[This reasoning] 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. . . .

**Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas join, dissenting.**

“Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood v. Casey* (1992). That was the Court’s sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade* (1973). The Court’s response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick* (1986) is very different. The need for stability and certainty presents no barrier.

Most of the rest of today’s opinion has no relevance to its actual holding—that the Texas statute “furthers no legitimate state interest which can justify” its application to petitioners under rational-basis review. Though there is discussion of “fundamental proposition[s],” and “fundamental decisions,” nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” Instead the Court simply describes petitioners’ conduct as “an

exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. . . .

[The ban on homosexual sodomy] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim. The Fourteenth Amendment *expressly allows* States to deprive their citizens of “liberty,” *so long as “due process of law” is provided.* . . .

Our opinions applying the doctrine known as “substantive due process” hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg* (1997). We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called “heightened scrutiny” protection—that is, rights which are “deeply rooted in this Nation’s history and tradition.” All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest. . . .

The Court’s description of “the state of the law” at the time of *Bowers* only confirms that *Bowers* was right. The Court points to *Griswold v. Connecticut* (1965). But that case *expressly disclaimed* any reliance on the doctrine of “substantive due process,” and grounded the so-called “right to privacy” in penumbras of constitutional provisions *other than* the Due Process Clause. *Eisenstadt v. Baird* (1972) likewise had nothing to do with “substantive due process”; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well-known dictum relating to the “right to privacy,” but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a “substantive due process” right.

*Roe v. Wade* recognized that the right to abort an unborn child was a “fundamental right” protected by the Due Process Clause. The *Roe* Court, however, made no attempt to establish that this right was “deeply rooted in this Nation’s history and tradition”; instead, it based its conclusion . . . on its own normative judgment that antiabortion laws were undesirable. We have since rejected *Roe*’s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, *see Casey*, and thus, by logical implication, *Roe*’s holding that the right to abort an unborn child is a “fundamental right.” . . .

[T]he Court proclaims that, “it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” . . . It is (as *Bowers* recognized) entirely irrelevant whether the[se] laws in our long national tradition criminalizing homosexual sodomy were “directed at homosexual conduct as a distinct matter.” . . . [T]he only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right “deeply rooted in our Nation’s history and tradition.” . . .

Next the 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.” . . . 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. . . . 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. . . .

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.*” (Emphasis added). 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 any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s]” . . . . 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. . . .

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” *Bowers*—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.” (Emphasis added). . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

Finally, I turn to petitioners’ equal-protection challenge . . . . [Texas law] does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia* (1967) similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was “designed to maintain White Supremacy.” A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. *See Washington v. Davis* (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society’s belief that certain forms of sexual behavior are “immoral and unacceptable.” This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O’Connor argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor. . . . Of course the same could be said of any law. A law against public nudity targets “the conduct that is closely correlated with being a nudist,” and hence “is targeted at more than conduct”; it is “directed toward nudists as a class.” But be that as it may. Even if the Texas law *does* deny equal protection to “homosexuals as a class,” that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality. . . .

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Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . .

[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. . . . So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, and that in some cases such "discrimination" is a constitutional right. See *Boy Scouts of Am. v. Dale* (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. . . . [I]t is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage. . . . At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “[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,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? . . .

**[The opinion of Justice Thomas, dissenting, is omitted.]**

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### Notes and Questions

1. How did *Lawrence* identify “fundamental” liberty? And why did the Court ultimately conclude that the government's interest was insufficient?
2. *Lawrence* did not claim to overrule *Glucksberg*, and in subsequent decades it was generally understood that *Glucksberg* remained “good law.” But how? Was *Lawrence*'s method for identifying fundamental rights consistent with *Glucksberg*'s method? If not, how might you distinguish the cases where *Glucksberg*'s method should apply from those where *Lawrence*'s method should apply?

3. How were the Justices in the majority and the dissenting thinking about the *nature* of claims about fundamental liberty? In other words, for them, what was it that makes a claim about fundamental liberty true or false? Did the Justices seem to think that some types of liberty are, *in the nature of things*, “fundamental”? If so, were those rights fundamental in 1868, regardless of what those who enacted the Fourteenth Amendment thought? And relatedly, was it within a judge’s duty to identify violations of these rights back then, even if nobody else in the society thought that the rights in question were fundamental? By contrast, if one rejects the idea that certain types of liberty are *naturally* fundamental, then where does their fundamentality come from, and why?

4. Why might Justice Kennedy have preferred to resolve *Lawrence* under principles of substantive due process rather than under the Equal Protection Clause? What are the benefits and drawbacks of that choice?

5. How did Justice O’Connor conclude that the statute was unconstitutional? Was her reasoning consistent with *Bowers*? Recall that in *Bowers*, the government successfully defended the statute based on an interest in promoting morality. Why wasn’t that interest sufficient in *Lawrence*?

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The holding of the next case is straightforward: The Fourteenth Amendment requires states to recognize a right of same-sex couples to marry. But why? What method does the Court use to identify what the right to marry entails? What are the strengths and weaknesses of that method?

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## Obergefell v. Hodges (2015)

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### **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.

### I

These cases come from . . . 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 petitioners claim . . . the right to marry or to have their marriages, lawfully performed in another State, given full recognition. . . .

### II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of [marriage].

### A

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. . . . [I]t 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. . . .

## B

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. . . .

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 much of the 20th century, moreover, homosexuality was treated as an illness. . . . 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. . . .

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* (1986). There it upheld . . . a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans* (1996), 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* (2003).

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. . . .

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. . . . [I]n *United States v. Windsor* (2013), this Court invalidated [the federal Defense of Marriage Act (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." . . .

### III

. . . The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. . . .

[T]he Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* (1967), 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." . . . 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. . . .

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. *See, e.g., Eisenstadt v. Baird* (1972); *Poe* (Harlan, J., dissenting).

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. . . . 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. . . .

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* (1965), which held the Constitution protects the right of married couples to use contraception. And in *Turner v. Safley* (1987), 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." *United States v. Windsor* (2013). 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. . . .

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Soc'y of Sisters* (1925); *Meyer v. Nebraska* (1923). . . . [S]ome of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*. . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . .

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. . . . 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. . . . 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. . . .

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. . . . 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* (1997), 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” . . . . Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. *See also Glucksberg* (Souter, J., concurring in judgment).

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.

The Court’s cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. . . .

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. [*Justice Kennedy then discussed sex-equality cases*]. . . .

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. . . . 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. . . .

## IV

. . . Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . [But] [t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. . . . “[F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *West Virginia State Bd. of Educ. v. Barnette* (1943). 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. . . .

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. . . . 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. . . .

Finally, . . . 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. . . .

\* \* \*

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. . . .

**Chief Justice Roberts, with whom Justices Scalia and Thomas join, dissenting.**

Petitioners make strong arguments rooted in social policy and considerations of fairness. . . . 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. . . .

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. . . .

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. . . .

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* (1905) (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. . . .

## I

. . . There is no serious dispute that . . . 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”? . . .

Th[e] 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.

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. . . .

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.” *United States v. Windsor* (2013). 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. . . .

This Court’s precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. . . .

As the majority notes, some aspects of marriage have changed over time. . . . [These changes did not] 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. . . .

## II

... 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* (1905). 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. . . .

## A

... Allowing unelected federal judges to select which unenumerated rights rank as “fundamental”—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges “exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg* (1997). . . .

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* (1857). . . . 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.” . . .

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that “[t]he criterion of constitutionality is not whether we believe the law to be for the public good.” *Adkins v. Children’s Hospital of D.C.* (1923) (Holmes, J., dissenting). . . . Eventually, the Court recognized its error and vowed not to repeat it. . . .

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 . . . [o]ur precedents have required that implied fundamental rights be “objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*. . . .

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 . . . [e]xpanding 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.” John Hart Ely, *Democracy and Distrust* (1980). The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise

appreciation of the great roles [of] the doctrines of federalism and separation of powers.” *Griswold v. Connecticut* (1965) (Harlan, J., concurring in judgment).

## B

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. . . .

When the majority turns to the law, it relies primarily on precedents discussing the fundamental “right to marry.” . . . 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.” *Griswold*. . . .

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. . . . [T]he laws in no way interfere with the “right to be let alone.” . . .

[P]etitioners 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. *See DeShaney v. Winnebago County Dep’t of Soc. Servs.* (1989); *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973). . . .

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the “careful” approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority’s methodology: *Lochner v. New York*. The majority opens its opinion by announcing petitioners’ right to “define and express their identity.” The majority later explains that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” This freewheeling notion of individual autonomy echoes nothing so much as “the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor.” *Lochner* (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own “reasoned judgment,” informed by its “new insight” into the “nature of injustice,” which was invisible to all who came before but has become clear “as we learn [the] meaning” of liberty. The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right.” Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. . . .

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. . . .

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*. [*Judge Friendly's opinion appears on page 199.*] And it certainly does not enact any one concept of marriage. . . .

### III

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. . . . 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. . . . In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence* (O'Connor, J., concurring in judgment). . . .

### IV

. . . 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. . . .

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." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, N.C. L. Rev. (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. . . .

**Justice Scalia, with whom Justice Thomas joins, dissenting.**

. . . 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. . . .

[The Court’s] opinion lack[s] 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. . . . 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 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. . . . [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

But what really astounds is the hubris reflected in today’s judicial Putsch. The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriages in 2003. . . .

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.<sup>22</sup> 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? . . . [O]ne would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. . . .) 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

<sup>22</sup> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “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,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

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. . . . 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. . . .

**[The dissenting opinions of Justices Thomas and Alito are omitted.]**

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### Notes and Questions

1. What was the method of decision in Justice Kennedy’s majority opinion? Did it logically follow from previous decisions? Were the criticisms waged by Chief Justice Roberts and Justice Scalia valid?

2. On Justice Kennedy’s view, was the availability of a marriage to people of the same sex constitutionally required in 1868? Why or why not?

3. For many societies throughout history, the idea of marriage has included polygamous marriages between more than two people. Given that fact, is it defensible for Justice Kennedy to conclude that a marriage between *two people* is a necessary element of marriage?

4. Are there alternative ways to defend a constitutional right of same-sex couples to marry? What are the strengths or weaknesses of those approaches compared to the majority opinion?

5. In addition to thinking about the substance of the opinions in *Obergefell*, it is also worth considering their rhetoric. What do you make of Justice Kennedy’s opinion? Was Justice Scalia correct to state that it was “couched in a style that is as pretentious as its content is egotistic”? Who was Justice Kennedy’s audience? Was his rhetoric effective?

It is also worth considering Justice Scalia’s style. In a part of the majority opinion that is omitted above, Justice Kennedy wrote: “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.” Kennedy was surely referring to the caustic tone of Justice Scalia’s opinion. Others have been more pointed. According to a former Scalia clerk, “The manner in which Justice Scalia chose to express himself publicly under conditions of sharp disagreement is dismaying, and it is a blot upon his legacy.”<sup>\*</sup> Or, as one law professor puts it, “Scalia’s frequently nasty tone and rhetoric degrades the quality of public discourse.”<sup>†</sup> Do you agree? Assuming that Justice Scalia truly thought that the majority was acting in a wholly unprincipled and undemocratic way, was sharp rhetoric appropriate?

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<sup>\*</sup> Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, MICH. L. REV. FIRST IMPRESSIONS (2016).

<sup>†</sup> Mitchell Berman, *The Tragedy of Justice Scalia*, MICH. L. REV. (2017).



### 3.6. Abortion Rights, Part II

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#### Dobbs v. Jackson Women's Health Org. (2022)

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##### **Justice Alito, delivered the opinion of the Court.**

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. . . .

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. . . . [T]he opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature. . . .

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the “exercise of raw judicial power,” and it sparked a national controversy that has embittered our political culture for a half century.<sup>4</sup>

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court revisited *Roe* . . . .

*Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an “undue burden” on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a “due” and an “undue” burden. But the three Justices who authored the controlling opinion “call[ed] the contending sides of a national controversy to end their national division” by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as “viable” outside the womb. . . .

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the

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<sup>4</sup> See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, N.Y.U. L. Rev. (1992) (“*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue”).

Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg* (1997).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

*Stare decisis*, the doctrine on which *Casey*’s controlling opinion was based, does not compel unending adherence to *Roe*’s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. “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.” *Casey* (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

## II

### ... A

... [Before considering the Due Process Clause,] we briefly address one additional constitutional provision that some of respondents’ *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” *Geduldig v. Aiello* (1974). And as the Court has stated, the “goal of preventing abortion” does not constitute “invidiously discriminatory animus” against women. *Bray v. Alexandria Women’s Health Clinic* (1993). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. . . .

[W]e turn to *Casey*’s bold assertion that the abortion right is an aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. . . .

The underlying theory on which this argument rests—that the Fourteenth Amendment’s Due Process Clause provides substantive, as well as procedural, protection for “liberty”—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. . . . The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution. . . .

[I]n *Glucksberg*, . . . [we] made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition.” . . .

On occasion, when the Court has ignored the “[a]ppropriate limits” imposed by “respect for the teachings of history,” *Moore v. East Cleveland* (1977) (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term “liberty.” When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.<sup>22</sup>

## B

. . . [Under] the common law . . . abortion was a crime at least after “quickening”—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy. . . .

English cases dating all the way back to the 13th century corroborate . . . that abortion was a crime. . . .

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. . . .

By the end of the 1950s, according to the *Roe* Court’s own count, statutes in all but four States and the District of Columbia prohibited abortion “however and whenever performed, unless done to save or preserve the life of the mother.”

This overwhelming consensus endured until the day *Roe* was decided. . . .

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: “Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].” . . .

The Solicitor General next suggests that history supports an abortion right because the common law’s failure to criminalize abortion before quickening means that “at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages.” But the insistence on quickening was not universal, *see Commonwealth v. Mills* (1850); *State v. Slagle* (1880), and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an “unlawful” act without regard to whether it occurred before or after quickening. . . .

<sup>22</sup> That is true regardless of whether we look to the Amendment’s Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. . . . But even on that view, such a right would need to be rooted in the Nation’s history and tradition. . . .

## C

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy.” *Casey* elaborated: “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.”

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about “existence,” “meaning,” the “universe,” and “the mystery of human life,” they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of “liberty,” but it is certainly not “ordered liberty.”

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” But the people of the various States may evaluate those interests differently. . . . Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, the right to marry while in prison, the right to obtain contraceptives, the right to reside with relatives, the right to make decisions about the education of one’s children, the right not to be sterilized without consent, and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures. . . .

These attempts to justify abortion through appeals to a broader right to autonomy and to define one’s “concept of existence” prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call “potential life” and what the law at issue in this case regards as the life of an “unborn human being.” None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way. . . .

## D

. . . Because the dissent cannot argue that the abortion right is rooted in this Nation’s history and tradition, it contends that the “constitutional tradition” is “not captured whole at a single moment,” and that its “meaning gains content from the long sweep of our history and from successive judicial precedents.” This vague formulation imposes no clear restraints on what Justice White called the “exercise of raw judicial power,” *Roe* (dissenting opinion), and while the dissent claims that its standard “does not mean anything goes,” any real restraints are hard to discern.

The largely limitless reach of the dissenters’ standard is illustrated by the way they apply it here. First, if the “long sweep of history” imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible

to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called “potential life.”

So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But . . . [t]here are occasions when past decisions should be overruled, and as we will explain, this is one of them. . . .

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that “theory of life.”

### III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.” *Kimble v. Marvel Entm't* (2015). It fosters “evenhanded” decisionmaking by requiring that like cases be decided in a like manner. *Payne v. Tennessee* (1991). It “contributes to the actual and perceived integrity of the judicial process.” *Id.* . . .

We have long recognized, however, that *stare decisis* is “not an inexorable command,” *Pearson v. Callahan* (2009), and it “is at its weakest when we interpret the Constitution,” *Agostini v. Felton* (1997). . . .

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education* (1954), the Court repudiated the “separate but equal” doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson* (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule.

In *West Coast Hotel Co. v. Parrish* (1937), the Court overruled *Adkins v. Children's Hospital of D.C.* (1923), which had held that a law setting minimum wages for women violated the “liberty” protected by the Fifth Amendment's Due Process Clause. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. *See Lochner v. New York* (1905).

Finally, in *West Virginia Board of Education v. Barnette* (1943), after the lapse of only three years, the Court overruled *Minersville School District v. Gobitis* (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong. . . .

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the “workability” of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

## A

*The nature of the Court's error.* An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy v. Ferguson* (1896), was one such decision. It betrayed our commitment to “equality before the law.” *Id.* (Harlan, J., dissenting). It was “egregiously wrong” on the day it was decided, *see Ramos v. Louisiana* (2020) (opinion of Kavanaugh, J.), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity.

*Roe* was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but “raw judicial power,” *Roe* (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. “*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.” *Casey* (opinion of Scalia, J.). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. . . .

## B

*The quality of the reasoning.* Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. In Part II, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds. [*Justice Alito then reviewed many of the same points made above. Much of that discussion is omitted.*]

[*Roe* failed to] justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

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 womb.

As Professor Laurence Tribe has written, “[c]learly, this mistakes a definition for a syllogism.” The definition of a “viable” fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling “after viability,” why isn't that interest “equally compelling before viability”? *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a “person.” Among the characteristics that have been offered as essential attributes of “personhood” are sentience, self-awareness, the ability to reason, or some combination thereof. By this logic, it would

be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as “persons.” But even if one takes the view that “personhood” begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where “personhood” begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later. When *Roe* was decided, viability was gauged at roughly 28 weeks. Today, respondents draw the line at 23 or 24 weeks. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be? . . .

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy. . . .

[*Casey*] made no real effort to remedy . . . [*Roe*'s] much-criticized discussion of viability. The Court retained what it called *Roe*'s “central holding”—that a State may not regulate previability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which “the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman.” Why “reason and fairness” demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling [joint] opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged “the reservations [some] of us may have in reaffirming [that] holding of *Roe*.” . . .

### C

*Workability.* Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s “undue burden” test has scored poorly on the workability scale.

Problems begin with the very concept of an “undue burden.” As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is “due” or “undue” is “inherently standardless.” [*Justice Alito then discussed various difficulties in applying the “undue burden” standard, as well as problems identifying whether such analysis should be facial or as-applied. That discussion is omitted.*]

### D

*Effect on other areas of law.* *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.

Members of this Court have repeatedly lamented that “no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.” *Thornburgh v. Am. College of Obstetricians and Gynecologists* (1986) (O'Connor, J., dissenting).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res*

*judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines. . . .

## E

*Reliance interests.* We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. . . .

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that “people [had] 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” and that “[t]he 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.” But this Court is ill-equipped to assess “generalized assertions about the national psyche.” *Id.* (opinion of Rehnquist, C.J.). *Casey*’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in “cases involving property and contract rights.” *Payne v. Tennessee* (1991).

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. . . . This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality’s speculations and weighing of the relative importance of the fetus and mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.” *Ferguson v. Skrupa* (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would “threaten the Court’s precedents holding that the Due Process Clause protects other rights.” That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, “[a]bortion is a unique act” because it terminates “life or potential life.” And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

## IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.



The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." . . .

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. . . .

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. *Casey* (opinion of Scalia, J.); see also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, N.Y.U. L. Rev. (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue"). And for the past 30 years, *Casey* has done the same. . . .

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly. . . .

## V

. . . [The concurring opinion of Chief Justice Roberts] recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." The concurrence would "leave for another day whether to reject any right to an abortion at all," and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." . . .

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "disca[r]d" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." But this rule was a critical component of the holdings in *Roe* and *Casey* . . . . Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds. . . .

The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United v. F.E.C.* (Roberts, C.J., concurring). For the reasons that we have explained, the concurrence's approach is not. . . .

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay.

## VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history. . . .

A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” *Heller v. Doe* (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

These legitimate interests justify Mississippi’s Gestational Age Act. . . . The Mississippi Legislature’s findings recount the stages of “human prenatal development” and assert the State’s interest in “protecting the life of the unborn.” The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure “for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.” These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents’ constitutional challenge must fail. . . .

**Justice Thomas, concurring.**

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. . . .

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that “due process of law” merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. *See, e.g., Johnson v. United States* (2015) (Thomas, J., concurring in judgment). . . .

As I have previously explained, “substantive due process” is an oxymoron that “lack[s] any basis in the Constitution.” *Id.* . . . Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion. . . .

For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. . . .

**Justice Kavanaugh, concurring.**

. . . The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.

On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve

through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address. . . .

Some *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion. . . .

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

*First* is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Loving v. Virginia* (1967); and *Obergefell v. Hodges* (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

*Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause. *Cf. Bouie v. City of Columbia* (1964).

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government. . . .

### **Chief Justice Roberts, concurring in the judgment.**

[*Chief Justice Roberts began with a lengthy critique of the viability line, as embraced by Roe and Casey. That discussion is omitted.*]

. . . Following th[e] “fundamental principle of judicial restraint,” *Washington State Grange v. Washington State Republican Party* (2007), we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned.

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this

area ground the abortion right in a woman’s “right to choose.” . . . And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided.

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*’s “central holding.” Other cases of ours have repeated that language. But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to “choose to terminate [a] pregnancy” under the Constitution, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period. The viability line is a separate rule fleshing out the metes and bounds of *Roe*’s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence. . . .

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi’s favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. Almost all know by the end of the first trimester. . . . Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman “to decide for herself” whether to terminate her pregnancy. . . .

The Court’s decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case. . . .

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education* (1954), *West Virginia Board of Education v. Barnette* (1943), and *West Coast Hotel Co. v. Parrish* (1937). The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court’s interpretation of the Constitution, “signal[ing] the demise of an entire line of important precedents”—a feature the Court expressly disclaims in today’s decision. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be “turmoil” until we did so, according to the Court, because of existing state laws with “shorter deadlines or no deadline at all.” But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective. . . .

#### **Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.**

For half a century, *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pa. v. Casey* (1992) have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the

Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

*Roe* and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. . . . Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. . . .

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. *See Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. *See Lawrence v. Texas* (2003); *Obergefell v. Hodges* (2015). They

are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does “cast[s] doubt on precedents that do not concern abortion.” *Cf. Dobbs* (Thomas, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”: Not until *Roe*, the majority argues, did people think abortion fell within the Constitution’s guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority’s cavalier approach to overturning this Court’s precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today’s opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women’s expectations of their choices when an unplanned pregnancy occurs. . . . The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” *Payne v. Tennessee* (1991); *Vasquez v. Hillery* (1986). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

## I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court’s precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation’s constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court’s precedents and reveal the broad implications of today’s decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within “the reach of majorities and [government] officials.” *West Virginia State Bd. of Educ. v. Barnette* (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

## A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman’s life. The *Roe* Court knew it was treading on difficult and disputed ground. It understood that different people’s “experiences,” “values,” and “religious training”

and beliefs led to “opposing views” about abortion. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, “founded in the Fourteenth Amendment’s concept of personal liberty,” protected individual decisionmaking related to “marriage, procreation, contraception, family relationships, and child rearing and education.” For the same reasons, the Court held, the Constitution must protect “a woman’s decision whether or not to terminate her pregnancy.” The Court recognized the myriad ways bearing a child can alter the “life and future” of a woman and other members of her family. A State could not, “by adopting one theory of life,” override all “rights of the pregnant woman.” . . .

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*’s core precepts. . . .

Like *Roe*, *Casey* grounded [the right to choose] in the Fourteenth Amendment’s guarantee of “liberty.” That guarantee encompasses realms of conduct not specifically referenced in the Constitution: “Marriage is mentioned nowhere” in that document, yet the Court was “no doubt correct” to protect the freedom to marry “against state interference.” And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. . . .

So *Casey* again struck a balance, differing from *Roe*’s in only incremental ways. It retained *Roe*’s “central holding” that the State could bar abortion only after viability. The viability line, *Casey* thought, was “more workable” than any other in marking the place where the woman’s liberty interest gave way to a State’s efforts to preserve potential life. At that point, a “second life” was capable of “independent existence.” If the woman even by then had not acted, she lacked adequate grounds to object to “the State’s intervention on [the developing child’s] behalf.” At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. [*Casey* thus adopted the undue-burden standard.] . . .

We make one initial point about this analysis in light of the majority’s insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a “State’s interest in protecting prenatal life.” Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman’s liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today’s majority does not—is that a woman’s freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. . . . The constitutional regime we enter today erases the woman’s interest and recognizes only the State’s (or the Federal Government’s).

## B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in “1868, the year when the Fourteenth Amendment was ratified”? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one. . . .

The majority’s core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. . . . If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the “people” who ratified the Fourteenth Amendment: What rights did those “people” have in their heads at the time? But, of course, “people” did not ratify the Fourteenth Amendment. Men did. So it is perhaps not

so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

*Casey* itself understood this point, as will become clear. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. *See Casey* (citing *Bradwell v. Illinois* (1873)). “There was a time,” *Casey* explained, when the Constitution did not protect “men and women alike.” But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was “no longer consistent with our understanding” of the Constitution. Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.”

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? . . .

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. “The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” *NLRB v. Noel Canning* (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. *McCulloch v. Maryland* (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg* (1997), that the Fourteenth Amendment “must be defined in a most circumscribed manner, with central reference to specific historical practices”—exactly the view today's majority follows. And the Court [in *Obergefell*] specifically rejected that view. In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, “rights were defined by who exercised them in the past, then received practices could serve as their own continued justification”—even when they conflict with “liberty” and “equality”



as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply. . . .

[A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe v. Ullman* (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell's* example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children. . . .

It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe's* recognition and *Casey's* reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as Justice Kavanaugh tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? . . . When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. . . .

*Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. . . . That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. *See, e.g., Loving*. And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. *See Lawrence v. Texas* (2003); *Obergefell*. In considering that question, the Court held, "[h]istory and tradition,"

especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” *Obergefell*. But the sentiments of 1868 alone do not and cannot “rule the present.” *Id.*

*Casey* similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. . . . The State could not now insist on the historically dominant “vision of the woman’s role.” And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. “The ability of women to participate equally” in the “life of the Nation”—in all its economic, social, political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. . . .

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) . . .

The first problem with the majority’s account comes from Justice Thomas’s concurrence—which makes clear he is not with the program. . . .

Even placing the concurrence to the side, the assurance in today’s opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority’s analysis. To the contrary, the majority takes pride in not expressing a view “about the status of the fetus.” The majority’s departure from *Roe* and *Casey* rests instead—and only—on whether a woman’s decision to end a pregnancy involves any Fourteenth Amendment liberty interest . . . . And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even “undermine”—any number of other constitutional rights.<sup>8</sup> . . .

## II

[*The joint dissent then turned to stare decisis. Most of that discussion is omitted, except for what follows.*] . . .

### A

Contrary to the majority’s view, there is nothing unworkable about *Casey*’s “undue burden” standard. . . .

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution’s broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. *See Dickerson v. United States* (2000) (“No court laying down a general rule can possibly foresee the various circumstances” in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. *See, e.g., Arizona*

<sup>8</sup> The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority’s (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority’s redoing any other decision it considered egregiously wrong.

*Free Enterprise Club’s Freedom Club PAC v. Bennett* (2011); *Burdick v. Takushi* (1992); *Pike v. Bruce Church, Inc.* (1970). The *Casey* undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the “rule of reason” in antitrust law or the “arbitrary and capricious” standard for agency decisionmaking. Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would . . .

Anyone concerned about workability should consider the majority’s substitute standard. The majority says a law regulating or banning abortion “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” And the majority lists interests like “respect for and preservation of prenatal life,” “protection of maternal health,” elimination of certain “medical procedures,” “mitigation of fetal pain,” and others. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the Fourteenth Amendment’s protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management?

Finally, the majority’s ruling today invites a host of questions about interstate conflicts. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today’s ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming “interjurisdictional abortion wars.”

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing. . . .

## B

In support of its holding, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co. v. Parrish* and *Brown v. Board of Education*. But those decisions, unlike today’s, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is. . . .

*Brown v. Board of Education* overruled *Plessy v. Ferguson* (1896), along with its doctrine of “separate but equal.” By 1954, decades of Jim Crow had made clear what *Plessy*’s turn of phrase actually meant: “inherent[ ] [in]equal[ity].” *Brown*. Segregation was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*’s time, the *Brown* Court explained, both experience and “modern authority” showed the “detrimental effect[s]” of state-sanctioned segregation: It “affect[ed]

[children’s] hearts and minds in a way unlikely ever to be undone.” By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools’ exclusion of black students. The logic of those cases, *Brown* held, “appl[ied] with added force to children in grade and high schools.” Changed facts and changed law required *Plessy*’s end. . . .

[W]e are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia State Board of Education v. Barnette* (1943), which the majority also relies on. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court’s ruling today. They protected individual rights with a strong basis in the Constitution’s most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority’s declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves. . . .

### C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. . . . By characterizing *Casey*’s reliance arguments as “generalized assertions about the national psyche,” reveals how little it knows or cares about women’s lives or about the suffering its decision will cause. . . .

Abortion is a common medical procedure and a familiar experience in women’s lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women’s opportunities to participate fully and equally in the Nation’s political, social, and economic life. See Brief for Economists as *Amici Curiae* (showing that abortion availability has “large effects on women’s education, labor force participation, occupations, and earnings”). . . .

That is especially so for women without money. When we “count[ ] the cost of [*Roe*’s] repudiation” on women who once relied on that decision, it is not hard to see where the greatest burden will fall. *Casey*. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. Even with *Roe*’s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of

pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. *See Casey*. That expectation helps define a woman as an "equal citizen[ ]," with all the rights, privileges, and obligations that status entails. *Gonzales v. Carhart* (2007) (Ginsburg, J., dissenting). It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants. . . .

Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense. . . .

### III

. . . With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

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### Notes and Questions

1. What method did Justice Alito endorse for identifying fundamental rights? His majority opinion invokes *Glucksberg* at many points, but it also seems to question the fundamental status of rights that were not recognized as fundamental at the time the Fourteenth Amendment was enacted. Are these approaches consistent?

2. If the Court were to use a tradition-based approach, such as the one identified in *Glucksberg*, what role should Supreme Court precedent take in that approach? Should it matter whether abortion rights were recognized for nearly 50 years? The deeper question here is *why* should we look to traditions? What values does this type of approach serve in our constitutional system? And what are its drawbacks?

3. Think back to the steps of the analysis in *Roe* and *Casey*. The Court began its analysis by identifying reproductive autonomy as a fundamental right. Having decided that issue, the Court *then* identified whether (and how) the government could regulate that right at various points in the pregnancy.

At which step of this analysis did "viability" enter into the analysis? Given your answer to that question, is Justice Alito right to say that viability was "a critical component of the holdings of *Roe* and *Casey*" and that "a new rule [such as the one defended by Chief Justice Roberts] that discards the viability rule cannot be defended on *stare decisis* grounds"? Why or why not?

4. The majority and dissent agree on one point: that those who enacted the Fourteenth Amendment "did not understand reproductive rights as part of the guarantee of liberty" in the Due Process Clause, to quote the joint dissent. But is that claim true? Would reproductive freedom have been understood as outside the *scope* of "liberty"? Or would those who enacted the Fourteenth Amendment likely have accepted the validity of abortion restrictions for some *other* reason?

5. Let's assume, *arguendo*, that in 1868 reproductive freedom was beyond the scope of the "liberty" protected by the Due Process Clause. If that's true, then how could the Due Process Clause's definition of "liberty" have changed? What are the strengths and weaknesses of the dissenters' view?

6. If the "liberty" secured by the Due Process Clause does not include a right to abortion, why did the Court nonetheless apply rational-basis review?

7. The majority, concurring, and dissenting opinions vary widely in how they portray the implications of *Dobbs* for *other* substantive due process rights. Who has the better argument?

8. Like the joint plurality in *Casey*, the joint dissenters in *Dobbs* emphasized the historical legacy of unequal treatment of women and the implications of abortion rights for women. What do you make of these arguments? How, if at all, should the historical subordination of women affect modern constitutional analysis? A skeptic of the dissenters' argument might say that such discrimination, though regrettable, does not inform the *meaning* of the Constitution. (Indeed, if anything, that legacy might underscore the correctness of *Dobbs*.) What are possible ways of responding?

9. Notice that Justice Alito dismissed the Equal Protection Clause argument out of hand, relying heavily on a nearly 50-year-old precedent, *Geduldig v. Aiello* (1974), which held that discrimination on the basis of pregnancy is not a form of sex discrimination. As noted in Unit 2.6, this decision remains controversial.

But suppose, *arguendo*, that *Geduldig* is overturned, and discrimination based on pregnancy is now considered as a form of sex discrimination. Should that affect the constitutionality of abortion restrictions?

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### Practice Question

Under substantive due process doctrine, which of the following is a court most likely to recognize as a "fundamental right"?

- A. A longstanding, widespread privilege of self-defense, which applies where there is an imminent risk of bodily harm.
  - B. A right to marry two other people at once (*i.e.*, a "plural marriage" or "three-person marriage").
  - C. A right of cancer patients to purchase and use marijuana, because of its importance to them.
  - D. A right to a jury trial in cases where the defendant is able to prove that the benefits of jury trials clearly exceed the costs.
- 

## 3.7. Fundamental Rights and Equal Protection

Our earlier discussion of modern equal-protection doctrine turned on *whom* the government was discriminating against. This inquiry is often said to be whether the law discriminates against a *protected class* (also called a *suspect class*), although—in light of cases like *Bakke*—it would probably be more accurate to ask whether the law discriminates using a *suspect means of classification*.

A separate branch of equal-protection doctrine applies some form of heightened scrutiny based on *what* is being regulated. These are known as the "fundamental rights" cases. But be careful. The

Supreme Court has recognized a *different* set of “fundamental rights” cases under the Due Process Clauses. These are *not* the same doctrines!

An early example of this branch of equal protection law was the Court’s decision in *Skinner v. Oklahoma* (1942), which you read in Unit 2.1. After *Skinner*, the Court recognized other “fundamental” rights that we will encounter in a moment. But it is worth emphasizing at the outset of this Unit that the Court has stopped recognizing any new “fundamental” rights under the rubric of the Equal Protection Clause.

Why? Well, consider that question as you read the Court’s analysis in *San Antonio Independent School District v. Rodriguez* (1973), which rejected the plaintiff’s argument that public education is a “fundamental right” within the meaning of the Equal Protection Clause:

Nothing this Court holds today in any way detracts from our historic dedication to public education. . . . 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 . . . “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.” *Shapiro v. Thompson* (1969) (Stewart, J., concurring).

*Lindsey v. Normet* (1972) . . . 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. . . . *Absent constitutional mandate*, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. . . .

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. . . . [The claimants] 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. . . . 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 pursued by a implemented by judicial intrusion into otherwise legitimate state activities. . . .

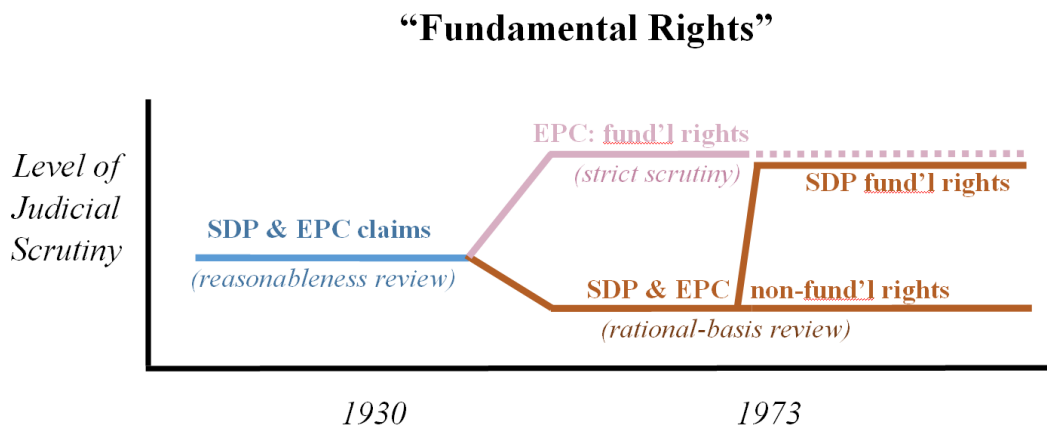
Furthermore, the logical limitations on [the] nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, 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. . . .

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. . . . 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 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.

How does this reasoning limit the breadth of “fundamental rights” under the Equal Protection Clause? The method of analysis in *Rodriguez* is still applicable today. The Court continues to reject the idea that the Equal Protection Clause is itself a source of new “fundamental rights.”

Notwithstanding its assertions in *Rodriguez*, the Court *had*, in fact, recognized “fundamental” rights using the Equal Protection Clause. But these rulings, which are still valid today, were mostly confined to two issues—access to court and voting—as described below under the headings “Access to Court” and “Voting.”

In *Roe v. Wade* (1973) and *San Antonio Independent School District v. Rodriguez* (1973), the Supreme Court essentially flipped the locus of “fundamental rights” jurisprudence from the Equal Protection Clause to the “substantive” protections of the Due Process Clause, as depicted below:



In other words, *Rodriguez* did not eliminate “fundamental rights” claims! For one thing, claimants could still bring fundamental-rights claims under the Equal Protection Clause within already recognized categories (as depicted with the dashed line above, and described in more detail below). For another thing, claimants could now bring fundamental rights claims under the rubric of substantive due process.



What practical difference did this shift make? What types of claims that were previously available were foreclosed by the shift of most fundamental-rights claims from the Equal Protection Clause to the Due Process Clause?

### Access to Court

In one of the foundational access-to-court decisions, *Griffin v. Illinois* (1956), the Supreme Court held that states could not impose fees or other hurdles that effectively blocked access to court for people with insufficient financial means. As Justice Frankfurter explained in his concurring opinion (later highlighted by the Supreme Court in *M.L.B. v. S.L.J.* (1996)):

Of course a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review.

Thus, although the state did not have to provide appellate review, it was obligated to ensure that any review procedures did not impose discriminatory burdens on indigent parties. The Court has extended this idea to *civil* proceedings, too, but it generally provides only relief from *state-imposed obligations*, like filing fees, transcript fees, etc., see *M.L.B. v. S.L.J.* (1996)—not an “affirmative” right to government-provided benefits, like a free lawyer, see *Ross v. Moffitt* (1974).

### Voting

The Constitution says *a lot* about voting! Article I specifies that the House of Representatives will be *elected* (meaning that *somebody* has to vote); Article IV provides that the federal government shall ensure that states retain a *republican* form of government (again, *somebody* must vote); and then a variety of Amendments disallow *discrimination* in voting along a number of bases: race (the Fifteenth Amendment), sex (the Nineteenth Amendment), and for persons over eighteen years old (the Twentieth Sixth Amendment). But one thing that you won’t find anywhere in the constitutional text is a general “right to vote.”

From the standpoint of original meaning, voting was outside the confines of the Fourteenth Amendment. As we saw in *Minor v. Happersett* (1875), voting in the nineteenth century was understood to be a *political* right, not a *civil* right, and it had nothing to do with an original understanding of “protection of the laws.”

As the Supreme Court abandoned older conceptions of the Fourteenth Amendment in the mid-twentieth century, however, it also began to recognize voting as a constitutionally protected “fundamental right” within the meaning of the Equal Protection Clause. Today, this is a core feature of modern jurisprudence. But what is the scope of this right? What level of scrutiny does it trigger?

The Supreme Court has recognized two types of voting rights within the “fundamental rights” strand of equal protection law. The first of these is the *individual* right to vote, which includes not only questions of who is qualified to vote but also claims relating to obstacles placed on exercising the right to vote (registration requirements, voter identification laws, etc.). Our first case, *Crawford v. Marion County Election Board* (2008), deals with that issue. The second type of claim is a challenge to district lines. In these cases, the plaintiff voter *is* able to vote just fine, so the individual right to vote isn’t at issue. Rather, the alleged problem in these cases is the way that the legislature has drawn the electoral district lines.

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**Crawford v. Marion County Election Board (2008)**

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**Justice Stevens announced the judgment of the Court and delivered an opinion, in which the Chief Justice and Justice Kennedy join.**

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government. . . .

A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk's office within 10 days. No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity. . . .

[Plaintiffs] allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification. . . .

## I

In *Harper v. Virginia Board of Elections* (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of \$1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. Applying a stricter standard, we concluded that a State "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." . . . Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze* (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands. . . . [A] court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule."

## II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified.

Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient. The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration—namely, that Indiana's voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.

*Election Modernization.* Two recently enacted federal statutes [the National Voter Registration Act of 1993 and the Help America Vote Act of 2002] have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote. . . .

*Voter Fraud.* The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that . . . punishing such conduct as a felony provide[s] adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history . . . .

*Safeguarding Voter Confidence.* Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. . . .

### III

. . . The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483. . . . For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote. . . .

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. . . .

## IV

. . . Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State’s broad interests in protecting election integrity. Petitioners urge us to ask whether the State’s interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk’s office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification . . . Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. . . The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. . .

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes “excessively burdensome requirements” on any class of voters. *See Storer v. Brown* (1974). A facial challenge must fail where the statute has a “plainly legitimate sweep.” *Washington v. Glucksberg* (1997) (Stevens, J., concurring). When we consider only the statute’s broad application to all Indiana voters we conclude that it “imposes only a limited burden on voters’ rights.” *Burdick v. Takushi* (1992). The “precise interests” advanced by the State are therefore sufficient to defeat petitioners’ facial challenge to SEA 483.

Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. . .

## V

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it. . . It is fair to infer that partisan considerations may have played a significant role in the decision to enact SEA 483. If such considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.

But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting “the integrity and reliability of the electoral process.” *Anderson v. Celebrezze* (1983).

**Justice Scalia, with whom Justices Thomas and Alito join, concurring in the judgment.**

. . . To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi* (1992). This calls for application of a deferential “important regulatory interests” standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. . . Strict scrutiny is appropriate only if the burden is severe. . .

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, but what petitioners view as the law’s several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in

person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. Nor are voters who already have photo identifications exempted from the burden, since those voters must maintain the accuracy of the information displayed on the identifications, renew them before they expire, and replace them if they are lost.

The Indiana photo-identification law is a generally applicable, non-discriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. . . .

Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. *See, e.g., Washington v. Davis* (1976). The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected. *See Harris v. McRae* (1980) (poverty); *Cleburne v. Cleburne Living Center, Inc.* (1985) (disability); *Gregory v. Ashcroft* (1991) (age); *cf. Employment Division v. Smith* (1990) (First Amendment does not require exceptions for religious objectors to neutral rules of general applicability).

Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. . . .

That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. *See* Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe. . . .

**Justice Souter, with whom Justice Ginsburg joins, dissenting.**

[A] State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent . . . .

**I**

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. The Judiciary is obliged to train a skeptical eye on any qualification of that right. *Reynolds v. Sims* (1964).

As against the unfettered right, however, lies the “[c]ommon sense, as well as constitutional law . . . that government must play an active role in structuring elections . . . .” *Burdick v. Takushi* (1992).

Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And

whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State's reasons for imposing those precise burdens. . . .

The lead opinion does not disavow these basic principles. . . . But I think it does not insist enough on the hard facts that our standard of review demands.

## II

Under *Burdick*, “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,” upon an assessment of the “character and magnitude of the asserted [threatened] injury,” and an estimate of the number of voters likely to be affected.

### A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. The travel is required for the personal visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV) . . . . The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive . . . .

For those voters who can afford the round trip, a second financial hurdle appears: . . . most voters must pay at least one fee to get the ID necessary to cast a regular ballot. As with the travel costs, these fees are far from shocking on their face, but in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.

### B

[V]oters who lack the necessary ID [may] sign the pollbook and cast a provisional ballot. . . . [T]o have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ID at that point). . . . Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage.

That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. Thirty-four provisional ballots were cast, but only two provisional voters made it to the county clerk's office within the 10 days. All 34 of these aspiring voters appeared at the appropriate precinct; 33 of them provided a signature, and every signature matched the one on file; and 26 of the 32 voters whose ballots were not counted had a history of voting in Marion County elections.

All of this suggests that provisional ballots do not obviate the burdens of getting photo identification.

### C

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not “severe” ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, we may accept that court's rough calculation that 43,000 voting-age

residents lack the kind of identification card required by Indiana’s law. . . . [N]ational surveys show[] roughly 6%-10% of voting-age Americans without a state-issued photo identification card. . . . To be sure, the 43,000 figure has to be discounted to some extent, residents of certain nursing homes being exempted from the photo identification requirement. But the State does not suggest that this narrow exception could possibly reduce 43,000 to an insubstantial number. . . . There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting. . . .

Thus, petitioners’ case is clearly strong enough to prompt more than a cursory examination of the State’s asserted interests. . . .

### III

Because the lead opinion finds only “limited” burdens on the right to vote, it avoids a hard look at the State’s claimed interests. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment . . . . [T]he “effort to modernize elections,” is not for modernity’s sake, but to reach certain practical (or political) objectives. . . . The State says that it adopted the ID law principally to combat voter fraud, and it is this claim, not the slogan of “election modernization,” that warrants attention.

There is no denying the abstract importance, the compelling nature, of combating voter fraud. But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. . . . [B]ut the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana’s history. . . . [This is] consistent with the dearth of evidence of in-person voter impersonation in any other part of the country.

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect. But this is like saying the “man who wasn’t there” is hard to spot, and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud (*e.g.*, by absentee ballot) which the State has had no trouble documenting. The answer seems to be no . . . .

I will readily stipulate that a State has an interest in responding to the risk (however small) of in-person voter impersonation. I reach this conclusion, like others accepted by the Court, because “[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.” *Randall v. Sorrell* (2006) (Souter, J., dissenting). Weight is owed to the legislative judgment as such. But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance. . . .

What is left of the State’s claim must be downgraded further for one final reason: regardless of the interest the State may have in adopting a photo identification requirement as a general matter, that interest in no way necessitates the particular burdens the Voter ID Law imposes on poor people and religious objectors. Individuals unable to get photo identification are forced to travel to the county seat every time they wish to exercise the franchise, and they have to get there within 10 days of the election. Nothing about the State’s interest in fighting voter fraud justifies this requirement of a postelection trip to the county seat instead of some verification process at the polling places. . . .

The State’s final justification, its interest in safeguarding voter confidence, [also] collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State’s electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.

It should go without saying that none of this is to deny States’ legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and anti-gratuity statutes as well. *See Nixon v. Shrink Missouri Gov’t PAC* (2000). But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. *See id.* (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised”). . . . It is simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless “inherent” in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls. . . .

**[The dissenting opinion of Justice Breyer is omitted.]**

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### Notes and Questions

1. Why was the claim within the *scope* of the Equal Protection Clause? And how did the Court approach *strength* analysis in this situation?
2. Did the Court consider a “facial” claim, an “as applied” claim, or both? Why? What are the consequences of considering claims like this on a “facial” as opposed to an “as applied” basis?
3. How do the different approaches to voting rights reflected in the plurality, concurring, and dissenting opinions resemble other areas of constitutional rights jurisprudence that we’ve seen?

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### Challenges to District Lines

In addition to cases involving a citizen’s ability to vote, another line of doctrine addresses the constitutionality of the way that states draw electoral district lines. (States have power not only to draw district lines with respect to *state* elections; they also have power to draw *congressional* district lines. *See* U.S. Const., Art. I, § 4.) The Supreme Court has recognized two different types of challenges to district lines:

First, “one-person, one-vote” claims are available to challenge the *proportionality of district populations*. *See Reynolds v. Sims* (1964). States must ensure that each district within that state has essentially the same number of people, although the Supreme Court has held that states have ten-percent leeway when creating *state* district lines (but not *federal* congressional districts). If the deviation is less than ten percent, the challenger must show that the deviation from perfect proportionality “reflects the predominance of illegitimate reapportionment factors,” which is very hard to do. *See Harris v. Ariz. Ind. Redistricting Comm’n* (2016). But if states violate the one-person, one-vote principle, then the district lines are effectively rendered unconstitutional.

Second, claimants can successfully challenge district lines if they can show that racial considerations were the *predominant factor* in how the legislature drew district lines. *See* note 5 on



page 106. These are often called “racial gerrymandering” claims. It is probably better to think of these claims as a type of “suspect classification” claim, since strict scrutiny applies because of the impermissible use of race—not because the right to vote is at issue. But you should probably still make a note in your outline in the voting-rights section about racial gerrymandering claims. Again, see note 5 on page 106 for the details.

In addition to one-person-one-vote claims and racial gerrymandering claims, there has been longstanding debate over Constitutional limits on the ability of state legislators to draw districts in order to create particular *partisan* outcomes. All of the Justices for the past several decades have agreed that this type of partisan gerrymandering poses a serious problem that is, in some sense, of constitutional dimensions. But there has been deep disagreement about how, if at all, *judges* might intervene to limit partisan gerrymandering.

In *Vieth v. Jubelirer* (2004), the Court fragmented without any majority opinion. A four-justice plurality opinion by Justice Scalia acknowledged that partisan gerrymandering was constitutionally problematic but held that judges should not consider these claims because they raised a “political question.” “The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution,” Scalia wrote, “but whether it is for the courts to say when a violation has occurred, and to design a remedy.” Justice Kennedy agreed with the plurality’s conclusion about the lack of any judicially administrable way of deciding these cases. Nonetheless, his opinion left the door open to the idea that judges might someday be able to identify a viable method. Meanwhile, the four dissenters voted to strike down the redistricting plans but did not agree on a method for identifying how to determine whether particular district lines were unconstitutional. Justice Stevens had one approach; Justice Breyer another; and Justice Souter still another, joined by Justice Ginsburg.

Our next case is the Court’s latest decision on this controversial topic. It was decided the year after Justice Kennedy retired.

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## Rucho v. Common Cause (2019)

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

Voters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State’s districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State’s plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court [*pursuant to rules applicable to redistricting cases*].

These cases require us to consider once again whether claims of excessive partisanship in districting are “justiciable”—that is, properly suited for resolution by the federal courts. . . .

Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison* (1803). Sometimes, however, “the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer* (2004) (plurality opinion). In such a case the claim is said to present a “political question” and to be

nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. *Baker v. Carr* (1962). Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” . . .

The question here is whether there is an appropriate role for the Federal Judiciary in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. . . .

Courts have . . . been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions.

In the leading case of *Baker v. Carr*, . . . [t]his Court . . . identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is “a lack of judicially discoverable and manageable standards for resolving it.” The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. . . .

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. . . .

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” *Hunt v. Cromartie* (1999).

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.” *Vieth* (plurality opinion). . . .

[I]n *Davis v. Bandemer* (1986), we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause. A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of “intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” Two Justices would have focused on “whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends.” Three Justices, meanwhile, would have held that the Equal Protection Clause simply “does not supply judicially manageable standards for resolving purely political gerrymandering claims.” . . .

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy’s counsel in *Vieth*: Any standard for resolving such claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” . . . [I]t is vital in such circumstances that the Court act only in accord with especially clear standards: “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Vieth* (opinion of Kennedy, J.). . . .

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.” *Davis v. Bandemer* (1984) (opinion of O’Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Bandemer*.

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. . . .

Unable to claim that the Constitution requires proportional representation out-right, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. . . .

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer* (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party. . . .

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. . . .

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? . . .

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? . . .

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. . . .

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. . . . Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

[One court] required the plaintiffs to prove “that a legislative mapdrawer’s predominant purpose in drawing the lines of a particular district was to subordinate adherents of one political party and entrench a rival party in power.” . . . [A]fter a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are “attributable to a legitimate state interest or other neutral explanation.”

The District Court’s “predominant intent” prong is borrowed from the racial gerrymandering context. . . . But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent “predominates.” . . .

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent’s proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” *Vieth* (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, but it seems a useful way to make the point.) The dissent’s answer says it all: “This much is too much.” That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or

common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine “substantial anticompetitive effect[s]” in antitrust law. That language, however, grew out of the Sherman Act, understood from the beginning to have its “origin in the common law” . . . . Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. *See* Art. I, § 4, cl. 1. . . .

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n* (2015), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. . . .

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. . . . One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. . . . Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. . . .

[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. . . .

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open. . . .

**Justice Kagan, with whom Justices Ginsburg, Breyer, and Sotomayor join, dissenting.**

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political

representatives. . . . If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong. . . .

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U.S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10-3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen.
- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed—including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10-3] partisan makeup" of the State's congressional delegation.
- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it[']s possible to draw a map with 11 Republicans and 2 Democrats."
- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn.
- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. . . .

Events in Maryland make for a similarly grisly tale. . . . [*In Maryland, Democrats gerrymandered district lines so that they would win 7 of the 8 congressional seats.*].

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so. . . . [*Justice Kagan then discussed the importance of representation in the American constitutional system and the way that gerrymandering undermines it.*]

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. . . .

Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. . . .

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren’t bad enough). It violates individuals’ constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. . . . He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment’s Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, “guarantees the opportunity for equal participation by all voters in the election” of legislators. *Reynolds v. Sims* (1964). And that opportunity “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. . . .

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views.” *Veith* (opinion of Kennedy, J.). . . .

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. *See, e.g., Veith* (plurality opinion) (“[A]n excessive injection of politics [in districting] is unlawful” (emphasis deleted)); *id.* (opinion of Kennedy, J.) (“[P]artisan gerrymandering that disfavors one party is [im]permissible”); *id.*, (Breyer, J., dissenting) (Gerrymandering causing political “entrenchment” is a “violat[ion of] the Constitution’s Equal Protection Clause”). . . . . Once again, the majority never disagrees . . . .

So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation’s history, the majority

declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. . . . And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: How much is too much?” . . .

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. . . .

[T]hat test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials’ predominant purpose in drawing a district’s lines was to entrench their party in power by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test’s application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. . . .

The majority’s response to the District Courts’ purpose analysis is discomfiting. The majority does not contest the lower courts’ findings; how could it? Instead, the majority says that state officials’ intent to entrench their party in power is perfectly “permissible,” even when it is the predominant factor in drawing district lines. But that is wrong. True enough, that the intent to inject “political considerations” into districting may not raise any constitutional concerns. In *Gaffney v. Cummings* (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. . . .

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. . . .



Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan’s effects mostly by relying on what might be called the “extreme outlier approach.” (Here’s a spoiler: the State’s plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State’s physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.*, the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State’s actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. . . .

The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” . . . To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. . . . [T]he State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians’ effort to entrench themselves in office. . . .

The majority’s sole response misses the point. According to the majority, “it does not make sense to use” a State’s own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria “will vary from State to State and year to year.” But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. . . .

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. . . . Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, it could have used the lower courts’ general standard—focusing on “predominant” purpose and “substantial” effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. [*Justice Kagan then cited cases involving race discrimination and free exercise of religion.*] Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map “substantially” dilutes the votes of a rival party’s supporters from the everything-but-partisanship baseline described above. . . . As this Court recently noted, “the law is full of instances” where a judge’s decision rests on “estimating rightly . . . some matter of degree”—including the “substantial[ity]” of risk or harm. *Johnson v. United States* (2015). . . . [C]ourts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket. . . .

Everything in today’s opinion assumes that these cases grew out of a “desire for proportional representation” or, more generally phrased, a “fair share of political power.” . . . But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. . . . The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals’ supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people’s power to vote. . . .

Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

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### Notes and Questions

1. Why did the North Carolina representative openly say that he was trying to maximize partisan gain? What purpose did that concession serve?

2. *Rucho* was largely about the judicial role, but let’s focus for a moment on the underlying issue of constitutional *meaning*. Did Chief Justice Roberts and Justice Kagan disagree about what the Constitution *means*? Both of them thought—at least to some extent—that partisan gerrymandering can violate the Equal Protection Clause. But do they agree *why*?

3. Chief Justice Roberts claimed that the argument against partisan gerrymandering inevitably relies on an errant assumption that the Equal Protection Clause requires proportional representation. What was Justice Kagan’s response? And how did the Chief reply? Who had the better argument?

4. The majority in *Rucho* concluded that judges cannot *implement* the constitutional principle rule—not that North Carolina and Maryland had complied with the Equal Protection Clause. Justice Kagan then began her opinion by writing, “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.” Is that statement correct? Have we encountered other cases where a right was underenforced because of limited judicial capacity?

5. The contrasting positions of Chief Justice Roberts and Justice Kagan reflect a common debate in constitutional law over whether courts should strike down clear violations of an otherwise vague constitutional standard.

Consider, for instance, *Caperton v. AT Massey Coal Co., Inc.* (2009), which addressed whether the Due Process Clause required the recusal of a state Supreme Court judge who received \$3 million in campaign contributions from a litigant. Justice Kennedy’s majority opinion concluded:

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case. We conclude that there is a serious

risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Chief Justice Roberts dissented, arguing that the majority had failed to identify a principled line that judges could use to delineate when non-recusal violates the Due Process Clause.

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## 4. Freedom of Expression

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“Congress shall make no law . . . abridging 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.” U.S. Const., Amdt. I.

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### 4.1. Introduction

This casebook aims to help you develop not just knowledge of various doctrines but also a broader appreciation for how various rights are related or distinct in their structure and how rights jurisprudence has evolved. Pursuing these goals together is not only more intellectually satisfying; it also allows current doctrine to come into better focus and will better prepare you for a decades-long legal career during which the Court will, no doubt, change its rights jurisprudence in various ways.

Speech doctrine, in particular, is an area where focusing solely on doctrinal minutiae would be a bad idea. We will still learn lots of doctrine, of course. But as we will see over the next few weeks, understanding modern interpretations of the First Amendment requires appreciating the justices’ competing views about what speech doctrine is trying to accomplish. As usual, pay attention to themes often highlighted in these materials:

1. What do the justices think that the speech clause *means*? In particular, what do the different justices think are the *purposes* of the First Amendment? How does that assessment then shape the doctrines (*i.e.*, “implementation rules”\*) that they adopt?
2. What is the basic structure of the speech right? Is it focused on the individual or on the government?
3. If the focus is on the government, does the First Amendment limit the *purposes* that the government may pursue? If so, how are judges supposed to evaluate purpose? Through a direct inquiry into subjective motives? Or through a more indirect, objective inquiry using a tiers-of-scrutiny framework? Or something else?

In addition to these themes, we will continue to think about *facial* and *as-applied* constitutional challenges as well as *unconstitutional conditions*.

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### 4.2. Early History

Founding-Era conceptions of expressive freedom *combined* protection for the natural liberty of speaking, writing, and publishing (a natural liberty that could be regulated in promotion of the public good) with more determinate guarantees of particular common-law rights, particularly the rule against press licensing, the right of a jury trial when the government restricted speech, and a right to engage in good-faith speech on matters of public concern, such as discussion of governmental affairs. Under this

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\* Remember: Judges nearly always deny that they are making up doctrine, so don’t go into court talking about implementation rules; that said, it is essential to recognize that judges make up doctrine all the time.

framework, Congress and state legislatures determined what rules best promoted the public good—deciding whether, for instance, to ban false and malicious statements about the government (*i.e.*, seditious libel)—but courts were well positioned to apply more determinate common-law rules that helped protect communication.

Into the early twentieth century, courts continued to treat speaking, writing, and publishing as natural rights that were generally regulable in promotion of the public good. As the Supreme Court explained in *Patterson v. Colorado* (1907), the government generally had authority to ban speech or publications “deemed contrary to the public welfare.” This latitude to restrict natural rights was, of course, part and parcel of the Court’s general approach in cases like *Plessy* and *Lochner*.

In our previous encounters with natural rights, we have focused on the requirement of *impartiality*—namely, the idea that a government violated the basic terms of the social contract if it failed to give equal consideration to everyone’s interests by acting with hostility toward (or disregard of) particular persons or groups. This principle applied in the speech context, too, but the particular concern here was that members of the government might persecute their critics because of a self-interested desire to stay in power (and avoid damage to their fragile egos). In other words, the government might censor speech *not in the public interest* but rather because of *self-interested, censorial motives*.

These concerns were originally addressed by recognizing traditional common-law rules—particularly the rule against press licensing, the right to a trial by jury, and the right to engage in good-faith discussion of public matters. But judges otherwise did very little to address the problem during the nineteenth century because of the high degree of deference given to governmental assessments of the public good. As with equal protection and due process, however, things began to change in the 1930s and 1940s.

There were many causes of this shift, but an especially important influence was changes in judicial attitudes about constitutional rights. In the view of most judges in the 1800s and early 1900s, constitutional rights were defined mostly in terms of their traditional meaning. The legal realism movement, however, started to change the way that many judges viewed constitutional rights. Progressive jurists began to shift toward a more “functional” method of legal interpretation. Judges still had to interpret the law. But this process of interpretation, the progressives thought, should be more forward-looking. “[W]hen [judges] are called upon to say how far existing rules are to be extended or restricted,” Benjamin Cardozo wrote in a famous treatise, “they must let the welfare of society fix the path, its direction and its distance.”

Assessing the functions of inherited legal rules did not necessarily mean that the scope of rights would expand. As Cardozo indicated, some types of restrictions of liberty were permissible in the 1900s even if they “would have been rejected as arbitrary and oppressive” a century earlier. The Court famously curtailed the Contracts Clause along these lines in *Home Building & Loan Ass’n v. Blaisdell* (1934).

But looking to the broader social functions of inherited rules *could* lead to an expansion of rights, too. And that is generally what occurred with respect to First Amendment rights in the twentieth century.

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### 4.3. Prior Restraints

“The liberty of the press,” William Blackstone famously declared in his *Commentaries on the Laws of England* (1760s), “consists in laying no previous restraints upon publications, and not in

freedom from censure for criminal matter when published.” In short, executive officials were prohibited from deciding *who* could operate a printing press and *what* they could publish. Consequently, without a governmental censor, local juries rather than royal agents controlled any efforts to restrict expressive freedom. “The liberty of the press, as established in England,” Jean Louis de Lolme wrote in his 1775 treatise on English constitutional law, effectively meant that courts considering libels against printers “must . . . proceed by the Trial by Jury.”

Americans echoed these ideas. “[W]hat is meant by the liberty of the press,” James Wilson observed during the 1787 ratification debates, “is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual.” As a procedural protection, the rule against prior restraints was especially important because it prevented the executive branch from censoring publications critical of the government.

As happened with a host of other constitutional rights, judges in the 1930s and 1940s began to expand the rule against prior restraints to cover new situations—not just executive-branch licensing of printers. The first time that the Supreme Court ruled that a law was invalid on First Amendment grounds was *Near v. Minnesota* (1931), which held that injunctions could be a form of “prior restraint.” In doing so, however, the Court also held that the rule against prior restraints did *not* apply in some exceptional situations, like cases involving protection of state secrets or cases involving obscenity. Thus, the *expansion* in the *scope* of a constitutional rule came with a *reduction* in its *strength*.

If the rule against prior restraints operated only against *executive* officials, then a categorical ban on *any* prior restraint might make sense. Once the Supreme Court extended the rule to cover any *judicial* restrictions of expression, however, the Court was no longer willing to acknowledge a categorical ban on prior restraints. Instead, the Justices limited the force of the rule in “exceptional cases.” In this sense, the rule against prior restraints focused not *only* on the governmental action but also on what the individual was doing.

The lack of a categorical ban on prior restraints has carried over to modern caselaw. We will not cover prior-restraint doctrine in depth, so here is a summary:

The Court now simply says that there is a “heavy presumption” against prior restraints. But judges do sometimes enjoin speech (especially often in intellectual-property cases). How does this “heavy presumption” operate? As we will see, speech doctrine generally employs a tiers-of-scrutiny framework akin to equal-protection law. *In my view* (although this isn’t well-recognized by judges or scholars), the best way to understand the rule against prior restraints is that it operates as a “plus” factor that lays on top of other doctrinal rules—just as signs of animus toward a disfavored group operate as “plus” factor in equal-protection law under *Cleburne* and *Romer*.

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#### 4.4. The Emergence of Modern Speech Doctrine

As noted in the introduction to this reading, the freedom of speech originally allowed the government to regulate speech for the promotion of the public good, though with an understanding that people could make well-intentioned statements on matters of public concern, like good-faith discussions of politics, religion, and culture. The privilege thus recognized certain limits on governmental power to regulate speech, but it also only applied when speakers were *public-regarding* in their aims. Speakers, in other words, had to take account of the harms that their speech might impose on others or the society at large. As Robert Post observes, the privilege “carried within it a strong

normative sense of the proper spirit in which public discussion should be conducted.” Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, Am. Bar Found. Res. J. (1987).

In many cases, the scope of the privilege was fairly straightforward. Everybody agreed that people had a constitutional right to express their views about public policy. The government could not arrest people simply because they were criticizing public officials. Pretty much everybody also agreed that this right did not apply when the speaker was promoting immoral or unlawful conduct.

But what should happen if these two principles conflicted? What should happen, for instance, if someone thought that American participation in World War I was immoral and that the draft was unconstitutional, so he stood near a U.S. military recruitment center to oppose the war and the draft? In this context, the speaker would be speaking on a matter of public concern. And it was his right to state these views in *some* way. But his decision to speak near the recruitment center might discourage draftees from joining the war effort. Was that enough to pull his speech outside the scope of the privilege?

The Supreme Court addressed this problem in a series of cases decided in 1919. Writing for the majority in the first trio of cases—*Schenck*, *Frohwerk*, and *Debs*—Justice Holmes construed the privilege as inapplicable any time there was a “clear and present danger” of harm to society. And since each of the defendants in those cases had spoken in a context where their speech was especially likely to harm the war effort, the Court upheld their convictions. It did not matter whether they had *actually* caused harm, nor did it matter that they may not have been *specifically trying* to cause harm. Rather, what mattered was that they had acted in a way that posed a sufficient risk of harm (a “clear and present danger”). Consequently, their actions were not within the scope of the constitutional privilege.

Within six months, though, Holmes began to rethink his approach. He still understood the constitutional privilege in essentially the same way, but he now recognized that virtually *any* speech in opposition to the war posed a risk of harm to society, which in turn meant that speakers effectively might lack a right to speak out against the war.

Holmes responded to this problem in a famous dissenting opinion in *Abrams v. United States* (1919). He acknowledged that a defendant who spoke with malicious intent should not enjoy the constitutional privilege. But for Holmes, the key issue was how to prove criminal intent based solely on a defendant’s political speech. Given that Holmes was one of the leading realists, he addressed this legal dilemma by examining the function of the freedom of speech in a democratic society:

Persecution for the expression of opinions seems to me perfectly logical. . . . But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.”

Unlike in his decisions in the earlier trio of Espionage Act cases, Holmes was now demanding that the government show more than simply a risk of harm. Rather, mere opposition to the war—without any other indication of malicious intent—could only be punished if there was an “imminent[ ] threat[ ]” or “emergency” that posed an “immediate[ ] danger[ ].” To hold otherwise, Holmes concluded, would undermine the “ultimate good” that flowed from allowing for the freedom of speech. As legal historian Ted White observes,\*

One might notice how this formulation asserts a great social interest in free speech, a comparable social interest in public safety, and then looks to empirical analysis (when is the safety of the public really imperiled?) on which to ground a rational process of balancing. By comparison the “bad tendency” test (“when it is barely conceivable that public safety may be slightly affected”) appears unduly vague, subjective, and irrationally underprotective of speech in wartime.

Holmes was a dissenter in *Abrams*—joined only by his progressive colleague Louis Brandeis. But the ideas that Holmes and Brandeis articulated in First Amendment cases turned out to be more enduring than those in the majority opinions. Here is White’s engaging discussion of the *Whitney* case and how Justice Brandeis’s separate opinion fit into the broader constellation of rights jurisprudence in this period:

In the 1927 case of *Whitney v. California*, Justice Brandeis wrote a concurring opinion, joined by Holmes, that also has been one of the most anthologized passages in twentieth-century American constitutional law. The *Whitney* case raised the constitutionality of Anita Whitney’s conviction under a California criminal syndicalist statute for attending a convention held in Oakland to create a California chapter of the Communist Labor Party. In upholding Whitney’s conviction, the majority adopted a conventional police power analysis and concluded that the state of California had a strong interest in suppressing the advocacy of doctrines designed to foment revolution. Although concurring in the result, Brandeis and Holmes declared that Whitney had a constitutional right to associate with a political party that advocated “the desirability of a proletarian revolution by mass action at some date necessarily far in the future.”

In his concurrence Brandeis, after acting as if clear and present danger rather than bad tendency was the Court’s test for evaluating speech claims, wrote the following:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Brandeis’s paragraph achieved a fusion of two sets of arguments justifying protection for free speech. One set rehearsed the now familiar search for truth position. The other identified freedom as both “an end” and “a means” and associated “freedom to think as you will and to speak as you think” with “public discussion.” . . .

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\* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, Mich. L. Rev. (1996).



Brandeis made three assertions about the value of speech in America in *Whitney*: that it signified a commitment to a broader ideal of human freedom itself; that it furthered the discovery and spread of truth; and that it fostered public discussion. But in the celebrated passage from his concurrence the assertions were not treated as separable. Freedom to think as you will and to speak as you think was linked to political truth; and political truth, as well as the duty of citizens to participate in government, were linked to public discussion. Thus, the *Whitney* concurrence can be read fairly, on a theoretical level, as subsuming the search for truth rationale in a rationale that identified the principal function of speech as promoting self-governance in a democratic society. . . . The rationale for protecting speech was its extraordinary value in promoting free and rational public discussion; speech as an embodiment of other liberties was implicitly less central. . . .

Brandeis, in short, used First Amendment cases to launch the project of bifurcated constitutional review. Speech rights were to be given greater protection against legislative infringement than property rights because speech was more closely connected than economic activity to the process of self-governance in a democracy. . . .

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Scholars have described different “theories” of free speech—that is, different accounts of *why* it’s important to protect speech, and particularly to protect speech more than other forms of liberty. What theories does White refer to? And why does it matter what underlying theory of expressive freedom we use? As you learn more about speech doctrine, it is crucial to recognize that the justices don’t always agree about the underlying “theory” of the First Amendment. It’s also important to keep in mind that governments *must* restrict at least *some* forms of communication, like perjury, threats, and so forth. The key issue in First Amendment law is figuring how to delineate permissible and impermissible restrictions of speech.

In the 1930s and 1940s, the Supreme Court slowly began to favor greater protection for speech. But this left open a huge question: What doctrinal rules would they adopt to protect speech? Would they adopt rules that focused on the details of what the *individual* was doing? Or would they look instead to what the *government* was doing? Or some mix of the two? This issue—the *doctrinal rules* that the Supreme Court has adopted in the First Amendment context—is the primary subject of the remaining materials in Unit 4.

In *Minersville School District v. Gobitis* (1940), the Supreme Court initially took an approach to the First Amendment that focused on the nature of the governmental regulation rather than on the privileged or unprivileged status of the individual’s conduct. In particular, it held that Jehovah’s Witness students did not have a right under the Free Exercise Clause not to comply with a rule requiring students at public schools to salute the flag and to recite the pledge of allegiance. But *Gobitis* faced sharp attacks from legal commentators—and eventually from many of the Justices who had joined the opinion. And in large part, though with exceptions, First Amendment doctrine over the next few decades focused on the privileged or unprivileged status of the individual conduct rather than on the nature of the governmental regulation.

As a result of this history, First Amendment casebooks often begin by focusing on categories of “unprotected” speech. This casebook takes a different approach. It begins with content and viewpoint neutrality, which are the most important concepts in modern speech law. After assessing those principles, the casebook then turns to “unprotected” speech categories, which now operate as exceptions to the normal rules rather than as an overarching framework for speech doctrine.

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## 4.5. Content and Viewpoint Neutrality

Throughout the remainder of Unit 4, we will focus on the *scope* of the Speech Clause—*i.e.*, when does speech doctrine come into play at all?—and issues of *strength*—*i.e.*, how does the Clause limit governmental power when it applies? The two cases in this Unit address both of these issues, although they focus mostly on the question of *strength*. As you read, keep track of the various steps in the Court’s reasoning. Modern speech doctrine is not math, but the Court has divided up the analysis in speech cases into discrete steps, and it’s important to keep them distinct.

As you may have noticed, the previous paragraph referred only to the Speech Clause, without making any mention of the Press Clause. That is not a mistake. Under current doctrine, “the freedom of speech, or of the press” are coterminous, and therefore essentially every modern expressive-freedom case is a speech case, regardless of whether it involves “speech,” “printing,” “movies,” etc. To be sure, judges occasionally refer to cases being litigated under the “freedom of the press,” but even when they do so, the doctrinal principles are drawn from speech doctrine.

We will begin with *United States v. O’Brien* (1968). At the time it was decided, *O’Brien* was best understood as a “symbolic speech” case rather than as a paradigm case for First Amendment analysis. Since then, however, the neutrality-based approach used in *O’Brien* has become the backbone of modern speech doctrine. It sets out the default rules for evaluating governmental restrictions of speech. (As we will see later on, other sets of *domain-specific* rules apply in certain situations.)

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### United States v. O’Brien (1968)

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#### Chief Justice Warren delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O’Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. . . . For this act, O’Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, “so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.”

The indictment upon which he was tried charged that he “willfully and knowingly did mutilate, destroy, and change by burning . . . [his Selective Service] Registration Certificate . . .” [The statute created criminal liability for anyone] “who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate. . . .” (Emphasis added.)

In the District Court, O’Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. . . . We hold that the 1965 Amendment is constitutional both as enacted and as applied. . . .

#### I

When a male reaches the age of 18, he is required by [federal law] to register with a local draft board. He is assigned a Selective Service number [and] issued a registration certificate [that specifies] the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant’s birth, his

residence at registration, his physical description, his signature, and his Selective Service number. . . . [The certificate also states] that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. . . .

*[Prior to 1965, federal law required Selective Service registrants to maintain possession of their registration certificates and made it a crime to forge or alter them.]*

By the 1965 Amendment, Congress added . . . the provision here at issue, subjecting to criminal liability not only one who “forges, alters, or in any manner changes” but also one who “knowingly destroys, [or] knowingly mutilates” a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O’Brien to argue otherwise. . . . It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records.

O’Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the “purpose” of Congress was “to suppress freedom of speech.” We consider these arguments separately.

## II

O’Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected “symbolic speech” within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of “communication of ideas by conduct,” and that his conduct is within this definition because he did it in “demonstration against the war and against the draft.”

We cannot accept the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. [W]hen “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment . . . meets all of these requirements, and consequently that O’Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. . . . The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. . . . [The certificate] serves purposes [that] would be defeated by the certificates’ destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. . . . [I]t is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. . . .

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned [by providing the address of the local board and the registrant's Selective Service number]. . . .

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. . . .

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. . . .

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. *Compare Sherbert v. Verner* (1963). The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California* (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. . . .

### III

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

“The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.” *McCray v. United States* (1904).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,<sup>30</sup> because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a “wiser” speech about it.

O’Brien’s position . . . rest[s] upon a misunderstanding of *Grosjean v. American Press Co.* (1936) and *Gomillion v. Lightfoot* (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax. Similarly, in *Gomillion*, the Court sustained a complaint which, if true, established that the “inevitable effect,” of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the “necessary scope and operation”—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O’Brien’s legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. After his brief statement, and without any additional substantive comments, the bill passed the Senate. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O’Brien makes his congressional-“purpose” argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. . . . While both reports make clear a concern with the “defiant” destruction of so-called “draft cards” and with “open” encouragement to others to destroy their cards,

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<sup>30</sup> The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court’s decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. *See, e.g., United States v. Lovett* (1946). . . . We face no such inquiry in this case. The 1965 Amendment to § 462(b) was clearly penal in nature, designed to impose criminal punishment for designated acts.

both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System. . . .

**Justice Harlan, concurring.**

The crux of the Court's opinion, which I join, is of course its general statement that:

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

**[The opinion of Justice Douglas is omitted.]**

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### Notes and Questions

1. The majority opinion in *O'Brien* quickly noted—but mostly skipped over—the first step of speech doctrine by assuming, *arguendo*, that O'Brien would prevail at that step. What was that step? Why was the Court able to skip it in this case?

2. *O'Brien* featured two distinct speech claims. How did the Court address each of them? What are the strengths and weaknesses of its approach?

3. Although *O'Brien* is sometimes remembered as a "symbolic speech" case, it reflects an approach to First Amendment law that avoids any firm distinction between "speech" and "conduct." As Professor John Hart Ely once noted, it is likely a fool's errand to distinguish between "speech" and "conduct":

[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct. Attempts to determine which element "predominates" will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected.\*

Rather than deciding the case based on a characterization of O'Brien's act, Ely remarked, the Court wisely focused on "an inquiry into whether the governmental interest or interests that support the regulation are related to the suppression of expression." Consider Ely's illuminating discussion:

Obviously this approach is not self-defining: it can, for one thing, be interpreted in a way that will guarantee that its demand can always be satisfied. Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying;

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\* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, Harv. L. Rev. (1975).

reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government. Thus in *Brandenburg* the state's defense was not that the speech in question was distasteful, though it surely was, but rather that speeches of that sort were likely to induce people to take the law into their own hands. The reference of *O'Brien's* [content-neutrality] criterion is therefore not the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts. If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such case it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of *O'Brien* . . . . The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.

Ely's description of *O'Brien's* approach nicely captures how the Court has framed First Amendment analysis ever since.

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## Texas v. Johnson (1989)

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

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

### **I**

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." . . . The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." . . . No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Texas Penal Code § 42.09(a)(3). After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000.

### **II**

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct,

permitting him to invoke the First Amendment . . . . See, e.g., *Spence v. Washington* (1974). If his conduct was expressive, we next decide whether the State’s regulation is related to the suppression of free expression. If the State’s regulation is not related to expression, then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O’Brien*’s test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard.<sup>3</sup> A third possibility is that the State’s asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,” *O’Brien*, we have acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” *Spence*.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Id.* Hence, we have recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a “whites only” area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing . . . .

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. . . . That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country . . . .

Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. . . . In these circumstances, Johnson’s burning of the flag was conduct “sufficiently imbued with elements of communication” to implicate the First Amendment.

### III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O’Brien*; *Clark v. Cmty. for Creative Non-Violence* (1984); *Dallas v. Stanglin* (1989). It may not, however, proscribe particular conduct *because* it has expressive elements. “[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.” *Cmty. for Creative Non-Violence v. Watt* (D.C. Cir. 1983) (Scalia, J., dissenting). It is, in short, not simply the verbal or

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<sup>3</sup> Although Johnson has raised a facial challenge to Texas’ flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one “knows” that one’s physical treatment of the flag “will seriously offend one or more persons likely to observe or discover his action,” this fact does not necessarily mean that the statute applies only to *expressive* conduct protected by the First Amendment. A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea . . . .



nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,” we have limited the applicability of *O’Brien’s* relatively lenient standard to those cases in which “the governmental interest is unrelated to the suppression of free expression.” In stating, moreover, that *O’Brien’s* test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,” we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O’Brien’s* less demanding rule.

In order to decide whether *O’Brien’s* test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson’s conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O’Brien’s* test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

## A

Texas claims that its interest in preventing breaches of the peace justifies Johnson’s conviction for flag desecration.<sup>4</sup> However, no disturbance of the peace actually occurred or threatened to occur because of Johnson’s burning of the flag. . . . The only evidence offered by the State at trial to show the reaction to Johnson’s actions was the testimony of several persons who had been seriously offended by the flag burning.

The State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago* (1949). It would be odd indeed to conclude *both* that “if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection,” *FCC v. Pacifica Foundation* (1978) (opinion of Stevens, J.), *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio* (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas’

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<sup>4</sup> Relying on our decision in *Boos v. Barry* (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States v. O’Brien* (1968). He reasons that the violent reaction to flag burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State’s interest to the suppression of expression. . . . Johnson’s theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is “related to expression” in the same way that a desire to prevent an audience from being offended is “related to expression.” Because we find that the State’s interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

arguments that it need only demonstrate “the potential for a breach of the peace,” and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do. . . .

## B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government’s interest in preserving the flag’s special symbolic value “is directly related to expression in the context of activity” such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson’s burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related “to the suppression of free expression” within the meaning of *O’Brien*. We are thus outside of *O’Brien*’s test altogether.

## IV

It remains to consider whether the State’s interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction. . . .

Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.” If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law . . . . The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. . . .

Whether Johnson’s treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct [and the governmental interest is therefore] content based. . . . We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.” *Boos v. Barry* (1988).

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. . . . According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag’s referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [*The Court then cited a long string of cases, including O’Brien.*]

We have not recognized an exception to this principle even where our flag has been involved. . . .

[N]othing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag’s symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State’s argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive . . . and where the regulation of that conduct is related to expression . . . .

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. . . .

To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. . . .

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today. . . .

We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents. . . .

**Chief Justice Rehnquist, with whom Justices White and O'Connor join, dissenting.**

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that “a page of history is worth a volume of logic.” For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. [*Chief Justice Rehnquist then surveyed the importance of the flag in American history, including its role in wars, memorials, holidays, etc.*] . . .

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. . . .

[T]he Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. *See Schenck v. United States* (1919). In *Chaplinsky v. New Hampshire* (1942), a unanimous Court said:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The Court upheld Chaplinsky’s conviction under a state statute that made it unlawful to “address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place.” Chaplinsky had told a local marshal, “You are a God damned racketeer” and a “damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; . . . it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute. . . .

As with “fighting words,” so with flag burning, for purposes of the First Amendment: It is “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed” by the public interest in avoiding a probable breach of the peace. . . .

The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson’s use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. . . . But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of “designated symbols” that the First Amendment prohibits the government from “establishing.” But the government has not “established” this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” The Court’s role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of “no taxation without representation” animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” *Fletcher v. Peck* (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

**Justice Stevens, dissenting.**

... Conceivably th[e flag’s symbolic] value will be enhanced by the Court’s conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression . . . be employed. . . .

The content of respondent’s message has no relevance whatsoever to the case. The concept of “desecration” does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. . . . The case has nothing to do with “disagreeable ideas.” It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent “was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.\*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at

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\* The Court suggests that a prohibition against flag desecration is not content neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. . . . In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration. . . .

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### Notes and Questions

1. What are the key steps of the Court’s analysis in these cases? What is the *scope* of the First Amendment? Scholars often describe this initial step as defining the “coverage” of the freedom of speech. And, assuming the First Amendment applies, what is its *strength*? What particular doctrinal limits on governmental authority does the Court articulate? Scholars often refer to this step as the “protection” of the First Amendment. This terminology is not universally used, but the conceptual distinction is essential. As *O’Brien* makes clear, not all restrictions of speech are unconstitutional.

2. In *Texas v. Johnson*, the Court referred to “*O’Brien*’s relatively lenient standard” and held that it did not apply when considering Johnson’s speech claim. Why not?

3. What sorts of justifications for the law did the government offer in *Texas v. Johnson*? Why did the Court reject those arguments?

4. Based on your answers to the questions in notes 2 and 3, read the following scenario and identify what level of scrutiny applies and whether the government has a sufficient interest:

Prior to this year, a quiet rural town has never had any problems with noise and did not have any laws to regulate noise. On January 1, an environmental activist moved to town and began to beat drums very loudly on his front lawn at midnight every night “as a reminder that we should not sleep soundly while climate change is threatening the Earth.” The town council then passed a noise ordinance that prohibited “intentionally creating noise in excess of 70 decibels between 11pm and 8am.” The next evening, the activist was arrested for beating drums after 11pm. He argued that the law was content and viewpoint discriminatory because (1) beating drums was the way he conveys his views, (2) the ordinance was passed in response to his protests, (3) the ordinance operates in a way that effectively only applies to his climate-change protests, (4) the town has taken the view that noise is harmful.

5. *Time, Place, and Manner Restrictions*. The majority opinion in *Texas v. Johnson* briefly remarks that “*O’Brien*’s test in the last analysis is little, if any different from the standard applied to time, place, or manner restrictions” in public forums—meaning public property held open for private speech. This statement meant that *intermediate scrutiny* applies to both types of claims.

*O’Brien* itself was not clear on this point. The final step of the Court’s analysis in *O’Brien* asked whether “the incidental restriction on alleged First Amendment freedoms is *no greater than is essential* to the furtherance of that interest.” (Emphasis added.) The Court had previously used the same language in assessing free-exercise claims. See, e.g., *United States v. Lee* (1982). And at that point, free-exercise claims of that sort were understood to trigger *strict scrutiny*.

In another line of cases involving limits on the time, place, or manner of speech on public property, however, the Court did not require such rigorous tailoring. For example, if the government imposed a ban on using megaphones in a public park, without drawing any content-based distinctions, then a reviewing court would evaluate whether the restriction was a *reasonable* time, place, or manner regulation. Here is how the Court described this inquiry in *Grayned v. City of Rockford* (1972):

The nature of a place, “the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.” Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same

speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the States legitimate interest.

In theory, content-neutral “time, place, or manner” regulations of speech activities on public property could be distinguished from other incidental, content-neutral restrictions of expressive conduct under *O’Brien*. In fact, some lower courts still seem inclined to distinguish them. *See, e.g., Club Madonna Inc. v. City of Miami Beach* (11th Cir. 2022). But, as *Texas v. Johnson* indicates, the Supreme Court has merged the two lines of cases. Intermediate scrutiny now applies in both situations, so long as the speech restriction is content neutral. Indeed, the Court has stated, “[l]est any confusion on the point remain,” that the normal intermediate scrutiny test applies in both contexts. *Ward v. Rock Against Racism* (1989).

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## 4.6. Structure of Speech Claims

We’re working toward developing a flow chart to clarify the structure of speech claims. The first part of this assignment will flesh out the first step: *scope* (sometimes called “coverage”). Remember, *this is only the threshold step*—assessing whether the governmental restriction implicates the First Amendment at all. Then we’ll return to the key issue at the second step when assessing the *strength* (or “protection”) of the First Amendment: whether the restriction is “content based.”

### Issue 1: Scope – Is the government restricting speech?

What counts as a speech restriction under the First Amendment? Notice how the Court approached this question in *Arcara v. Cloud Books, Inc.* (1986), which involved a bookstore forced to close because of health-code violations.

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### Arcara v. Cloud Books, Inc. (1986)

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**Chief Justice Burger delivered the opinion of the Court, in which Justices White, Powell, Rehnquist, Stevens, and O’Connor joined.**

. . . This Court has applied First Amendment scrutiny to a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion. *United States v. O’Brien* (1968). In *O’Brien*, the Court considered the First Amendment ramifications of a statute which imposed criminal sanctions on one who “knowingly destroys, knowingly mutilates, or in any manner changes” a draft registration certificate. The *O’Brien* Court noted that on its face the statute did not regulate conduct that was necessarily expressive, since the destruction of a draft card is not ordinarily expressive conduct. The defendant in *O’Brien* had, as respondents here do not, at least the semblance of expressive activity in his claim that the otherwise unlawful burning of a draft card was to “carry a message” of the actor’s opposition to the draft. As the Court noted in *O’Brien*: “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

Amendment freedoms.” . . . The Court determined that the prohibition against mutilation of draft cards met these requirements and could constitutionally be applied against one who publicly burned his draft card as a symbolic protest.

We have applied *O’Brien* to other cases involving governmental regulation of conduct that has an expressive element. In *Clark v. Community for Creative Non-Violence* (1984), we considered the application of a ban on camping and sleeping in Lafayette Park and on the Mall in Washington, D.C., to demonstrators who sought to sleep overnight in these parks as a protest of the plight of homeless people. Again in *United States v. Albertini* (1985), we considered a protester’s conviction for reentering a military base after being subject to an order barring him from entering that establishment based on his previous improper conduct on the base. In each of these cases we considered the expressive element of the conduct regulated and upheld the regulations as constitutionally permissible.

We have also applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983), we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, since the burden of the tax inevitably fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers exercising the constitutionally protected freedom of the press. [At the same time, we emphasized that] “[i]t is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. [The Court then cited cases upholding the enforcement of anti-trust rules, labor rules, and so forth, to organizations engaged in expressive activities.] . . .

The New York Court of Appeals held that the *O’Brien* test for permissible governmental regulation was applicable to this case because the closure order sought by petitioner would also impose an incidental burden upon respondents’ bookselling activities. That court ignored a crucial distinction between the circumstances presented in *O’Brien* and the circumstances of this case: unlike the symbolic draft card burning in *O’Brien*, the sexual activity carried on [in the bookstore] in this case [which triggered the healthcode violation] manifests absolutely no element of protected expression. . . .

Nor does the distinction drawn by the New York Public Health Law inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden, as did the tax struck down in *Minneapolis Star*. As we noted in *Minneapolis Star*, neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities. If the city imposed closure penalties for demonstrated Fire Code violations or health hazards from inadequate sewage treatment, the First Amendment would not aid the owner of premises who had knowingly allowed such violations to persist.

Nonetheless, respondents argue that the effect of the statutory closure remedy impermissibly burdens its First Amendment protected bookselling activities. The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location. In any event, this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner’s claim to a prison environment least restrictive of his desire to speak to outsiders.



It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to “least restrictive means” scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O’Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

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*Arcara*—and particularly the last paragraph—helps us identify the two situations in which there is First Amendment “coverage”:

Situation 1: An individual is restricted from engaging in conduct that is *expressive*. This test focuses on what the *individual* is doing.

Situation 2: The government directly or indirectly *targets speech*. This test focuses on what the *government* is doing. See, e.g., *United States v. Nat’l Treasury Emps. Union* (1995) (reviewing under the First Amendment a ban on public employees’ receipt of speaking funds because Congress “chose to restrict only expressive activities”).

Notice that some situations involve neither *expressive conduct* nor *targeting*. If the government requires drivers not to exceed the speed limit, for instance, and a driver speeds to pick up his kid from school, that restriction doesn’t implicate the First Amendment at all. His conduct wasn’t expressive (we’ll delve into what that means soon), and like the health code in *Arcara*, the speed-limit rule doesn’t have anything to do with speech. If the driver raised a First Amendment defense at his traffic-court hearing, the judge might laugh at him.

Some cases involve *expressive conduct* but not *targeting*. For instance, suppose that the government bans everyone from possessing lead. An artist, however, thinks that lead is far better than graphite for his drawings, so she buys lead on the black market and uses it anyway. In this case, the individual is engaged in expressive conduct (drawing is expressive conduct; again, more on that soon). At the same time, there’s no reason to think that the anti-lead rule was targeting speech—it applied to all uses of lead, regardless of the expressiveness of those uses. Since *either* expressive conduct *or* targeting is sufficient to implicate the First Amendment, the artist would at least have passed the threshold step for making out a free-speech claim. (Note: Laws can be *targeted at speech* without being content based. For instance, a rule that said: “Don’t say anything” would target speech—but not based on its content.)

Some cases might involve *targeting* but not *expressive conduct*. In *United States v. National Treasury Employees Union* (1995), for instance, Congress had banned federal employees from receiving speaking fees. Why was this a First Amendment problem? Well, getting paid probably isn’t “expressive conduct” (otherwise we’d have to scrutinize all commercial regulations under the First Amendment). But by focusing on *speaking fees*, the government was singling out speech. As the Court explained, the rule raised a First Amendment problem because Congress “chose to restrict only expressive activities.” Income taxes, by contrast, do not target speech.

Finally, some cases might involve *both* expressive conduct and targeting. If a statute banned criticism of the government, for instance, the statute would directly restrict expressive conduct *and* it would obviously target speech.

The foregoing principles apply to governmental restrictions of private speech. The *government* can speak *on its own* without implicating the First Amendment at all. That principle is explored further in Units 4.13 and 4.14.

### What Counts as Expressive Conduct?

There isn't a clear rule that delineates expressive conduct from non-expressive conduct. Verbal communication is obviously expressive. But what about non-verbal acts? Surely sign language counts. But what about flipping the middle finger? Staging a sit in? Wearing a black arm band in protest? Waving a flag? Burning a flag? Dancing in a ballet performance? Dancing nude in a strip club?

In *United States v. Spence* (1974), the government charged a college student with "improper use" of an American flag when he hung a flag upside down from his apartment window. He had also used black tape to create a peace sign on both sides of the flag. In considering the student's free-speech challenge, the Supreme Court noted that he "did not choose to articulate his views through printed or spoken words." But that did not end the Court's analysis. Instead, the Court explained, it was "necessary to determine whether the restricted activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Expressive conduct did not include a "limitless variety of conduct" in which a "person engaging in the conduct intends thereby to express an idea." But considering the "nature" of the activity and "the factual context and environment in which it was undertaken," the Court concluded that Spence's conduct was sufficiently expressive to trigger some form of heightened scrutiny. In particular, it explained, "flags are a form of symbolism comprising a primitive but effective way of communicating ideas." And, the Court continued, "the context may give meaning to the symbol. . . . A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it [in 1970]." Finally, the student was not engaged in "an act of mindless nihilism." Rather, his conduct was "a pointed expression of anguish . . . about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." You may have noticed that the Court invoked this standard at the beginning of *Texas v. Johnson* (1989).

The "*Spence* test," however, excluded more abstract expression, and the Court later expanded the definition. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995), the Court offered this explanation for why parades are expressive conduct under the First Amendment:

[W]e use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. . . . [T]he Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia State Bd. of Educ. v. Barnette* (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, wearing an armband to protest a war, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969), displaying a red flag, *Stromberg v. California* (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *Nat'l Socialist Party of Am. v. Skokie* (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," *cf. Spence v. Washington* (1974) (per

curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

A good example of a case at the edge of the *expressive/non-expressive* line is *Barnes v. Glen Theatre, Inc.* (1991). The case involved the application of a public-nudity ban to a strip club. Here is how Judge Posner analyzed the issue in a concurring opinion when the case reached the Court of Appeals for the Seventh Circuit:

The record contains a videotape of the dances that the proprietor of the “Kitty Kat Lounge” would like to exhibit. The name of the establishment does not promise high culture, nor the fact that it is a bar rather than a theater, nor (a related point) that the compensation of the dancers depends on the number of drinks they induce appreciative customers to buy after the dance. The dancers are presentable although not striking young women. They dance on a stage, with vigor but without accomplishment, to the sound of a jukebox, and while dancing they remove articles of clothing (beginning, for example, with a glove) until nothing is left. Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more. It is worth pausing a moment to ask why. Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England, where decent women were expected to wear dresses that reached from the top of the neck to the floor—where even the legs of furniture were sometimes clad for the sake of decency—a bare ankle was a sensation. Since then female dress has become progressively less modest, and today many decent women appear in public in states of undress (mini-skirts, hot pants, slit skirts, body stockings, see-through blouses, décolletage becoming outright topless evening wear) that would have been considered nakedness, or the garb of prostitutes, thirty years ago. A striptease that ended in a degree of nudity no longer suggestive of preparations for sex—a striptease that left the stripper garbed as she might be for an expedition to the supermarket—might lack erotic punch today. . . .

Dance . . . is a medium of expression, of communication. What it expresses, what it communicates, is, like most art—particularly but not only nonverbal art—emotion, or more precisely an ordering of sights and sounds that arouses emotion. . . . Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not *invariably* associated with sex. The goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the preparations are complete. The sequel is left to the viewer’s imagination. This is the “tease” in “striptease.”

The Supreme Court affirmed, concluding that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”

What *doesn’t* count as “expressive conduct”? One example is ballroom dancing, which the Court held was not sufficiently expressive to trigger First Amendment review in *Dallas v. Stanglin* (1989). But how can nude dancing count as expressive and ballroom dancing not? (Did the justices not watch Kevin Bacon in *Footloose*?) Here’s Justice Souter’s explanation in *Barnes*:

This Court has previously categorized ballroom dancing as beyond the Amendment’s protection, and dancing as aerobic exercise would likewise be outside the First Amendment’s

concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience.

As mentioned above, whether conduct is *expressive* depends on the individual conduct—not the government—and it involves a mix of that individual’s *intentions* and how the surrounding people would *perceive* the conduct—that is, whether they’d likely perceive it as being expressive. The end goal is to determine whether conduct is sufficiently communicative to trigger the First Amendment. This involves a highly contextual analysis; there aren’t clear lines to delineate “expressive conduct” from “non-expressive conduct.” For example, someone sitting down at a diner generally isn’t expressive, but it might be if done as part of a civil-rights “sit in.”

In a concurring opinion in *Barnes*, Justice Scalia argued—contrary to existing doctrine—that expressive conduct should *not* trigger First Amendment review:

[V]irtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. *See, e.g., Florida Free Beaches, Inc. v. Miami* (11th Cir. 1984) (nude sunbathers challenging public indecency law claimed their “message” was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, *see, e.g., United States v. O’Brien* (1968)—that it be justified by an “important or substantial” government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. *See, e.g., Texas v. Johnson* (1989). In [*Johnson*], we explicitly found that suppressing communication was the object of the regulation of conduct. Where that has not been the case, however—where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons—we have allowed the regulation to stand. *See, e.g., O’Brien*.

All our holdings (though admittedly not some of our discussion) support the conclusion that “the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription.” *Cnty. for Creative Non-Violence v. Watt* (D.C. Cir. 1983) (*en banc*) (Scalia, J., dissenting). Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation (which means in effect all regulation) survive an enhanced level of scrutiny.

But Justice Scalia lost in *Barnes*—a holding that the Court reaffirmed in *Erie v. Pap’s A.M.* (2000). In short, *incidental* restrictions of expressive conduct still trigger *some* form of elevated scrutiny. That is, they are within the scope of the First Amendment.

Another interesting scope question came up in the following case, *Heffernan v. City of Paterson* (2016). The case involved an allegation that a mayor retaliated against a police officer for purportedly engaging in protected speech by supporting the opposing candidate for mayor. So this was a context where First Amendment doctrine calls for courts to directly evaluate governmental motives (in contrast

to the general bar on such inquiries under *O'Brien*). What was odd about the case, however, was that the claimant, Jeffrey Heffernan, was not *actually* engaged in any political expression. Rather, the mayor had *mistakenly thought* that Heffernan was supporting his rival. The case thus presented the following question: If Heffernan was not actually engaged in any speech, could he bring a claim based on an alleged violation of his First Amendment rights under 42 U.S.C. § 1983, which provides a right of action for claimants to bring a civil action against persons who violate their federal rights?

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### Heffernan v. City of Paterson (2016)

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#### **Justice Breyer, delivered the opinion of the Court.**

The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. In this case a government official demoted an employee because the official believed, but *incorrectly* believed, that the employee had supported a particular candidate for mayor. The question is whether the official's factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion "deprive" him of a "right . . . secured by the Constitution"? 42 U.S.C. § 1983. We hold that it did.

#### I

To decide the legal question presented, we assume the following, somewhat simplified, version of the facts: In 2005, Jeffrey Heffernan, the petitioner, was a police officer in Paterson, New Jersey. He worked in the office of the Chief of Police, James Wittig. At that time, the mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Heffernan. Heffernan was a good friend of Spagnola's.

During the campaign, Heffernan's mother, who was bedridden, asked Heffernan to drive downtown and pick up a large Spagnola sign. She wanted to replace a smaller Spagnola sign, which had been stolen from her front yard. Heffernan went to a Spagnola distribution point and picked up the sign. While there, he spoke for a time to Spagnola's campaign manager and staff. Other members of the police force saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the force.

The next day, Heffernan's supervisors demoted Heffernan from detective to patrol officer and assigned him to a "walking post." In this way they punished Heffernan for what they thought was his "overt involvement" in Spagnola's campaign. In fact, Heffernan was not involved in the campaign but had picked up the sign simply to help his mother. Heffernan's supervisors had made a factual mistake.

Heffernan subsequently filed this lawsuit in federal court. He claimed that Chief Wittig and the other respondents had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. They had thereby "depriv[ed]" him of a "right . . . secured by the Constitution." 42 U.S.C. § 1983.

The District Court found that Heffernan had not engaged in any "First Amendment conduct," and, for that reason, the respondents had not deprived him of any constitutionally protected right. The Court of Appeals for the Third Circuit affirmed. . . .

## II

With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. The basic constitutional requirement reflects the First Amendment’s hostility to government action that “prescribe[s] what shall be orthodox in politics.” *West Virginia State Bd. of Educ. v. Barnette* (1943). . . .

We assume that the activities that Heffernan’s supervisors *thought* he had engaged in are of a kind that they cannot constitutionally prohibit or punish, but that the supervisors were mistaken about the facts. Heffernan had not engaged in those protected activities. Does Heffernan’s constitutional case consequently fail?

The text of the relevant statute does not answer the question. The statute authorizes a lawsuit by a person “depriv[ed]” of a “right . . . secured by the Constitution.” 42 U.S.C. § 1983. But in this context, what precisely is that “right?” Is it a right that primarily focuses upon (the employee’s) actual activity or a right that primarily focuses upon (the supervisor’s) motive, insofar as that motive turns on what the supervisor believes that activity to be? The text does not say.

Neither does precedent directly answer the question. In some cases we have used language that suggests the “right” at issue concerns the employee’s actual activity. In *Connick v. Myers* (1983), for example, we said that a court should first determine whether the plaintiff spoke “as a citizen” on a “matter[] of public concern.” We added that, if the employee has not engaged in what can “be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.” *Id.* We made somewhat similar statements in *Garcetti v. Ceballos* (2006) and *Pickering v. Board of Education* (1968).

These cases, however, did not present the kind of question at issue here. In *Connick*, for example, no factual mistake was at issue. The Court assumed that both the employer and the employee were at every stage in agreement about the underlying facts: that the employer dismissed the employee because of her having circulated within the office a document that criticized how the office was being run (that she had in fact circulated). The question was whether the circulation of that document amounted to constitutionally protected speech. If not, the Court need go no further. . . .

We conclude that . . . the government’s reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee’s behavior.

We note that a rule of law finding liability in these circumstances tracks the language of the First Amendment more closely than would a contrary rule. Unlike, say, the Fourth Amendment, which begins by speaking of the “right of the people to be secure in their persons, houses, papers, and effects . . .,” the First Amendment begins by focusing upon the activity of the Government. It says that “Congress shall make no law . . . abridging the freedom of speech.” The Government acted upon a constitutionally harmful policy whether Heffernan did or did not in fact engage in political activity. That which stands for a “law” of “Congress,” namely, the police department’s reason for taking action, “abridge[s] the freedom of speech” of employees aware of the policy. And Heffernan was directly harmed, namely, demoted, through application of that policy.

We also consider relevant the constitutional implications of a rule that imposes liability. The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. Hence, we do not require plaintiffs in political affiliation cases to “prove that they, or other employees, have been

coerced into changing, either actually or ostensibly, their political allegiance.” *Branti v. Finkel* (1980). The employer’s factual mistake does not diminish the risk of causing precisely that same harm. . . .

Finally, we note that, contrary to respondents’ assertions, a rule of law that imposes liability despite the employer’s factual mistake will not normally impose significant extra costs upon the employer. To win, the employee must prove an improper employer motive. In a case like this one, the employee will, if anything, find it more difficult to prove that motive, for the employee will have to point to more than his own conduct to show an employer’s intent to discharge or to demote him for engaging in what the employer (mistakenly) believes to have been different (and protected) activities. We concede that, for that very reason, it may be more complicated and costly for the employee to prove his case. But an employee bringing suit will ordinarily shoulder that more complicated burden voluntarily in order to recover the damages he seeks. . . .

**Justice Thomas, with whom Justice Alito joins, dissenting.**

Today the Court holds that a public employee may bring a federal lawsuit for money damages alleging a violation of a constitutional right that he concedes he did not exercise. Because federal law does not provide a cause of action to plaintiffs whose constitutional rights have not been violated, I respectfully dissent. . . .

Nothing in the text of § 1983 provides a remedy against public officials who attempt but fail to violate someone’s constitutional rights.

There are two ways to frame Heffernan’s First Amendment claim, but neither can sustain his suit. As in most § 1983 suits, his claim could be that the City interfered with his freedom to speak and assemble. But because Heffernan has conceded that he was not engaged in protected speech or assembly when he picked up the sign, the majority must resort to a second, more novel framing. It concludes that Heffernan states a § 1983 claim because the City unconstitutionally regulated employees’ political speech and Heffernan was injured because that policy resulted in his demotion. Under that theory, too, Heffernan’s § 1983 claim fails. A city’s policy, even if unconstitutional, cannot be the basis of a § 1983 suit when that policy does not result in the infringement of the plaintiff’s constitutional rights.

To state a claim for retaliation in violation of the First Amendment, public employees like Heffernan must allege that their employer interfered with their right to speak as a citizen on a matter of public concern. Whether the employee engaged in such speech is the threshold inquiry under the Court’s precedents governing whether a public employer violated the First Amendment rights of its employees. *See Garcetti v. Ceballos* (2006). If the employee has not spoken on a matter of public concern, “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.” *Id.* If the employee did, however, speak as a citizen on a matter of public concern, then the Court looks to “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” *Id.*

Under this framework, Heffernan’s claim fails at the first step. He has denied that, by picking up the yard sign, he “spoke as a citizen on a matter of public concern.” *Id.* . . .

At bottom, Heffernan claims that the City tried to interfere with his constitutional rights and failed. But it is not enough for the City to have attempted to infringe his First Amendment rights. To prevail on his claim, he must establish that the City *actually* did so. The City’s attempt never ripened into an actual violation of Heffernan’s constitutional rights because, unbeknownst to the City, Heffernan did not support Spagnola’s campaign. . . .

[T]he majority reframes Heffernan’s case as one about the City’s lack of power to act with unconstitutional motives. . . .

But § 1983 does not provide a cause of action for unauthorized government acts that do not infringe the constitutional rights of the § 1983 plaintiff. Of course the First Amendment “focus[es] upon the activity of the Government.” See Amdt. 1 (“Congress shall make no law . . .”). And here, the “activity of Government” has caused Heffernan harm, namely, a demotion. But harm alone is not enough; it has to be the right kind of harm. Section 1983 provides a remedy only if the City has violated Heffernan’s constitutional *rights*, not if it has merely caused him harm. . . .

The mere fact that the government has acted unconstitutionally does not necessarily result in the violation of an individual’s constitutional rights, even when that individual has been injured. Consider, for example, a law that authorized police to stop motorists arbitrarily to check their licenses and registration. That law would violate the Fourth Amendment. And motorists who were *not* stopped might suffer an injury from the unconstitutional policy; for example, they might face significant traffic delays. But these motorists would not have a § 1983 claim simply because they were injured pursuant to an unconstitutional policy. This is because they have not suffered the right kind of injury. They must allege, instead, that their injury amounted to a violation of their constitutional right against unreasonable seizures—that is, by being unconstitutionally detained.

Here too, Heffernan must allege more than an injury from an unconstitutional policy. He must establish that this policy infringed his constitutional rights to speak freely and peaceably assemble. Even if the majority is correct that demoting Heffernan for a politically motivated reason was beyond the scope of the City’s power, the City never invaded Heffernan’s right to speak or assemble. Accordingly, he is not entitled to money damages under § 1983 for the nonviolation of his First Amendment rights. . . .

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### Notes and Questions

1. In large part, Justice Thomas’s dissent is framed as an interpretation of § 1983—the federal statute conferring a *right of action* to bring First Amendment claims—rather than as an interpretation of the First Amendment. (Importantly, whether a person’s *constitutional rights* were violated is a distinct legal question from whether that person has a *right of action* allowing them to seek civil remedies.) Putting that point aside, however, *Heffernan* nicely tees up an interesting conceptual problem relating to the nature of First Amendment rights. Does the Speech Clause protect certain forms of *privileged individual conduct*? Or does it protect against certain forms of *governmental misconduct*? Or perhaps both?

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### Issue 2: Strength – Is the speech-restriction constitutional?

Knowing that the First Amendment *applies at all* is not sufficient to resolve free-speech cases. Why? Well, because the First Amendment is not absolute. There are plenty of times when the government can restrict speech!

As we saw in *United States v. O’Brien* and in *Texas v. Johnson*, the Court generally uses a *tiers of scrutiny* framework to figure out whether speech restrictions are constitutional. And the crucial rule that the Supreme Court uses to decide which level of scrutiny to apply is the distinction between “content based” and “content neutral” rules.

To what extent does *actual governmental purpose* matter in determining whether a rule is content based or content neutral?



We saw in *O'Brien* that when the government applies a rule that is content-neutral on its face and asserts a content-neutral justification, the court will *not* consider evidence that the *actual subjective motives* of the government were content based.

For example, in *Barnes* (the nude dancing case), the government simply banned all public nudity—a rule that was content neutral because the application of the law did not depend at all on the “communicative content” of the nudity. The law, for instance, didn’t single out “erotic nudity.” Nonetheless, the challengers argued that the legislature was *really* just trying to shut down the erotic-dancing parlors, and that the government’s content-neutral justifications (health, safety, etc.) were phony. Here is Justice Souter’s reply:

This asserted [content-neutral] justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. At least as to the regulation of expressive conduct, “[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a ‘wiser’ speech about it.” *O'Brien*. In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State’s enforcement of the statute against the type of adult entertainment at issue here.

In some First Amendment cases, this principle doesn’t apply, and courts *do* consider the government’s actual motives. But these cases involve a case-specific decision, usually by an executive officer, rather than the constitutionality of a legislative act. *See, e.g., NRA v. Vullo* (2024). In retaliation cases, for instance, the Court has recognized the viability of claims based on an allegation that a governmental actor made an adverse decision against someone because of that person’s exercise of First Amendment rights. *See Hartman v. Moore* (2006). In the context of *administrative* decisions, as opposed to *legislative* decisions, the subjective-purpose inquiry is usually thought to be easier to conduct. Nonetheless, for reasons not explored in this casebook, the Court has recently made it harder to prove retaliatory intent. *See Nieves v. Bartlett* (2019) (holding that retaliatory arrest claims will fail if police officers had probable cause, regardless of the officers’ subjective intent).

But the general rule is that statutes that are content neutral on their face cannot become content based through a subjective-motive inquiry.

Content-neutral rules, however, *can* be content based *in their application*. For instance, a breach-of-the-peace law isn’t content based on its face. Indeed, it doesn’t say anything about speech! And it can be applied in a content-neutral way. For instance, if someone yells loudly in another person’s face, the breach of the peace occurs from the fact that the person is screaming near someone’s face—not from *what* the person is yelling. But when a breach-of-the-peace statute is applied because of the *communicative harm* caused by what someone says, then the *application* of the rule is content based.

The importance of treating certain *applications* of laws as “content based” came up in *Holder v. Humanitarian Law Project* (2010). The federal statute at issue prohibited “material support” to designated terrorist organizations. A humanitarian group challenged the statute on First Amendment grounds, arguing that it unconstitutionally restricted their plans to train designated groups about “how to use humanitarian and international law to peacefully resolve disputes” and “how to petition various representative bodies such as the United Nations for relief” rather than resorting to violence. In response, the government argued that the rule should be evaluated under intermediate scrutiny because

the ban on material support did not single out speech at all—much less on the basis of its content. Consider the Court’s response:

The Government argues that § 2339B should . . . receive intermediate scrutiny because it generally functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California* (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O’Brien*. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction. This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.

In the next Unit, we’ll consider a different issue: Should a law that is content based on its face nonetheless be considered content neutral if the government can show a content-neutral subjective motive?

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### Reconsidering Tiers of Scrutiny

Although the “tiers of scrutiny” framework remains central in First Amendment law, there are signs of judicial dissatisfaction with that approach. In an opinion for the Court in *New York State Rifle and Pistol Association v. Bruen* (2022), for example, Justice Thomas argued for defining Second Amendment rights based on “text and history,” not “any means-end test such as strict or intermediate scrutiny.” He then argued that this test accorded with settled First Amendment principles:

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. In that context, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entm’t Group, Inc.* (2000). In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.* (2003). And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment’s protections. See, e.g., *United States v. Stevens* (2010) (placing the burden on the government to show that a type of speech belongs to a “historic and traditional categor[y]” of constitutionally unprotected speech “long familiar to the bar”).

Notice that Justice Thomas *really* stretches in this passage. It is true that the Court has adopted a historical inquiry for identifying “unprotected” or “low value” speech. See *United States v. Stevens* (2010). But as we will see, that historical inquiry is relevant in deciding which level of scrutiny to apply. See *Brown v. Entm’t Merchants Ass’n* (2011). The Court has not held that in *applying* intermediate or strict scrutiny the government has to “point to *historical* evidence” in order to defend its asserted interests.

Existing doctrine, however, was forged by different Justices, and there is no guarantee that today’s Justices will necessarily continue to follow the path that their predecessors laid out. Why might Justice Thomas have rejected the tiers of scrutiny framework in *Bruen*? What might that suggest for the future of First Amendment doctrine?

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### Practice Questions

**Question 1.**

A person was burning an American flag in the middle of the road. He was arrested for violating this statute: “It is a crime to set fires in public.” Is there First Amendment coverage (*i.e.*, is this within the *scope* of the First Amendment)?

**Question 2.**

A person was burning an American flag in the middle of the road. He was arrested for violating this statute: “It is a crime to set fires in public.” Is this restriction content based?

**Question 3.**

A person was burning an American flag in the middle of the road. He was arrested for violating this statute: “It is a crime to burn an American flag.” Is the restriction content based?

**Question 4.**

A person was burning an American flag in the middle of the road. He was arrested for violating this statute: “It is a crime to loiter in the road.” Is the restriction content based?

**Question 5.**

A person yells “fuck off” in a courthouse hallway. He was arrested for violating this statute: “It is a crime to yell in the courthouse.” Is there First Amendment coverage (*i.e.*, is this within the *scope* of the First Amendment)?

**Question 6.**

A person yells “fuck off” in a courthouse hallway. He was arrested for violating this statute: “It is a crime to yell in the courthouse.” Is the restriction content based?

**Question 7.**

A statute provides: “It is a crime to cause a public disturbance or otherwise breach the peace.” Bob was arrested for walking down 125th St., NYC, loudly banging a garbage can (to protest bad garbage collection). Is the restriction content based?

**Question 8.**

A statute provides: “It is a crime to cause a public disturbance or otherwise breach the peace.” Bob was arrested for walking down 125th St., NYC, wearing a KKK outfit. Is the restriction content based?

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## 4.7. Assessing Content Neutrality

Although direct assessments of legislative motives are generally not allowed, difficult questions still remain as to what counts as *discriminatory* legislation. The following case teed up that issue in the context of an abortion-facility “buffer zone.” Make sure to focus especially on the Court’s discussion

of content neutrality in Part III, but it is also worth considering the application of intermediate scrutiny in Part IV.

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### McCullen v. Coakley (2014)

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

A Massachusetts statute makes it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities’ entrances. The question presented is whether the statute violates the First Amendment. . . .

### III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. Respondents do not argue that the Act can survive this exacting standard.

Justice Scalia objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny, given that we ultimately conclude that it is not narrowly tailored. But we think it unexceptional to perform the first part of a multipart constitutional analysis first. The content-neutrality prong . . . is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive. *See, e.g., Bartnicki v. Vopper* (2001); *Holder v. Humanitarian Law Project* (2010) (concluding that a law was content based even though it ultimately survived strict scrutiny). . . .

[And] there is good reason to address content neutrality. In discussing whether the Act is narrowly tailored, we identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted. Some apply only at abortion clinics, which raises the question whether those provisions are content neutral. While we need not (and do not) endorse any of those measures, it would be odd to consider them as possible alternatives if they were presumptively unconstitutional because they were content based and thus subject to strict scrutiny.

### A

The Act applies only at a “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” Given this definition, petitioners argue, “virtually all speech affected by the Act is speech concerning abortion,” thus rendering the Act content based.

We disagree. To begin, the Act does not draw content-based distinctions on its face. *Contrast Boos v. Barry* (1988) (ordinance prohibiting the display within 500 feet of a foreign embassy of any sign that tends to bring the foreign government into “public odium” or “public disrepute”); *Carey v. Brown* (1980) (statute prohibiting all residential picketing except “peaceful labor picketing”). The Act would be content based if it required “enforcement authorities” to “examine the content of the message that

is conveyed to determine whether” a violation has occurred. *FCC v. League of Women Voters* (1984). But it does not. Whether petitioners violate the Act “depends” not “on what they say,” *Humanitarian Law Project*, but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism* (1989). The question in such a case is whether the law is “justified without reference to the content of the regulated speech.” *Renton v. Playtime Theatres, Inc.* (1986).

The Massachusetts Act is. Its stated purpose is to “increase forthwith public safety at reproductive health care facilities.” Respondents have articulated similar purposes before this Court—namely, “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.”

We have previously deemed the foregoing concerns to be content neutral. *See Boos* (identifying “congestion,” “interference with ingress or egress,” and “the need to protect . . . security” as content-neutral concerns). Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “[l]isteners’ reactions to speech.” *Id.* If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener’s reactions. Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth’s interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests “apply outside every building in the State that hosts any activity that might occasion protest or comment,” not just abortion clinics. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to “single[ ] out for regulation speech about one particular topic: abortion.”

We cannot infer such a purpose from the Act’s limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. *See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, U. Chi. L. Rev. (1996). At the same time, however, “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” *Burson v. Freeman* (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with “every building in the State that hosts any activity that might occasion protest or comment.” In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution.

When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

Justice Scalia objects that the statute does restrict more speech than necessary, because “only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses.” But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by Justice Scalia goes to the question of narrow tailoring, which we consider below.

## B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, one of which comprises “employees or agents of [a reproductive healthcare] facility acting within the scope of their employment.” This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an “egregious form of content discrimination,” *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). In particular, petitioners argue that the exemption allows clinic employees and agents—including the volunteers who “escort” patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that “an exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.’” *City of Ladue v. Gilleo* (1994) (quoting *First Nat’l Bank of Boston v. Bellotti* (1978)). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance. . . .

There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. . . .

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways. It is unclear from petitioners’ testimony whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts’ employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act’s express terms. Petitioners’ complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. . . . [T]he record before us contains insufficient evidence to show that

the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.<sup>4</sup>

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

#### IV

Even though the Act is content neutral, it still must be “narrowly tailored to serve a significant governmental interest.” *Ward v. Rock Against Racism* (1989). The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily “sacrific[ing] speech for efficiency.” *Riley v. National Federation of Blind of N.C., Inc.* (1988).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*. Such a regulation, unlike a content-based restriction of speech, “need not be the least restrictive or least intrusive means of” serving the government’s interests. But the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.*

#### A

As noted, respondents claim that the Act promotes “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” . . . The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners’ speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics’ entrances and driveways. The zones thereby compromise petitioners’ ability to initiate the close, personal conversations that they view as essential to “sidewalk counseling.” . . .

[W]hile the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that “one-on-one communication” is “the most effective, fundamental, and perhaps economical avenue of political discourse.” *Meyer v. Grant* (1988). And “handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression”; “[n]o form of speech is entitled to greater constitutional protection.” *McIntyre v. Ohio Elections Comm’n* (1995) (“Leafletting and commenting on matters of

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<sup>4</sup> Of course we do not hold that “[s]peech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed.” (Scalia, J., dissenting). We instead apply an uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so. Justice Scalia can decry this analysis as “astonishing” only by quoting a sentence that is explicitly limited to *as-applied* challenges, and treating it as relevant to facial challenges.

public concern are classic forms of speech that lie at the heart of the First Amendment”). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of “protest”—such as chanting slogans and displaying signs—outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. . . . If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message. . . .

## B

### 1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth’s interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. . . . If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.”<sup>8</sup>

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances.

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction “regulates the activities, and perhaps the speech, of a group,” but only “because of the group’s past *actions* in the context of a specific dispute between real parties.” *Madsen v. Women’s Health Center* (1994) (emphasis added). Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act,

<sup>8</sup> We do not “give [our] approval” to this or any of the other alternatives we discuss. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term “harassment” had been authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by Justice Scalia.



by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech. . . .

## 2

Respondents have but one reply: “We have tried other approaches, but they do not work.” Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth’s allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth’s experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the “frenetic” activity in front of clinic entrances. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts “tried other laws already on the books,” they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth “tried injunctions,” the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective. . . .

### **Justice Scalia, with whom Justices Kennedy and Thomas join, concurring in the judgment.**

Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. *See, e.g., Hill v. Colorado* (2000); *Madsen v. Women’s Health Center, Inc.* (1994). . . .

[Justice Scalia began by criticizing the Court for “gratuitous[ly]” addressing whether the statute was content neutral. That discussion is omitted.]

It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not. . . .

The majority points only to the statute’s stated purpose of increasing “public safety” at abortion clinics, and to the additional aims articulated by respondents before this Court—namely, protecting “patient access to healthcare . . . and the unobstructed use of public sidewalks and roadways.” Really? Does a statute become “justified without reference to the content of the regulated speech” simply because the statute itself and those defending it in court *say* that it is? Every objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion. . . .

As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently “tailored” to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute “restrict[s] more speech than necessary” in light of the problems that it allegedly addresses is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences. . . .

[In addressing a similar provision in *Hill v. Colorado* (2000),] the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called “[t]he unwilling listener’s interest in avoiding unwanted communication.” The Court held that interest to be content neutral.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens’ supposed right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court’s opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. The majority avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. . . . Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks. . . .

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts “employees or agents” of an abortion clinic “acting within the scope of their employment.”

It goes without saying that “[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional.” *Thomas v. Chicago Park Dist.* (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision “draw[s] . . . distinctions on its face,” and instead proceeds directly to the purpose-related prong, asking whether the exemption “represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.” I disagree with the majority’s negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—“license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V. v. St. Paul* (1992).

Is there any serious doubt that *abortion-clinic employees or agents* “acting within the scope of their employment” near clinic entrances may—indeed, often will—speak in favor of abortion (“You are doing the right thing”)? Or speak in opposition to the message of abortion opponents—saying, for example, that “this is a safe facility” to rebut the statement that it is not? The Court’s contrary assumption is simply incredible. . . .

Going from bad to worse, the majority’s opinion contends that “the record before us contains insufficient evidence to show” that abortion-facility escorts have actually spoken in favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject

to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing.<sup>5</sup> . . .

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to “protect” prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch . . . .

**[The opinion of Justice Alito, concurring in the judgment, is omitted.]**

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### Notes and Questions

1. How do the majority and dissenting opinions differ in their approach to defining “content neutrality”? What are the strengths and weaknesses of their respective approaches?

2. Justice Scalia’s dissenting opinion exudes the sense that he knew what was *really* going on here: A liberal, pro-choice Massachusetts legislature was trying to shut down anti-abortion speech. He might be right about that. But it is also possible that members of the legislature were genuinely concerned about clinic safety. Indeed, there had been dozens of recent shootings and assaults around abortion facilities perpetrated by anti-abortion extremists who thought that violence (including even the murder of abortion doctors) would promote the greater good of protecting human life. See Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (2015).

One thing to keep in mind in trying to evaluate this issue is the ever-present problem of implicit bias. Even when acting entirely in good faith, people who view the same facts often come to radically different conclusions based on their prior experiences and views. This concern is relevant for thinking about how to evaluate *judicial* behavior. (E.g., were the Supreme Court justices’ approaches in *McCullen* influenced by their views on abortion?) But it is also relevant for thinking about how to structure the content-neutrality inquiry. If that inquiry is supposed to help judges uncover underlying viewpoint discrimination, should it matter whether such discrimination is *conscious* (or explicit) as opposed to *subconscious* (or implicit)?

Trying to define “content neutrality” also replicates some of the same “neutrality” debates that arise in the context of affirmative action. If certain groups are subject to greater levels of social discrimination, are governmental efforts to counteract that discrimination properly considered “discriminatory”? Consider Genevieve Lakier’s summary of a general shift in First Amendment doctrine on this issue:<sup>\*</sup>

For much of the twentieth century, the Court interpreted the guarantee of expressive equality in a manner that was sensitive to the economic, political, and social inequalities that

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<sup>5</sup> The Court states that I can make this assertion “only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges.” That is not so. The sentence in question appears in a paragraph immediately following rejection of the facial challenge, which begins: “It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones.” And the prior discussion regarding the facial challenge points to the fact that “[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones.” To be sure, the paragraph in question then goes on to concede only that the statute’s constitutionality *as applied* would depend upon explicit clinic authorization. Even that seems to me wrong. Saying that voluntary action by a third party can cause an otherwise valid statute to violate the First Amendment as applied seems to me little better than saying it can cause such a statute to violate the First Amendment facially. A statute that punishes me for speaking unless *x* chooses to speak is unconstitutional facially and as applied, without reference to *x*’s action.

<sup>\*</sup> Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, Colum. L. Rev. (2018); see also Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, U. Chi. L. Rev. (2020); Catharine A. MacKinnon, *Weaponizing the First Amendment*, Va. L. Rev. (2020).

inhibited or enhanced expression. It interpreted the First Amendment, for example, to require that those who lacked other means of expressing themselves be granted access to publicly important spaces (including privately owned public spaces) to do so. It also struck down laws that, although in principle applicable to all, had a disparate impact on the ability of the poor and the powerless to communicate. And it refused to invalidate on First Amendment grounds laws that restricted the speech of the powerful in an effort to enhance the speech of the powerless. It interpreted the First Amendment, in other words, to guarantee—or at least permit—a rough kind of substantive equality in expressive opportunity.

Since the 1970s, however, the Court has moved increasingly far away from this context-sensitive, substantive-equality-promoting view of the First Amendment. It has rejected the idea that courts should take into account inequalities in economic and political power when interpreting the First Amendment command. It has also, for the most part, rejected the idea that the First Amendment permits the government to limit the speech of wealthy or powerful speakers in order to enhance the speech of others. Instead, it has interpreted the guarantee of expressive equality to require—and to require only—formally equal treatment at the government’s hands.

How might these sorts of concerns map onto the decision in *McCullen v. Coakley*?

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Just a year after *McCullen v. Coakley*, the Court again grappled with “content neutrality” in the following case, *Reed v. Town of Gilbert* (2015). Importantly, though, the issue in *Reed* was the flip side of the issue in *McCullen*. The statute in *McCullen* was (arguably) formally neutral, but contextual factors (arguably) suggested a heightened risk of viewpoint discrimination. In *Reed*, by contrast, the statute was formally *non-neutral*, but contextual factors suggested a *minimal* risk of viewpoint discrimination.

Be sure to identify the *legal doctrine* that the Court recognized. Should a law that is content based on its face nonetheless be considered content neutral if the government can show a content-neutral subjective motive? But also consider which opinion—Justice Thomas’s majority, Justice Breyer’s concurrence, or Justice Kagan’s concurrence—was more faithful to the underlying rationales of the First Amendment. What are the costs and benefits of the three approaches?

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### Reed v. Town of Gilbert (2015)

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

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

**I****A**

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is “Ideological Sign[s].” This category includes any “sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.” Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all “zoning districts” without time limits.

The second category is “Political Sign[s].” This includes any “temporary sign designed to influence the outcome of an election called by a public body.” The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on non-residential property, undeveloped municipal property, and “rights-of-way.” These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

The third category is “Temporary Directional Signs Relating to a Qualifying Event.” This includes any “Temporary Sign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event’” . . . defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the “qualifying event” and no more than 1 hour afterward.

**B**

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church’s name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town’s Sign Code compliance manager, who twice cited the Church for violating the Code. . . . [After some further drama, Reed and his church] filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. . . .

Relying on this Court’s decision in *Hill v. Colorado* (2000), the Court of Appeals concluded that the Sign Code is content neutral. . . . In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment.

We granted certiorari and now reverse.

## II

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” Under that Clause, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley* (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys.” Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

### B

The Town’s Sign Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” And it defines “Ideological Signs” on the basis of whether a sign “communicat[es] a message or ideas” that do not fit within the Code’s other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke’s *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government. More to the point, the Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

## C

. . . The Court of Appeals . . . determined that the Sign Code was content neutral because the Town “did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,” and its justifications for regulating temporary directional signs were “unrelated to the content of the sign.” In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign’s communicative content—if those distinctions can be “justified without reference to the content of the regulated speech.”

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. We have thus made clear that “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,” and a party opposing the government “need adduce no evidence of an improper censorial motive.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991). Although “a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.” *Turner Broadcasting Sys., Inc. v. FCC* (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose. *See, e.g., Sorrell v. IMS Health Inc.* (2011) (statute was content based “on its face,” and there was also evidence of an impermissible legislative motive); *United States v. Eichman* (1990) (“Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted *interest* is related to the suppression of free expression”); *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984) (“The text of the ordinance is neutral,” and “there is not even a hint of bias or censorship in the City’s enactment or enforcement of this ordinance”); *Clark v. Cmty. for Creative Non-Violence* (1984) (requiring that a facially content-neutral ban on camping must be “justified without reference to the content of the regulated speech”); *United States v. O’Brien* (1968) (noting that the statute “on its face deals with conduct having no connection with speech,” but examining whether the “the governmental interest is unrelated to the suppression of free expression”). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward v. Rock Against Racism* (1989) as suggesting that a government’s purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. In that context, we looked to governmental motive, including whether the government had regulated speech “because of disagreement” with its message, and whether the regulation was “justified without reference to the content of the speech.” But *Ward*’s framework “applies only if a statute is content neutral.” *Hill v. Colorado* (2000) (Kennedy, J., dissenting). Its rules thus operate “to protect speech,” not “to restrict it.” *Id.*

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the “abridg[ement] of speech”—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. “The vice of content-based legislation . . . is not that it is

always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.” *Hill* (Scalia, J., dissenting). . . .

### III

Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny. . . . Thus, it is the Town’s burden to demonstrate that the Code’s differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town’s aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are “no greater an eyesore” than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. . . .

#### **Justice Breyer, concurring in the judgment.**

. . . In my view, the category “content discrimination” is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic “strict scrutiny” trigger, leading to almost certain legal condemnation. To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. . . .

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic “strict scrutiny” trigger is not to argue against that concept’s use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government’s rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold



that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.*, 15 U.S.C. § 78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 2 U.S.C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U.S.C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality, *e.g.*, 38 U.S.C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient’s spouse or sexual partner); of income tax statements, *e.g.*, 26 U.S.C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings, *e.g.*, 14 CFR § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.*, N.Y. Gen. Bus. Law Ann. § 399-ff(3) (requiring petting zoos to post a sign at every exit “strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area”); and so on. . . .

I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no . . . general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant “strict scrutiny.” Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment. I consequently concur in the Court’s judgment only.

**Justice Kagan, with whom Justices Ginsburg and Breyer join, concurring in the judgment.**

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. . . . Elsewhere, historic site markers—for example, “George Washington Slept Here”—are also exempt from general regulations. And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to “scenic and historical attractions” or advertise free coffee.

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. . . . [O]n the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions

that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley* (2014). The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. St. Paul* (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” *Davenport v. Washington Educ. Ass’n* (2007) (quoting *R.A.V.*). That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case . . . when a law restricts “discussion of an entire topic” in public debate. . . . When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test. *R.A.V.* (quoting *Simon & Schuster, Inc.*).

But when that is not realistically possible, we may do well to relax our guard so that entirely reasonable laws imperiled by strict scrutiny can survive. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, . . . strict scrutiny is unwarranted.” *Davenport*. To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. In *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating “historical, cultural, or artistic event[s]” from a generally applicable limit on sidewalk signs. After all, we explained, the law’s enactment and enforcement revealed “not even a hint of bias or censorship.” *Id.*; see also *Renton v. Playtime Theatres, Inc.* (1986). . . .

[But even under intermediate scrutiny, the Town loses.] The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. The best the Town could come up with at oral argument was that directional signs “need to be smaller because they need to guide travelers along a route.” Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to “time, place, or manner” speech regulations. . . .

[The concurring opinion of Justice Alito is omitted.]

### Notes and Questions

1. How does the First Amendment question in *Reed* relate to the equal-protection question considered in *Johnson v. California* (2005), addressed in note 7 on page 107? Should the Court be consistent in how it addresses similar questions across different areas of constitutional doctrine?

2. Although *Reed* embraced a capacious definition of “content neutrality,” the Court has not overturned cases upholding zoning laws that target sexually explicit “adult” stores or “adult” theaters. In these cases, the Court has endorsed the use of intermediate scrutiny on the theory that these laws are actually aimed at the “secondary effects” of such establishments (e.g., drawing crime to the area or “neighborhood blight”)—not the content of the speech. See *City of Los Angeles v. Alameda Books, Inc.* (2002); *Renton v. Playtime Theatres, Inc.* (1986). Lower courts have concluded that *Reed* did not overturn these decisions, see, e.g., *BBL, Inc. v. Angola* (7th Cir. 2015) (“We don’t think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment.”), but they have also been careful not to extend the “secondary effects” cases past their original context, see, e.g., *Free Speech Coalition, Inc. v. Att’y General* (3d Cir. 2016) (“[T]he secondary effects doctrine has been limited in application to the regulation of physical purveyors of adult sexually explicit speech.”). Some scholars thus playfully refer to these cases as the “erogenous zoning” cases.

3. How far does *Reed* extend? Suppose, for instance, that a public school bans plagiarism. Is that rule “content based”? Why or why not? What about a “revenge porn” law that bans individuals from releasing sexually explicit photographs of others without their consent? What is the underlying *rationale* for applying heightened scrutiny to “content based” restrictions? Does applying strict scrutiny make sense in these situations? Under *Reed*, does the answer matter?

4. In *City of Austin v. Reagan National Advertising of Texas* (2022), a divided Court once again confronted the question of what counts as a “content based” restriction. The case involved a municipal ordinance that banned digitized signs *unless* the sign referred to *on-premises* activities. For instance, it would be okay for McDonald’s to have an on-premise digitized sign saying “Eat here,” but it would not be okay for McDonald’s to put up the same sign a block away saying “Go one more block to eat at McDonald’s.” The primary issue presented in *City of Austin* was whether this ordinance should be treated as a “content based” speech restriction.

Let’s start with the dissenting opinion of Justice Thomas, since his position is easier to unpack. He argued that the ordinance was plainly “content based” under the holding of *Reed* because the only way to know whether the sign was allowed under the ordinance was to read and understand its *content*. A sign saying “eat here” would be treated differently than one with a different message, such as “eat over there.” Thus, Thomas concluded, the ordinance was content based.

In her opinion for the majority, however, Justice Sotomayor disagreed. The ordinance, she explained, was drawing a *location-based* distinction, not a *content-based* distinction. “Unlike the regulations at issue in *Reed*,” Sotomayor wrote, “the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content.” In contrast to the ordinance in *Reed*, the Austin ordinance did “not single out any topic or subject matter for differential treatment. . . . A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign’s relative location.” Is this reasoning consistent with *Reed*?

5. For the most part, *Reed* is notable for its holding with respect to the definition of content neutrality. But another aspect of the opinion is worth highlighting. The Court holds that the statute is unconstitutional because it is *underinclusive* and therefore lacks the requisite ends/means fit required under strict scrutiny. This may be defensible, but notice that it is a bit odd, too. As the Court has noted, “It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech.” *Williams-Yulee v. Florida Bar* (2015). But then why is underinclusivity treated as a problem in cases like *Reed*? For First Amendment purposes, should overinclusivity and underinclusivity be treated as equally serious? Why or why not?

6. *Medium-based restrictions.* Many decades ago, the Supreme Court indicated that doctrinal rules could depend on which type of “media” was being regulated (“media” refers to the *means* or *form* of communication—*e.g.*, publications, movies, radio, broadcast TV, cable TV). As the Supreme Court put it in 1969, “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” *Red Lion Broadcasting Co. v. FCC* (1969). Although some remnants of this idea remain in current doctrine, the Court’s current approach is to apply general principles—like content neutrality—rather than use special doctrinal rules for particular media.

7. *“Bans” of particular media.* In general, content-neutral restrictions trigger only intermediate scrutiny. But what if a town prohibited newspapers? Or movies? Or pamphlets? These restrictions target a *medium* of expression—not communicative *content*. Should such laws trigger only intermediate scrutiny? Here’s what the Court said about this issue in *City of Ladue v. Gilleo* (1994):

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. City of Griffin* (1938); handbills on the public streets, *Jamison v. Texas* (1943); the door-to-door distribution of literature, *Martin v. City of Struthers* (1943); *Schneider v. State* (1939), and live entertainment, *Schad v. Mount Ephraim* (1981). *See also Frisby v. Schultz* (1988) (picketing focused upon individual residence is “fundamentally different from more generally directed means of communication that may not be completely banned in residential areas”). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.

The level of scrutiny that applies to such laws isn’t clear. The Court has suggested that “bans” are *per se* invalid, but other cases call for strict scrutiny. *See Ward v. Rock Against Racism* (1989) (“A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.”).

Treating “bans” differently from “regulations” may be problematic. Consider the following excerpt from Joseph Blocher, *Bans*, Yale L.J. (2019):

All laws are bans with regard to that which they prohibit—a driver’s-license requirement is a ban on driving without one. But it is hard to see why the label should be of any constitutional consequence if it is simply a way of restating that a law prohibits something. Indeed, the characterization might often escape notice precisely because it is a predicate to the familiar constitutional tests and standards, not a result of them. There are, of course, constitutional tests designed to evaluate whether a burden on protected conduct goes too far—whether it is “undue,” for example. But in the context of bans, that doctrinal machinery never gets up and running. Characterizing something as a ban typically frames the challenged law as unconstitutional regardless of whatever scrutiny a court might apply. This raises the risk that calling a law a ban may simply be an exercise of judicial power masquerading as restraint.

Stay tuned. This issue may come up again in these materials.

### Discussion Questions

*Note: The following questions are ones that the Supreme Court has not yet considered and that, in my view, are not clearly resolved under current doctrine, although others would surely disagree. Based on what you've read, what are the best arguments on each side? Which position is stronger?*

#### Question 1:

A statute provides: "It is a crime to take pictures in a locker room." Bob was arrested for secretly taking a nude picture of someone else in a locker room. Is there First Amendment coverage (*i.e.*, is this within the *scope* of the First Amendment)?

#### Question 2:

A statute provides: "It is a crime to take pictures in a locker room." Bob was arrested for secretly taking a nude picture of someone else in a locker room. Is the restriction content based?

#### Question 3:

A statute provides: "It is a crime to disseminate nude pictures of someone without permission." Bob was arrested for sharing pictures of his ex. Is the restriction content based?

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## 4.8. Which Harms?

In this Unit, we will read two classic First Amendment opinions. The first is Justice Harlan's decision in *Cohen v. California* (1971), and the second is Judge Easterbrook's opinion in *American Booksellers Ass'n v. Hudnut* (7th Cir. 1985). For both opinions, pay particular attention to which types of harms the government can assert to justify speech restrictions.

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### Cohen v. California (1971)

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

. . . Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct. . . ." He was given 30 days' imprisonment. The facts . . . are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

In affirming the conviction the Court of Appeal held that “offensive conduct” means “behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,” and that the State had proved this element because, on the facts of this case, “[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.” . . .

## I

. . . The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon “speech,” not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen’s ability to express himself. *Cf. United States v. O’Brien* (1968). . . .

Appellant’s conviction, then, rests squarely upon his exercise of the “freedom of speech” protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail . . . .

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called “fighting words,” those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not “directed to the person of the hearer.” *Cantwell v. Connecticut* (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. . . .

Finally, in arguments before this Court much has been made of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting viewers . . . . While this Court has

recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g.*, *Rowan v. Post Office Dep't* (1970), we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen’s jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one’s own home. Given the subtlety and complexity of the factors involved, if Cohen’s “speech” was otherwise entitled to constitutional protection, we do not think the fact that some unwilling “listeners” in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant’s conduct did in fact object to it, and where that portion of the statute upon which Cohen’s conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all “offensive conduct” that disturbs “any neighborhood or person.”

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as “offensive conduct,” one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an “undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969). . . . The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision

as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *See Whitney v. California* (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. . . .

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, . . . linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. . . .

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. . . .

**Justice Blackmun, with whom the Chief Justice and Justices Black and White\* join, dissenting.**

. . . Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. . . . Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire* (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

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### Notes and Questions

1. *Which Harms?* Which types of harms did the Supreme Court treat as valid justifications for restricting speech? Why? Which types of harms did the Court treat as insufficient? Why?
2. *Profanity.* How should courts evaluate laws that restrict profanity? Of course, *Cohen* involved profanity, and courts often cite it for the notion that "profane" speech is still protected. But even after *Cohen*, Supreme Court judges have suggested that government-imposed limits on using profane words

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\* [Justice White joined the excerpted part of this dissenting opinion.]



are sometimes okay. In a separate opinion in *Iancu v. Brunetti* (2019), for instance, Chief Justice Roberts distinguished speech acts that “offend because of the ideas they convey” and speech acts “that offend because of their mode of expression (such as vulgarity and profanity),” indicating broader leeway for governmental restrictions of the latter category. In the same case, which involved federal trademark law, Justice Sotomayor distinguished “offensive ideas” and “offensive manners of expressing ideas.” These comments harken back to Justice Stevens’s observation in *FCC v. Pacifica Foundation* (1978) that “[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication.” But is that distinction analytically coherent? For a counterargument, consider what Justice Brennan wrote in dissent in *Pacifica*: “The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.”

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### American Booksellers Ass'n v. Hudnut (7th Cir. 1985)

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#### **Easterbrook, Circuit Judge.**

Indianapolis enacted an ordinance defining “pornography” as a practice that discriminates against women. . . .

“Pornography” under the ordinance is “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”

The statute provides that the “use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.” The ordinance as passed in April 1984 defined “sexually explicit” to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined. . . .

The City and many amici . . . maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, “if a woman is subjected, why should it matter that the work has other value?” Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, Harv. Civ. Rts.-Civ. Lib. L. Rev. (1985).

Civil rights groups and feminists have entered this case as amici on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce's *Ulysses* to Homer's *Iliad*; both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters “premised on equality” (MacKinnon)—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

[Judge Easterbrook then summarized the ordinance and procedural history. That discussion is omitted.]

### III

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Bd. of Educ. v. Barnette* (1943). Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. *Brandenburg v. Ohio* (1969). Communists may speak freely and run for office. *DeJonge v. Oregon* (1937). The Nazi Party may march through a city with a large Jewish population. *Collin v. Smith* (7th Cir. 1978). People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. *Lebron v. Washington Metro. Area Transit Auth.* (D.C. Cir. 1984) (Bork, J.). People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because “above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas. . . .” *Police Dep’t v. Mosley* (1972); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, William & Mary L. Rev. (1983); Paul B. Stephan, *The First Amendment and Content Discrimination*, Va. L. Rev. (1982).

Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].” Indianapolis Code § 16-1(a)(2).

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler’s orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. . . . The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent. See *New York Times Co. v. Sullivan* (1964); cf. *Brandenburg v. Ohio* (1969); *New York Times Co. v. United States* (1971).

Racial bigotry, anti-semitism, violence on television, reporters’ biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the “subordination” of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the image of pain is not necessarily pain. . . . Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

Much of Indianapolis’s argument rests on the belief that when speech is “unanswerable,” and the metaphor that there is a “marketplace of ideas” does not apply, the First Amendment does not apply either. The metaphor is honored; Milton’s *Aeropagitica* and John Stewart Mill’s *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): “We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity.” If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.* (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever “excluded” from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

The Supreme Court has rejected the position that speech must be “effectively answerable” to be protected by the Constitution. For example, in . . . *Mills v. Alabama* (1966), the Court held unconstitutional a statute prohibiting editorials on election day—a statute the state had designed to prevent speech that came too late for answer. . . .

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is. . . .

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### Notes and Questions

1. Is Judge Easterbrook’s opinion in *Hudnut* consistent with earlier cases that helped give rise to modern First Amendment principles?

2. *Terminology*: Judge Easterbrook’s opinion relies on a principle that many scholars refer to as a requirement of “*viewpoint neutrality*.” But people use that term in a number of different ways, so one needs to be careful to avoid the conceptual slippage that can occur when one term takes on multiple meanings. In my view, it makes sense to associate this term with the rule that the government generally

cannot justify restrictions of private speech by asserting interests that turn on disagreement with people's views. As the Supreme Court stated in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." A few comments are worth making about this way of thinking about viewpoint discrimination.

First, this principle is all about the sorts of *justifications* that the government can use to defend speech restrictions. In this way, *viewpoint neutrality* is a different type of concept than *content neutrality*, the latter of which generally relates to the *means* that the government is employing, not its *justifications*. Thus, at the first step of "strength" analysis, we usually ask whether a governmental restriction of speech is "content neutral," which determines the applicable level of scrutiny. Once that is resolved, however, the idea of "viewpoint neutrality" constrains the sorts of justifications that can be used to restrict speech.

Second, although content neutrality and viewpoint neutrality are distinct, both of these inquiries focus on what the *government* is doing, not on the speaker. A speaker might be expressing a variety of views with lots of content, but that does not mean that the government is engaged in content or viewpoint discrimination. To assess that, you need to consider which *rule* the government is using and which *justifications* it is offering. Both of those inquiries focus on what the *government* is doing, not on the speaker. For example, O'Brien destroyed his draft card to express his views about the Vietnam War, but that is irrelevant when assessing whether the *government* engaged in viewpoint discrimination.

Third, as a theoretical matter, the points made above indicate that viewpoint-discriminatory *means* can be upheld if they survive strict scrutiny and are defended based on a viewpoint-neutral interest. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, U. Penn. L. Rev. (1996) ("the orthodox view is still that *all* restrictions, including viewpoint-based ones, are valid if they pass strict scrutiny"). As a practical matter, however, it is unlikely that the use of viewpoint-based *means* will survive strict scrutiny. That is because such means are unlikely to be narrowly tailored to a viewpoint-neutral *interest*.

Fourth, we're going to see viewpoint neutrality used in a somewhat different way in the limited-public-forum cases, where the idea of viewpoint neutrality relates not only to governmental justifications but also whether the government is using viewpoint-neutrality *means*.

Fifth, viewpoint discrimination does *not* impose a governmental obligation to maintain neutrality with respect to all aspects of speech-related policy. That would be impossible. All public policies are grounded on some set of views. Again, *O'Brien* is a good example. The ban on destroying draft cards reflected the government's view that destroying draft cards was harmful. But that does not make the government's policy "viewpoint discriminatory" as that term is used in First Amendment. Rather, the government engages in viewpoint discrimination when its rationale for restricting speech is premised on agreement or disagreement with the views that private speakers are expressing. Notice that this inquiry still focuses on the *government*, but viewpoint discrimination only occurs when the governmental interest turns on advancing or suppressing the views of private speakers. In other words, viewpoint discrimination turns on whether the government's interest is based on the perceived harmfulness of the private speaker's views.

3. Although Judge Easterbrook's opinion has received plenty of praise from First Amendment scholars, see, e.g., Geoffrey R. Stone, *American Booksellers Association v. Hudnut: "The Government Must Leave to the People the Evaluation of Ideas,"* U. Chi. L. Rev. (2010), others have criticized the way that a neutrality-based approach to First Amendment law ossifies existing power dynamics, see, e.g., Catharine A. MacKinnon, *Weaponizing the First Amendment*, Va. L. Rev. (2020). What are the

potential costs and benefits of allowing the government to justify pornography restrictions along the lines that Judge Easterbrook rejects?

4. *Harassment.* How should courts evaluate laws that restrict various forms of harassment? What criteria should courts use? Consider, for instance, Justice Brown’s dissenting opinion in *Aguilar v. Avis Rent A Car Sys., Inc.* (Cal. 1999), which involved a First Amendment challenge to the application of a law banning workplace harassment:

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” *Texas v. Johnson* (1989)—that is, until today. Today, this court holds that an idea that happens to offend someone in the workplace is “not constitutionally protected.” Why? Because it creates a “hostile . . . work environment” . . . . In essence, the court has recognized [an] exception to the First Amendment. . . .

[W]ith an offhand summary of [Supreme Court decisions applying Title VII], and no further analysis, the plurality states that “these decisions are at least implicitly inconsistent with any suggestion that speech of this nature is constitutionally protected.” Why? These cases did not even discuss the First Amendment, let alone apply it. Finally, the plurality relies on dictum that is not even on point from *R.A.V. v. St. Paul* (1992).

The issue in *R.A.V.* had nothing to do with Title VII or workplace discrimination. Rather, *R.A.V.* held that, even when speech falls within a category that is generally subject to regulation—such as obscenity, defamation, or fighting words—the government cannot regulate the speech in a content-based way. . . . As an example [of a permissible regulation], the court noted, expressly without deciding, that “sexually derogatory ‘fighting words,’ among other words, *may*” violate Title VII, though this regulation of only those fighting words that are “sexually derogatory” is obviously not content-neutral. (Italics added.)

This tentative dictum . . . is clearly limited to “proscribable speech” such as fighting words. Indeed, if it were not so limited, it would fail to illustrate the high court’s point, which is that the content-neutrality requirement applies less strictly in the case of “proscribable speech.” As such, this dictum can hardly be characterized as a definitive determination that the First Amendment does not protect speech that creates a hostile work environment. On the contrary, *R.A.V.* emphasizes that the content-neutral requirement is more strict in the case of “fully protected speech.” Thus, if anything, *R.A.V.* suggests Title VII’s content-based regulation of speech is invalid to the extent it regulates “fully protected speech” like the speech at issue here. In other words, if the ordinance at issue in *R.A.V.* was unconstitutional because it singled out for regulation only those fighting words that “provoke[d] violence ‘on the basis of race, color, creed, religion or gender,’” then a fortiori Title VII is unconstitutional because it is a content-based regulation of speech *not* limited to fighting words. . . .

Here, it is the speaker’s philosophical beliefs and opinions themselves that cause the injury, and it is those beliefs and opinions that the government wants to censor. If government can censor those beliefs and opinions under the rubric of merely proscribing discriminatory conduct, then it can also punish Father Terminiello for discriminatorily denouncing Russian Jews in his speech in a Chicago auditorium, and it can punish Clarence Brandenburg for advocating the deportation of Blacks, and it can prevent Nazis from marching through the streets of Skokie.

Indeed, if applied generally, the plurality’s rule would create the exception that swallowed the First Amendment. . . .

As Justice Brown observes, workplace harassment laws explicitly call for an inquiry into the *content* of what is said. The difference between one boss saying “I appreciate your great work” and another boss saying “I think people of your race and gender are inferior workers” is a difference in message. Should these laws thus trigger strict scrutiny? Is there a viewpoint-neutral way of justifying them? If not, does that mean that they should be struck down? Or does it perhaps suggest that something has gone awry with modern doctrine’s insistence on “neutrality”?

If the government can proscribe sexist or racist harassment, what about other forms of activity that are labelled as “harassment”? Could a legislature prevent doctors from discussing with patients the risks of gun ownership because the legislature deems such discussions as “harassment”? See *Wollschlaeger v. Governor of Florida* (11th Cir. 2017) (en banc). Is there a viewpoint-neutral way of distinguishing the two cases? Should that matter?

5. “*Outrageous*” *Speech*. In *Snyder v. Phelps* (2011), the Supreme Court held that the tort of intentional infliction of emotional distress could not be constitutionally applied against a group that protested the funeral of Matthew Snyder, a U.S. Marine killed in the line of duty in Iraq. The protesters claimed that God punishes the United States for social and legal acceptance of homosexuality, and they held up signs with a variety of related messages: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.”

These signs addressed “matters of public concern,” the Court concluded, because “the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.” Moreover, “even if a few of the signs—such as ‘You’re Going to Hell’ and ‘God Hates You’—were viewed as containing messages related to Matthew Snyder or the [Snyder family] specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.” Consequently,

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson* (1989). . . .

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was “outrageous.” “Outrageousness,” however, is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. In a case such as this, a jury is “unlikely to be neutral with respect to the content of [the] speech,” posing “a real danger of becoming an instrument for the suppression of . . . ‘vehement, caustic, and sometimes unpleasan[t]’ expression. *Bose Corp. v. Consumers Union of United States, Inc.* (1984) (quoting *New York Times Co. v. Sullivan* (1964)). Such a risk is unacceptable . . . . What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

Notice that the Court in *Snyder* was especially concerned about the risk of viewpoint discrimination by the jury. Ordinarily, the legal system uses jury selection and jury instructions to address concerns about jury bias. Should those typical methods be sufficient in this context? Why or why not?

6. In current doctrine, the focus of neutrality analysis is on what the government is doing—not on underlying social conditions or resulting social effects. We ask questions like: *Does the law discriminate between views? Does the government’s interest turn on favoring or disfavoring particular views?* The actual impact of the law generally doesn’t matter when assessing its “neutrality.”

This approach has considerable benefits. But it is important to recognize its drawbacks. As Fred Schauer writes:<sup>\*</sup>

[E]xisting understandings of the First Amendment are based on based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern.

Uneven distributional consequences are, of course, not unique to speech doctrine. And the beneficiaries of expressive freedom in one situation may not be the same as those in another.

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### Hate Speech

Because the government cannot justify speech restrictions as efforts to shape how people think, governmental restrictions on “hate speech” are unconstitutional under the First Amendment.

Before the 1960s, however, the Court had not yet embraced such robust neutrality principles. And as you will see in the following case, *Beauharnais v. Illinois* (1952), the Justices initially fractured over the constitutionality of so-called “group libel” laws, which restricted speech disparaging a particular demographic group.

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### Beauharnais v. Illinois (1952)

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

The petitioner was convicted upon information in the Municipal Court of Chicago of violating § 224a of the Illinois Criminal Code. He was fined \$200. The section provides:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .

The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . .” Below was a call for “One million self respecting white people in Chicago to unite . . .” with the statement added that “If persuasion and the

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<sup>\*</sup> Fred Schauer, *Uncoupling Free Speech*, Colum. L. Rev. (1992).



need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.” . . .

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether the protection of “liberty” in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities [*i.e.*, at certain groups]. . . .

[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. . . .

We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. . . .

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase “clear and present danger.” Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. . . .

#### **Justice Black, with whom Justice Douglas joins, dissenting.**

. . . This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of “witches.” . . .

Today Beauharnais is punished for publicly expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero’s reception in many other localities, if not in some parts of Chicago itself. Moreover, the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation. . . .

#### **Justice Douglas, dissenting.**

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus. . . .

My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment. . . .

An historic aspect of the issue of judicial supremacy was the extent to which legislative judgment would be supreme in the field of social legislation. The vague contours of the Due Process Clause were used to strike down laws deemed by the Court to be unwise and improvident. That trend has been reversed. In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature, for there is no guarantee in the Constitution that the *status quo* will be preserved against regulation by government. Freedom of speech, however, rests on a different constitutional basis. . . . Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power . . . .

Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms. Farm laborers in the West who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of the dominant religious group—all of these are caught in the mesh of today’s decision. Debate and argument even in the courtroom are not always calm and dispassionate. Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of Beauharnais may be. . . .

### **Justice Jackson, dissenting.**

. . . As a limitation upon power to punish written or spoken words, Fourteenth Amendment “liberty” in its context of state powers and functions has meant and should mean something quite different from “freedom” in its context of federal powers and functions. . . .

What restraints upon state power to punish criminal libel are implied by the “concept of ordered liberty”? Experience by Anglo-Saxon peoples with defamation and laws to punish it extends over centuries and the statute and case books exhibit its teachings. If one can claim to announce the judgment of legal history on any subject, it is that criminal libel laws are consistent with the concept of ordered liberty only when applied with safeguards evolved to prevent their invasion of freedom of expression. . . .

This Court, by construction of the Fourteenth Amendment, has [declared] that where expression, oral or printed, is punished, although it has not actually caused injuries or disorders but is thought to have a tendency to do so, the likelihood of such consequence must not be remote or speculative. That is the “clear and present danger” test which Mr. Justice Holmes and Mr. Justice Brandeis, eventually with support of the Court, thought implied in both the First and Fourteenth Amendments, although the former was not bodily bound up in the latter. Any superficial inconsistency between applying the same standard but permitting a wider range of action to the States is resolved upon reference to the latter part of the statement of the formula: clear and present danger of *those substantive evils which the legislature has a right to prevent*. The evils at which Congress may aim, and in so doing come into conflict with

free speech, will be relatively few since it is a government of limited powers. Because the States may reach more evils, they will have wider range to punish speech which presents clear and present danger of bringing about those evils. . . .

I agree with the Court that a State has power to bring classes “of any race, color, creed, or religion” within the protection of its libel laws . . . . But I am equally clear that in doing so it is essential to our concept of ordered liberty that the State also protect the accused by those safeguards the necessity for which is verified by legal history. . . .

In this case, neither the court nor jury found or were required to find any injury to any person, or group, or to the public peace, nor to find any probability, let alone any clear and present danger, of injury to any of these. . . . The trial court . . . refused to charge the jury that it must find some “clear and present danger,” and the Supreme Court of Illinois sustained conviction because, in its opinion, the words used had a tendency to cause a breach of the peace.

Not the least of the virtues of this formula in such tendency cases is that it compels the prosecution to make up its mind what particular evil it sought or is seeking to prevent. . . . Words on their own account are not to be punished in such cases but are reachable only as the root of punishable evils.

Punishment of printed words, based on their *tendency* either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the “clear and present danger” test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities. . . .

Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field. Such efforts, if properly applied, do not justify frenetic forebodings of crushed liberty. . . .

**[The dissenting opinion of Justice Reed is omitted.]**

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### Notes and Questions

1. As we have seen, one of the key issues under modern doctrine is what *justifications* the government may use to restrict speech—that is, *which harms* the government may seek to counteract through speech restrictions. In the *Beauharnais* opinions, Justice Frankfurter had the broadest view of governmental authority in this respect, followed by Justice Jackson. The other dissenters took a narrower view. What sorts of justifications did these opinions suggest are permissible under the First Amendment? Was speech punishable merely on the basis that it may cause hurt feelings? Or that it may cause violence?

2. *Modern Doctrine:* The Supreme Court has never formally overruled *Beauharnais*, but the decision stands in marked contrast to countless modern precedents, including *Cohen* and *Hudnut*. As one court put it, “though *Beauharnais v. Illinois* (1952) has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.” *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.* (7th Cir. 2008).

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## 4.9. “Unprotected” Speech, Part I

The key issue in First Amendment law is deciding how to distinguish between permissible and impermissible speech restrictions. We have seen cases where the Supreme Court has focused on the government, and especially whether the government is applying a neutral rule and asserting a neutral justification. This Unit explores how this modern approach fits with an older tradition in First Amendment that focused on the speaker rather than on the government.

For most of American history, the Press and Speech Clauses principally enshrined two rules: first, prior restraints were unconstitutional, and second, the government could not punish individuals for well-intentioned speech on matters of public concern. By the 1940s, the latter rule was understood to shield speakers addressing matters of public concern unless prosecutors could show that the speech posed a “clear and present danger” of harm to others or to society. But the Supreme Court also recognized several types of speech that could be restricted without any case-specific showing of harm. Punishment of speech within these “well-defined and narrowly limited” categories, the Court explained in *Chaplinsky v. New Hampshire* (1942), had “never been thought to raise any Constitutional problem.” Those categories include:

**Fighting words.** These are words likely to provoke a fight, including “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California* (1971). The Supreme Court has construed this category very narrowly, reflecting the way that doctrine disfavors restricting speech based on the hostile reactions of an audience.

**Incitement.** This is speech “directed to inciting or producing imminent lawless action and [that] is likely to incite or produce such action.” *Brandenburg v. Ohio* (1969). This category sometimes overlaps with “fighting words.” But it is still worth separating. For instance, a speaker might “incite” someone to break a store window during a protest, even though that doesn’t count as fighting words. The Supreme Court has construed this category narrowly by requiring a high degree of directness, immanency, and likelihood.

**True threats.** “True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black* (2003). “Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat. . . . The existence of a threat depends not on ‘the mental state of the author,’ but on ‘what the statement conveys’ to the person on the other end.” *Counterman v. Colorado* (2023) (quoting *Elonis v. United States* (2015)). However, because of the “chilling effect” created by legal liability, the Court also held in *Counterman* that the First Amendment requires the prosecution to show that the defendant speaker was at least *reckless* in making a statement that he should have perceived as threatening. As with incitement, there can be overlap between true threats and other categories. For instance, many threats may also constitute “fighting words.” But one can imagine threats without any expectation that the other person will immediately retaliate, such as threats sent by email.

**Obscenity.** Obscene speech is “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California* (1973). This test depends on local standards, not national ones. Like many other categories of “unprotected” speech, it is one that the Supreme Court has construed narrowly. Given contemporary norms regarding what is patently offensive, this category does not embrace ordinary forms of pornography (*e.g.*, films showing consensual oral sex, vaginal sex, anal sex, orgies, etc.). Prosecutions for obscenity are so rare that the

boundaries of this category are rarely tested, but at least in theory the category allows the government to restrict things like graphic depictions of sexual violence.

**Child Pornography.** Although obscenity is narrowly defined and rarely prosecuted, that is not true of child pornography. “As a general rule, pornography can be banned only if obscene, but . . . pornography showing minors can be proscribed whether or not the images are obscene.” *Ashcroft v. Free Speech Coalition* (2003) (citing *New York v. Ferber* (1982)). Although one could imagine a moralistic rationale for this category, the Supreme Court has instead defended it in terms of protecting the children depicted in such pornography. Consequently, pornographic depictions of children that are realistic but fake (*i.e.*, computer-generated) are considered to be “protected” speech rather than “unprotected” child pornography.

**Defamation.** Statements that are false and injurious to someone’s reputation are generally considered “unprotected” speech. Statements of this sort typically trigger civil liability without requiring any mens rea (*i.e.*, defamation is generally a “strict liability” tort). In *N.Y. Times v. Sullivan* (1964), however, the Court held that the First Amendment limits when the government can restrict defamatory statements about public figures or on matters of public concern. In these situations, the Court has required that plaintiffs prove “actual malice,” meaning knowledge or reckless disregard of the falsity of the statements.

In addition to these recognized categories, three other types of speech are worth comment:

**False Statements of Fact.** There are plenty of comments in earlier Supreme Court opinions about how false statements of fact have no value. But the justices have also cautioned that there is no general exception to the First Amendment for false statements. See *United States v. Alvarez* (2012) (plurality opinion) (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”).

**Crime-Facilitating Speech.** There is no “crimes” exception in speech doctrine. For instance, it would patently violate the First Amendment for the federal government to make it a crime to criticize the President. At the same time, however, courts often do not treat crime-facilitating speech as constitutionally protected. If two co-conspirators verbally agree to commit a crime, for instance, few courts would treat their speech as protected. See *Giboney v. Empire Storage & Ice Co.* (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”).

**Commercial Speech.** The Supreme Court has not recognized any “for-profit” exception to the First Amendment. Book publishers, for instance, sell their books, but their goal of making money does not diminish their enjoyment of First Amendment rights. Nonetheless, the Supreme Court has recognized that *speech proposing a commercial transaction* (known in First Amendment law as “commercial speech”) can be regulated in certain content-based respects while triggering only intermediate scrutiny, not the strict scrutiny that generally applies to content-based restrictions. See *Central Hudson Gas & Electric Corp. v. Public Service Comm’n* (1980). Here is a fascinating footnote from *Central Hudson* addressing why restrictions of commercial speech only trigger intermediate scrutiny:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does “no more than propose a commercial transaction” and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be

more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints.

In recent decades, however, the Court has indicated that the government’s leeway to restrict commercial speech is limited to those restrictions that protect consumers against misleading advertising (or other commercial solicitation)—not ones that prevent the spread of truthful information in order “to keep people in the dark for what the government perceives to be their own good.” 44 *Liquormart, Inc. v. Rhode Island* (1996) (plurality opinion); see *Sorrell v. IMS Health Inc.* (2011).

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Rather than delving into these categories, we’ll focus on *why* and *how* the Supreme Court recognizes these categories of “unprotected” (or “low value”) speech and the *doctrinal implications* of these categories. The foundational case in this area is *Chaplinsky v. New Hampshire* (1942), in which the Court stated the following:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>4</sup> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>5</sup> “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” *Cantwell v. Connecticut* (1940).

What does *Chaplinsky* suggest about how and why the Court recognizes categories of “unprotected” speech? What are the benefits and drawbacks of that approach? And consider those same questions as you read the following case, which is one of the most famous in First Amendment law.

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<sup>4</sup> Zechariah Chaffee, *Free Speech in the United States* (1941).

<sup>5</sup> *Id.*

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**New York Times Co. v. Sullivan (1964)**

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**Justice Brennan delivered the opinion of the Court.**

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

*[Third paragraph:]* In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

*[Sixth paragraph:]* Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. . . .

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times"

would be read as referring to him; he further contended that the “They” who did the arresting would be equated with the “They” who committed the other described acts and with the “Southern violators.” Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King’s protests with “intimidation and violence,” bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not “My Country, ’Tis of Thee.” Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time “ring” the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault. . . .

The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. . . .

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. . . . The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that “we . . . are somewhat puzzled as to how you think the statements in any way reflect on you,” and “you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.” Respondent filed this suit a few days later without answering the letter. . . .

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were “libelous per se” and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made “of and concerning” respondent. . . . The judge rejected petitioners’ contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

## I

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that “The Fourteenth Amendment is directed against State action and not private action.” That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional



freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, “commercial” advertisement. The argument relies on *Valentine v. Chrestensen* (1942), where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for “the freedom of communicating information and disseminating opinion”; its holding was based upon the factual conclusions that the handbill was “purely commercial advertising” and that the protest against official action had been added only to evade the ordinance.

The publication here was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

## II

Under Alabama law as applied in this case, a publication is “libelous per se” if the words “tend to injure a person . . . in his reputation” or to “bring [him] into public contempt”; the trial court stated that the standard was met if the words are such as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . .” Once “libel per se” has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. . . .

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the first and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social

changes desired by the people.” *Roth v. United States* (1957). “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg v. California* (1931). . . . Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California* (1927), gave the principle its classic formulation:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. . . . As Madison said, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” . . .

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, “if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.” The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. . . . [Madison’s] premise was that the Constitution created a form of government under which “The people, not the government, possess the absolute sovereignty.”

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines. . . . The invalidity of the Act has also been assumed by Justices of this Court. See *Abrams v. United States* (1919) (Holmes, J., dissenting); *Beauharnais v. Illinois* (1952) (Jackson, J., dissenting); Douglas, *The Right of the People* (1958); see also Cooley, *Constitutional Limitations* (1868); Chafee, *Free Speech in the United States* (1942). These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment. . . .

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Whether or not a newspaper can survive a succession of [libel] judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. . . .

The state rule of law is not saved by its allowance of the defense of truth. . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . .

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. [State and federal law provide that] all officials are protected [in their official statements] unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise “inhibit the fearless, vigorous, and effective administration of policies of government” and “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Barr v. Matteo* (1959). Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

### III

We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. . . .

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. . . . We must “make an independent examination

of the whole record,” *Edwards v. South Carolina* (1963), so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. . . . [T]here is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times’ own files. The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. . . . We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury’s finding that the allegedly libelous statements were made “of and concerning” respondent. . . .

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

**Justice Black, with whom Justice Douglas joins, concurring.**

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that “the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.” I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely “delimit” a State’s power to award damages to “public officials against critics of their official conduct” but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if “actual malice” can be proved against them. “Malice,” even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. . . .

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about “malice,” “truth,” “good motives,” “justifiable ends,” or any other legal formulas which in theory

would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount. . . .

While our Court has held that some kinds of speech and writings, such as “obscenity” and “fighting words” are not expression within the protection of the First Amendment, freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. . . . An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

**Justice Goldberg, with whom Justice Douglas joins, concurring in the result.**

The Court today announces a constitutional standard which prohibits “a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” . . . In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. . . . In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel. . . .

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

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### Notes and Questions

1. The majority adopted an “actual malice” standard. What does this standard mean? And when exactly does it apply?
2. What is the difference between the majority opinion and the concurring opinions? Which justice has the better argument?
3. The Court mentions “persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” Indeed, the Court has continually adhered to the view that “the press” refers to *printing* (the historical understanding of “the press”)—not to *journalists* (the modern understanding of “the press”).
4. But even though the First Amendment’s reference to “the press” doesn’t refer to journalists, should journalists nonetheless get special privileges under the First Amendment because of their unique role in facilitating public debate (which many people think lies at the heart of the Speech and Press Clauses)? For instance, should journalists be exempt from having to disclose confidential sources pursuant to a subpoena?

The Supreme Court has *never recognized special journalist privileges* under the First Amendment, although it hasn’t *completely* shut the door to the possibility. In *Branzburg v. Hayes* (1972), the Court rejected the journalists’ claim, saying:

The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

But Justice Powell—the crucial fifth vote in a five-member majority—wrote a separate concurring opinion “to emphasize . . . the limited nature of the Court’s holding.” According to Powell, members of the press could challenge whether an investigation was “being conducted in good faith,” in which instances an “asserted claim to privilege should be judged on its facts by striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

This cryptic opinion has led some Courts of Appeals to adopt a limited reporters’ privilege in certain circumstances. So in some circuits there *is* a limited First Amendment privilege. But the more recent trend is to entirely deny journalist privileges under the First Amendment. As we have seen, the Supreme Court now strongly disfavors any speech-related *discrimination*, so giving journalists special privileges that others do not enjoy would seem to violate that principle.

5. Notwithstanding the lack of *federal constitutional* protection, journalists sometimes enjoy conditional privileges under state and/or federal law. And some governmental entities, like the federal Department of Justice, have adopted internal rules to restrict prosecutorial efforts to subpoena journalists.

6. While we are on the topic of *statutory* protections for speech, it is worth being aware of two others:

First, many states have passed “anti-SLAPP” laws. SLAPP refers to “Strategic Lawsuits (or Litigation) Against Public Participation,” meaning retaliatory civil suits brought against speakers where the goal of the litigation is not to recover damages for tortious behavior but rather to squelch protected speech by burdening the speaker with the costs of litigation and threat of liability. So called “anti-SLAPP” laws offer speakers with a limited form of protection against this type of vexatious litigation by creating defendant-friendly procedural rules—such as allowing defendants to immediately appeal (*i.e.*, “collaterally appeal”) the denial of a motion to dismiss—and/or by enabling prevailing defendants to recover attorney’s fees if a plaintiff’s suit is meritless. For a summary of the anti-SLAPP laws adopted (or not) by each state, see this site: <https://www.ifs.org/anti-slapp-report/>. (Lower federal courts have struggled trying to figure out whether, and how, various aspects of these laws should apply in federal diversity cases under *Erie Railroad Co. v. Tompkins* (1938).)

Second, a federal statutory provision—§ 230 of the Communications Decency Act—preempts the normal operation of state tort law relating to certain decisions made by Internet platforms. Under the traditional common-law rules that still operate in most states, “publishers” (such as newspapers and book publishers) are strictly liable for publishing defamatory material, whereas “distributors” (such as newspaper vendors or bookstores) are not strictly liable for defamatory materials that they sell, just as telephone companies are not strictly liable for slanderous statements made over the phone lines. In the early days of the Internet, however, this traditional rule created a paradox for websites that published user-generated content. They could be treated as distributors by letting users put *anything* they wanted up on the site, but if they started curating the content of user posts (by, for instance, removing pornographic or threatening content), they would be subject to strict liability as publishers. In essence, § 230 preempts state tort law by enabling web-based platforms (*e.g.*, Twitter and Facebook) to curate user-generated content without facing strict liability for user-generated tortious speech.

Although § 230 is often defended as a landmark protection that has facilitated the growth of the modern Internet, it has generated plenty of criticism. Some critics have argued that courts have interpreted § 230 too broadly—shielding Internet companies in ways that Congress never intended. *See, e.g.,* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, Georgetown L. Tech. Rev. (2018). Others have argued that § 230 facilitates politically discriminatory content moderation, often by large corporations that are said to have a “liberal” bias. This latter argument is difficult to sustain under conventional tort rules, which leave publishers free to engage in political discrimination if they want to. Moreover, lower courts have held that publishers like Facebook and Twitter have a First Amendment right to curate the content of what they publish, relying on older cases like *Miami Herald Publishing Co. v. Tornillo* (1974). Nonetheless, some commentators have argued that certain Internet platforms should be treated as “common carriers,” who have an obligation to serve all customers evenhandedly, and that such treatment would not violate the platforms’ own First Amendment rights.

7. Under current Supreme Court doctrine, “the freedom of speech, or of the press” are coterminous, and therefore *essentially every modern expressive-freedom case is a speech case*, regardless of whether it involves “speech,” “printing,” “movies,” etc. To be sure, judges sometimes refer to cases being litigated under the “freedom of the press,” but even when they do so the doctrinal principles are the same as those under speech doctrine.

8. *New York Times v. Sullivan* recognized a constitutional privilege to make defamatory statements against a *public official*, so long as those statements were not made with actual malice. In *Gertz v. Robert Welch Inc.* (1974), the Court extended this holding to *public figures*—that is, persons who occupy “positions of such persuasive power and influence that they are deemed public figures for all purposes” (*e.g.,* Oprah Winfrey)—and *limited public figures*—that is, persons who “thrust themselves to the forefront of particular public controversies . . . to influence the resolution of the issues involved” (*e.g.,* a professor who writes an op-ed about voting). The actual malice standard applies to otherwise defamatory statements about public figures, but it only applies to statements about limited public figures when those statements *relate to the topic on which that person is a limited public figure*. For instance, if a professor writes an op-ed about election law, the actual-malice rule would apply to otherwise defamatory statements about that person’s legal acumen, but it would not apply to defamatory statements having nothing to do with election law, like the person’s medical history or sexual exploits.

9. *Other Torts*. Cases like *New York Times Co.* and *Gertz* involved defamation claims. But the Court has recognized First Amendment limits on other forms of tort liability, too. In *Hustler Magazine v. Falwell* (1988), the Court held that the First Amendment protects parodies of public figures, even if those parodies satisfy the elements of the tort of intentional infliction of emotional distress. According to Chief Justice Rehnquist’s majority opinion:

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. “[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumers Union of U.S., Inc.* (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a “false” idea. *Gertz v. Robert Welch, Inc.* (1974). As Justice Holmes wrote, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .” *Abrams v. United States* (1919) (Holmes, J., dissenting).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or [] public figures . . . .

[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana* (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. . . . The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. . . .

Respondent contends, however, that the caricature in question here was so “outrageous” as to distinguish it from more traditional political cartoons. . . . If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description “outrageous” does not supply one. “Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. . . .

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice,” *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This . . . reflects our considered judgment that such a standard is necessary to give adequate “breathing space” to the freedoms protected by the First Amendment.

At first glance, the Court’s embrace of the “actual malice” standard seems poorly fitted to parodies, which usually involve statements that the creator of the parody knows are untrue. In effect, however, the *Hustler Magazine* decision provides absolute protection for parodies of public figures, since a work that is recognizable as a parody is, the thinking goes, not asserting any facts.

10. The Supreme Court further articulated a distinction between “factual” claims and statements of “opinion” in defamation cases. In *Gertz*, the Court stated:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open debate on the public issues.”



As Judge Kenneth Starr later noted, the *Gertz* decision “provide[s] absolute immunity from defamation actions for all opinions . . . . At the same time, however, the Supreme Court provided little guidance in *Gertz* itself as to the manner in which the distinction between fact and opinion is to be discerned.” *Ollman v. Evans* (D.C. Cir. 1984) (*en banc*).

Lower courts have struggled to delineate “facts” and “opinions.” In *Ollman*, for instance, the Court of Appeals considered a statement in an editorial alleging that Bertell Ullman, a Marxist professor of political science at N.Y.U., did not enjoy a good professional reputation. Here is a long excerpt from Judge Bork’s concurring opinion, followed by a section of then-Judge Scalia’s dissent:

[I] conclude that Professor Ollman cannot press a libel action. But I do not find it easy to reach that result through a blunt distinction between opinion and fact, which while sometimes useful in just that crude dichotomy, is not adequate to the task here. . . .

Judge Starr’s opinion for the majority contends that, in the circumstances of this case and in the context of the column as a whole, the quoted statement that “Ollman has no status within the profession, but is a pure and simple activist” qualifies as an opinion and so is constitutionally protected. The dissents, on the other hand, suggest that an assertion about one’s general reputation is an assertion of fact. If common usage were the test, and if we looked at the sentence standing alone, the dissent’s characterization would certainly be correct. . . . But I do not think these simple categories, semantically defined, with their flat and barren descriptive nature, their utter lack of subtlety and resonance, are nearly sufficient to encompass the rich variety of factors that should go into analysis when there is a sense, which I certainly have here, that values meant to be protected by the first amendment are threatened.

The temptation to adhere to sharply-defined categories is understandable. Judges generalize, they articulate concepts, they enunciate such things as four-factor frameworks, three-pronged tests, and two-tiered analyses in an effort, laudable by and large, to bring order to a universe of unruly happenings and to give guidance for the future to themselves and to others. But it is certain that life will bring up cases whose facts simply cannot be handled by purely verbal formulas, or at least not handled with any sophistication and feeling for the underlying values at stake. When such a case appears and a court attempts nevertheless to force the old construct upon the new situation, the result is mechanical jurisprudence. Here we face such a case, and it seems to me better to revert to first principles than to employ categories which, in these circumstances, inadequately enforce the first amendment’s design. . . .

The American press is extraordinarily free and vigorous, as it should be. It should be, not because it is free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings. Yet the area in which legal doctrine is currently least adequate to preserve press freedom is the area of defamation law, the area in which this action lies. We are said to have in the first amendment “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan* (1964). That principle has resulted in the almost total abolition of prior restraints on publication, the curtailment of the possibility of criminal sanctions, and, in *Sullivan* itself, the construction of serious obstacles to private defamation actions by government officials. The cases that came afterward deployed similar obstacles to defamation actions by “public figures.” Thus, we have a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment.

Judge Scalia’s dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There

is not at issue here the question of creating new constitutional rights or principles . . . . When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The commerce power was established by men who did not foresee the scope and intricate interdependence of today’s economic activities. But that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment’s guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting. . . .

Perhaps the framers did not envision libel actions as a major threat to [press] freedom. . . . But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless. It is to say that not merely the particular rules but the entire enterprise of the Supreme Court in *New York Times v. Sullivan* was illegitimate.

We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions. *Sullivan* was an instance of the Supreme Court doing precisely this, as *Brown v. Board of Education* (1954) was more generally an example of the Court applying an old principle according to a new understanding of a social situation. . . .

We now face a need similar to that which courts have met in the past. . . . [I]n the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press . . . . Taking such matters into account is not, as one dissent suggests, to engage in sociological jurisprudence, at least not in any improper sense. Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as *Sullivan*. Nor does analysis here even approach the degree to which the Supreme Court quite properly took such matters into account in *Brown*. Matters such as the relaxation of legal rules about permissible recovery, the changes in tort law to favor compensation, and the existence of doctrinal confusion are matters that courts know well. Indeed, courts are responsible for these developments.

The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. See *Bose Corp. v. Consumers Union of United States, Inc.* (1984). This requires a consideration of the totality of the circumstances that provide the

context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting into the law an element of judicial subjectivity. To that objection there are various answers. A balancing test is better than no protection at all. Given the appellate process, moreover, the subjective judgment of no single judge will be controlling. Over time, as reasons are given, the element of subjectivity will be reduced. There is, in any event, at this stage of the law’s evolution, no satisfactory alternative. Hard categories and sharply-defined principles are admirable, if they are available, but usually, in the world in which we live, they share the problem of absolutes, of which they are a subgenre: they do not stand up when put to the test of hard cases. . . .

In dissent, Judge Scalia sharply disagreed with Judge Bork’s methodology:

It seems to me that the concurrence embarks upon an exercise of, as it puts it, constitutional “evolution,” with very little reason and with very uncertain effect upon the species. . . .

I am not prepared to accept [Judge Bork’s] novel view that since political debate is always discounted [by an expected frequency of misstatement and hyperbole], a decent amount of defamation in that context is protected by the first amendment. Besides the fact that it is unprecedented, it is impracticable. Whereas there are some rational limits (if only vague ones) upon what sorts of statements can be considered opinion and hence nondefamatory—limits which are plainly exceeded here—there is really no mechanism to gauge how much defamation is a decent amount.

It is *this* “risk of judicial subjectivity,” rather than that which inheres in the unavoidable need in all libel cases to balance the “totality of the circumstances,” which troubles me. Beyond that, I may add, I distrust the more general risk of judicial subjectivity presented by the concurrence’s creative approach to first amendment jurisprudence. It is an approach which embraces “a continuing evolution of doctrine,” not merely as a consequence of thoughtful perception that old cases were decided wrongly at the time they were rendered, *see, e.g., Brown v. Board of Education* (1954), . . . but rather in reaction to judicially perceived “modern problems,” which require “evolution of the law in accordance with the deepest rationale of the first amendment.” (Bork, J., concurring).<sup>2</sup> It seems to me that the identification of “modern problems” to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before. . . . And not only is our cloistered capacity to identify “modern problems” suspect, but our ability to provide condign solutions through the rude means of constitutional prohibition is nonexistent. What a strange notion that the problem of excessive libel awards should be solved by permitting, in political debate, intentional

<sup>2</sup> In opposing such unguided “evolution” I am not in need of the concurrence’s reminder that the fourth amendment must be applied to modern electronic surveillance, the commerce clause to trucks and the first amendment to broadcasting. The application of existing principles to new phenomena—either new because they have not existed before or new because they have never been presented to a court before, *see New York Times v. Sullivan* (1964)—is what I would call not “evolution” but merely routine elaboration of the law. What is under discussion here is not application of preexisting principles to new phenomena, but rather *alteration* of preexisting principles in their application to preexisting phenomena on the basis of judicial perception of changed social circumstances. The principle that the first amendment does not protect the deliberate impugning of character or reputation, in its application to the preexisting phenomenon of political controversy, is to be revised to permit “bumping” of some imprecisable degree because we perceive that libel suits are now too common and too successful.

destruction of reputation—rather than by placing a legislative limit upon the amount of libel recovery. It has not often been thought, by the way, that the press is among the least effective of legislative lobbyists. . . .

What do you think of this intramural debate among originalists? Who had the better argument, and why?

Though showing no interest in rehashing these interesting theoretical questions, the Justices considered the fact/opinion distinction in *Milkovich v. Lorain Journal Co.* (1990). Writing for the Court, Chief Justice Rehnquist rejected any *independent* constitutional protection for statements of opinion. Instead, such protection was a byproduct of the rule that plaintiffs bore the burden of proving the falsity of a defendant’s allegedly defamatory statement when the topic was a matter of public concern. As Rehnquist explained:

[W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled “opinion.” Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of “opinion” may often imply an assertion of objective fact.

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.” As Judge Friendly aptly stated: “[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” . . .

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such as, “In my opinion John Jones is a liar,” should be protected by a separate privilege for “opinion” under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is “opinion” or “fact,” and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the “breathing space” which “[f]reedoms of expression require in order to survive,” *Philadelphia Newspapers, Inc. v. Hepps* (1986) (quoting *New York Times*), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between “opinion” and fact.

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.<sup>6</sup> Thus, unlike the statement, “In my opinion Mayor Jones is a liar,” the statement, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot “reasonably [be] interpreted as stating actual facts” about an individual. *Falwell*. This

<sup>6</sup> In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, and accordingly we do the same. Prior to *Hepps*, of course, where public-official or public-figure plaintiffs were involved, the *New York Times* rule already required a showing of falsity before liability could result. [Note: *Subsequent lower-court cases have generally rejected a media/nonmedia distinction. See, e.g., Obsidian Finance Grp. v. Cox (9th Cir. 2014).*]

provides assurance that public debate will not suffer for lack of “imaginative expression” or the “rhetorical hyperbole” which has traditionally added much to the discourse of our Nation. . . .

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for “opinion” is required to ensure the freedom of expression guaranteed by the First Amendment. . . .

*Milkovich* thus avoided any need to resolve the interesting debate between Judges Bork and Scalia over the fact/opinion dichotomy. In doing so, however, it also signaled—albeit implicitly—that the Court was becoming less interested in further developing the layers upon layers of constitutional defamation law that had been accumulating since *New York Times v. Sullivan*. But the older cases still remain “good law” today, so the doctrine has essentially remained stable since 1990, with lower courts resolving smaller issues as they arise.

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#### 4.10. “Unprotected” Speech, Part II

How did the Court’s approach to identifying the boundaries of “unprotected” speech in the following case differ from its earlier approach in *New York Times Co. v. Sullivan*? What are the strengths and weaknesses of each approach?

The two cases in this Unit will also help us better appreciate how the idea of “unprotected” speech fits into the landscape of modern First Amendment doctrine.

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#### Brown v. Entertainment Merchants Association (2011)

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

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

##### **I**

California Assembly Bill 1179 (2005) (Act), prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act is punishable by a civil fine of up to \$1,000.

Respondents, representing the video-game and software industries, brought a pre-enforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed, and we granted certiorari.

## II

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. . . . Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *United States v. Playboy Entm’t Group, Inc.* (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears.

The most basic of those principles is this: “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. ACLU* (2002). There are of course exceptions. “From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations.” *United States v. Stevens* (2010) (quoting *R.A.V. v. St. Paul* (1992)). These limited areas—such as obscenity, incitement, and fighting words—represent “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire* (1942).

Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. The statute covered depictions “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed” if that harm to the animal was illegal where the “the creation, sale, or possession t[ook] place.” A saving clause largely borrowed from our obscenity jurisprudence exempted depictions with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a “simple balancing test” that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. We emphatically rejected that “startling and dangerous” proposition. “Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.” But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the “judgment [of] the American people,” embodied in the First Amendment, “that the benefits of its restrictions on the Government outweigh the costs.”

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct.” . . .

Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene

from the perspective of a child. We held that the legislature could “adjus[t] the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of . . . minors.” And because “obscenity is not protected expression,” the New York statute could be sustained so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults*—and it is wise not to, since that is but a hair’s breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik v. Jacksonville* (1975). No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.*

California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by *other children* while marooned on an island.

This is not to say that minors’ consumption of violent entertainment has never encountered resistance. [*The Court then recounted a variety of censorship efforts throughout American history.*] . . .

California claims that video games present special problems because they are “interactive,” in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. . . . [A]ll literature is interactive. . . .

Justice Alito has done considerable independent research to identify video games in which “the violence is astounding” . . . [and ones] that have a racial or ethnic motive for their violence—“ethnic cleansing [of] . . . African Americans, Latinos, or Jews.” To what end does he relate this? . . . Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

## III

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, *United States v. Playboy Entm’t Grp., Inc.*, (2000), and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Id.*

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc. v. FCC* (1994), the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. California’s burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.

The State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). . . . They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game. . . .

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. . . .

But leaving that aside, California cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. . . . This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.

And finally, the Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to “assisting parents” that restriction of First Amendment rights requires.

**Justice Alito, with whom Chief Justice Roberts joins, concurring in the judgment.**

. . . Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained.



I disagree, however, with the approach taken in the Court’s opinion. In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.

In the view of the Court, all those concerned about the effects of violent video games—federal and state legislators, educators, social scientists, and parents—are unduly fearful, for violent video games really present no serious problem. Spending hour upon hour controlling the actions of a character who guns down scores of innocent victims is not different in “kind” from reading a description of violence in a work of literature.

The Court is sure of this; I am not. There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show. . . .

The Court is wrong in saying that the holding in *United States v. Stevens* (2010), “controls this case.” First, the statute in *Stevens* differed sharply from the statute at issue here. *Stevens* struck down a law that broadly prohibited *any person* from creating, selling, or possessing depictions of animal cruelty for commercial gain. The California law involved here, by contrast, is limited to the sale or rental of violent video games *to minors*. . . . And the California law does not prevent parents and certain other close relatives from buying or renting violent games for their children or other young relatives if they see fit.

Second, *Stevens* does not support the proposition that a law like the one at issue must satisfy strict scrutiny. The portion of *Stevens* on which the Court relies rejected the Government’s contention that depictions of animal cruelty were categorically outside the range of *any* First Amendment protection. Going well beyond *Stevens*, the Court now holds that any law that attempts to prevent minors from purchasing violent video games must satisfy strict scrutiny instead of the more lenient standard applied in *Ginsberg v. New York* (1968), our most closely related precedent. As a result of today’s decision, a State may prohibit the sale to minors of what *Ginsberg* described as “girlie magazines,” but a State must surmount a formidable (and perhaps insurmountable) obstacle if it wishes to prevent children from purchasing the most violent and depraved video games imaginable.

Third, *Stevens* expressly left open the possibility that a more narrowly drawn statute targeting depictions of animal cruelty might be compatible with the First Amendment. In this case, the Court’s sweeping opinion will likely be read by many, both inside and outside the video-game industry, as suggesting that no regulation of minors’ access to violent video games is allowed—at least without supporting evidence that may not be realistically obtainable given the nature of the phenomenon in question. . . .

The Court’s opinion distorts the effect of the California law. . . . Citing the video-game industry’s voluntary rating system, the Court argues that the California law does not “meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so.” The Court does not mention the fact that the industry adopted this system in response to the threat of federal regulation, a threat that the Court’s opinion may now be seen as largely eliminating. Nor does the Court acknowledge that compliance with this system at the time of the enactment of the California law left much to be desired—or that future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished. Nor does the Court note, as Justice Breyer points

out, that many parents today are simply not able to monitor their children’s use of computers and gaming devices.

Finally, the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future.

Today’s most advanced video games create realistic alternative worlds in which millions of players immerse themselves for hours on end. These games feature visual imagery and sounds that are strikingly realistic. . . . Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. . . . For example, a player who wants a video-game character to swing a baseball bat—either to hit a ball or smash a skull—could bring that about by simulating the motion of actually swinging a bat. . . .

In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in “ethnic cleansing” and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository. . . .

It is certainly true, as the Court notes, that [literature is interactive]. . . . But only an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game. To take an example, think of a person who reads the passage in *Crime and Punishment* in which Raskolnikov kills the old pawn broker with an axe. Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim, and then to bring it down; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.

When all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then for at least some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.

For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.

**Justice Thomas, dissenting.**

... As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to *all* speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire* (1942); *see also United States v. Stevens* (2010). Laws regulating such speech do not "abridg[e] the freedom of speech" because such speech is understood to fall outside "the freedom of speech."

In my view, the practices and beliefs held by the Founders reveal another category of excluded speech: speech to minor children bypassing their parents. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents.

[Justice Thomas then provided an extended discussion of eighteenth-century attitudes toward children.] . . .

**Justice Breyer, dissenting.**

... Applying traditional First Amendment analysis, I would uphold the statute as constitutional on its face and would consequently reject the industries' facial challenge. . . .

Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children. But because video games also embody important expressive and artistic elements, I agree with the Court that the First Amendment significantly limits the State's power to regulate. And I would determine whether the State has exceeded those limits by applying a strict standard of review.

Like the majority, I believe that the California law must be "narrowly tailored" to further a "compelling interest," without there being a "less restrictive" alternative that would be "at least as effective." *Reno v. ACLU* (1997). I would not apply this strict standard "mechanically." *United States v. Playboy Entm't Grp., Inc.* (2000) (Breyer, J., dissenting). Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying "compelling interests," the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide." *Id.*

First Amendment standards applied in this way are difficult but not impossible to satisfy. Applying "strict scrutiny" the Court has upheld restrictions on speech that, for example, ban the teaching of peaceful dispute resolution to a group on the State Department's list of terrorist organizations and limit speech near polling places. . . .

Moreover, although the Court did not specify the "level of scrutiny" it applied in *Ginsberg*, we have subsequently described that case as finding a "compelling interest" in protecting children from harm sufficient to justify limitations on speech. . . . [I]n this case, California has substantiated its claim of harm with considerably stronger evidence.

California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. All it prevents is a child or

adolescent from buying, without a parent’s assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17. . . .

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the “basic” parental claim “to authority in their own household to direct the rearing of their children,” which makes it proper to enact “laws designed to aid discharge of [parental] responsibility,” and (2) the State’s “independent interest in the well-being of its youth.” *Ginsburg*. . . . Both interests are present here. . . .

At the same time, there is considerable evidence that California’s statute significantly furthers this compelling interest. That is, in part, because video games are excellent teaching tools. Learning a practical task often means developing habits, becoming accustomed to performing the task, and receiving positive reinforcement when performing that task well. Video games can help develop habits, accustom the player to performance of the task, and reward the player for performing that task well. Why else would the Armed Forces incorporate video games into its training? . . .

There are many scientific studies that support California’s views. Social scientists, for example, have found *causal* evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. . . . Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. . . . Cutting-edge neuroscience has shown that “virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior.” . . .

Some of these studies take care to explain in a commonsense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child’s behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm.

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions. I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm. [*Justice Breyer then summarized those professional opinions.*] . . .

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. *See Holder v. Humanitarian Law Project* (2010) (deferring, while applying strict scrutiny, to the Government’s national security judgments); *Turner Broad. Sys., Inc. v. FCC* (1997) (deferring, while applying intermediate scrutiny, to the Government’s technological judgments). The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.

[*Justice Breyer also concluded that there was “no less restrictive alternative to California’s law that would be at least effective.”*] . . .

I add that the majority’s different conclusion creates a serious anomaly in First Amendment law. *Ginsberg* makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video

games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?

This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that *Ginsberg* controls the outcome here *a fortiori*. And it is why I believe California’s law is constitutional on its face.

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children.

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### Notes and Questions

1. What is the Court’s method for identifying categories of “low-value speech” (*a.k.a.*, “unprotected speech”)? What are the advantages and disadvantages of this approach? Does it resemble any other doctrinal methodologies you’ve seen outside the context of First Amendment rights?

2. *Brown* involved “protected speech,” but that determination did not resolve the case. Rather, the Court then assessed whether the law (which was content-based) survived strict scrutiny. How did the Court analyze this issue? The decision reflects how difficult it usually is for the government to win a case involving content-based regulations of speech.

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The next case—*R.A.V. v. St. Paul* (1992)—is also challenging and important. In particular, Justice Scalia’s majority opinion illustrates how the Court’s early use of a *speaker*-focused inquiry (based on the distinction between privileged and unprivileged speech and certain categories of “unprotected” speech) has now morphed into an approach that focuses far more on what the *government* is doing, even in “unprotected” speech cases. Be sure to identify how the majority in *R.A.V.* situates unprotected speech categories in the broader constellation of modern First Amendment law.

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### R.A.V. v. St. Paul (1992)

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

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was

staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, which provides:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner’s overbreadth claim because . . . the ordinance reached only expression “that the first amendment does not protect.” The court also concluded that the ordinance was not impermissibly content based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” We granted certiorari.

## I

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court’s authoritative statement that the ordinance reaches only those expressions that constitute “fighting words” within the meaning of *Chaplinsky v. New Hampshire* (1942). . . . [W]e nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky*. We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. [*Justice Scalia then cited cases involving obscenity, defamation, and fighting words.*] Our decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. . . .

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government “may regulate [them] freely.” (White, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government.

Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. . . .

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. *See Texas v. Johnson* (1989). Similarly, we have upheld reasonable “time, place, or manner” restrictions, but only if they are “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism* (1989). And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

In other words, the exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech”; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. . . .

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991). But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. And the Federal Government can criminalize only those threats of violence that are directed against the President, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. . . .

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the . . . speech.” *Renton v. Playtime Theatres, Inc.* (1986). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of

speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy. . . .

## II

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules. . . .

St. Paul’s brief asserts that a general “fighting words” law would not meet the city’s needs because only a content-specific measure can communicate to minority groups that the “group hatred” aspect of such speech “is not condoned by the majority.” The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content. . . .

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul’s comments and concessions in this case elevate the possibility to a certainty. . . .



**Justice White, with whom Justices Blackmun and O'Connor join, and with whom Justice Stevens joins except as to Part I-A, concurring in the judgment.**

. . . This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. . . . [T]he Court has held that the First Amendment does not apply to them because their expressive content is worthless or of *de minimis* value to society. . . .

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are "not within the area of constitutionally protected speech." The present Court submits that such clear statements "must be taken in context" and are not "literally true."

To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence. . . . It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

The majority's observation that fighting words are "quite expressive indeed" is no answer. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. . . .

**Justice Stevens concurring in the judgment.**

. . . I have reservations about the "categorical approach" to the First Amendment [that] . . . lead me to find Justice White's response to the Court's analysis unsatisfying.

Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. . . . The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of *context*. The meaning of any expression and the legitimacy of its regulation can only be determined in context. Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. . . . The categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment.

Perhaps sensing the limits of such an all-or-nothing approach, the Court has applied its analysis less categorically than its doctrinal statements suggest. The Court has recognized intermediate categories of speech (for example, for indecent nonobscene speech and commercial speech) and geographic categories of speech (public fora, limited public fora, nonpublic fora) entitled to varying levels of protection. The Court has also stringently delimited the categories of unprotected speech. While we once declared that "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech," *Beauharnais v. Illinois* (1952), our rulings in *New York Times Co. v. Sullivan* (1964) [and other cases] have substantially qualified this broad claim. Similarly, we have consistently

construed the “fighting words” exception set forth in *Chaplinsky* narrowly. . . . In short, the history of the categorical approach is largely the history of narrowing the categories of unprotected speech.

This evolution, I believe, indicates that the categorical approach is unworkable and the quest for absolute categories of “protected” and “unprotected” speech ultimately futile. . . .

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### Notes and Questions

1. What is the doctrinal significance of “low value” speech after *R.A.V.*?
  2. The note on page 539 mentions that “hate crimes” do not abridge the freedoms of thought and belief. But what about the freedom of speech? Can a “hate crimes” statute single out crimes inspired by racial or religious hatred (and not other forms of hatred)? Can prosecutors introduce the defendant’s hateful blog posts as evidence of the defendant’s motive?
  3. What was Justice White’s criticism of the majority? What was his underlying perspective about the nature of First Amendment rights, and how did that differ from the majority’s perspective?
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## 4.11. “Unprotected” Speech, Part III

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### Virginia v. Black (2003)

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**Justice O’Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which the Chief Justice and Justices Stevens and Breyer join.**

In this case we consider whether the Commonwealth of Virginia’s statute banning cross burning with “an intent to intimidate a person or group of persons” violates the First Amendment. We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as *prima facie* evidence of intent to intimidate renders the statute unconstitutional in its current form.

#### I

Respondents Barry Black, Richard Elliott, and Jonathan O’Mara were convicted separately of violating Virginia’s cross-burning statute, § 18.2-423. That statute provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons.

*[After the defendants were convicted, the Virginia Supreme Court overturned the convictions, holding that the state statute was unconstitutional under the First Amendment.]*

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan. [A summary of the Klan's history is omitted.] . . .

From the inception of the second Klan [in 1915], cross burnings have been used to communicate both threats of violence and messages of shared ideology. . . .

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. . . .

[After *Brown v. Board of Education* (1954),] [m]embers of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. . . .

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a “symbol of hate.” *Capitol Square Review and Advisory Bd. v. Pinette* (Thomas, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. . . .

## III

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The hallmark of the protection of free speech is to allow “free trade in ideas”—even ideas that the overwhelming majority of people might find distasteful or discomfiting. *Abrams v. United States* (1919) (Holmes, J., dissenting); *see also Texas v. Johnson* (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). Thus, the First Amendment “ordinarily” denies a State “the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.” *Whitney v. California* (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. *See, e.g., R. A. V. v. City of St. Paul* (1992); *Texas v. Johnson* (1989); *United States v. O'Brien* (1968); *Tinker v. Des Moines Indep. Comm. Sch. Dist.* (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . .

Thus, for example, a State may punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire* (1942). We have consequently held that fighting words—“those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”—are generally proscribable under the First Amendment. *Cohen v. California* (1971). Furthermore, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio* (1969) (per curiam). And the First Amendment also permits a State to ban a “true threat.” *Watts v. United States* (1969) (per curiam).

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” *Watts*. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. . . . [T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

## B

The Supreme Court of Virginia ruled that in light of *R.A.V. v. City of St. Paul* (1992), even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else’s lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.<sup>2</sup>

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V. v. City of St. Paul*, to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree. . . .

We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support

<sup>2</sup> Justice Thomas argues in dissent that cross burning is “conduct, not expression.” While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. . . .

exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. . . .

[T]he First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue . . . is proscribable.”

Similarly, Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.” Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. *See, e.g., infra; State v. Miller* (Kan. App. 1981) (describing the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). . . .

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

#### IV

The Supreme Court of Virginia ruled in the alternative that Virginia’s cross-burning statute was unconstitutionally overbroad due to its provision stating that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” . . . In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face. . . .

The prima facie evidence provision, as interpreted by the [state’s model] jury instruction, renders the statute unconstitutional. . . . [T]he prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted “would create an unacceptable risk of the suppression of ideas.” *Secretary of State of Md. v. Munson* (1984). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, “[b]urning a cross at a political rally would almost certainly be protected expression.” *R.A.V. v. St. Paul* (1992) (White, J., concurring); cf. *National Socialist Party of Am. v. Skokie* (1977) (*per curiam*). Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott’s *The Lady of the Lake*.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. . . .

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black’s case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike Justice Scalia, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. . . .

**Justice Souter, with whom Justices Kennedy and Ginsburg join, concurring in the judgment in part and dissenting in part.**

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction we considered in *R.A.V. v. St. Paul* (1992). I disagree that any exception should save Virginia’s law from unconstitutionality under the holding in *R.A.V.* or any acceptable variation of it.

**I**

The ordinance struck down in *R. A. V.*, as it had been construed by the State’s highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative “on the basis of race, color, creed, religion or gender.” Although the Virginia statute in issue here contains no such express “basis of” limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. . . .

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R.A.V.*’s general condemnation of limited content-based proscription within a broader category of expression proscribable generally. Because of the burning cross’s extraordinary force as a method of intimidation, the *R.A.V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R.A.V.* opinion called an exception for content discrimination on a basis that “consists entirely of the very reason the entire class of speech at issue is proscribable.” This is the

exception the majority speaks of here as covering statutes prohibiting “particularly virulent” proscribable expression.

I do not think that the Virginia statute qualifies for this virulence exception as *R.A.V.* explained it. The statute fits poorly with the illustrative examples given in *R.A.V.*, none of which involves communication generally associated with a particular message, and in fact, the majority’s discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in *R.A.V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R.A.V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute’s prima facie evidence provision. That provision is essential to understanding why the statute’s tendency to suppress a message disqualifies it from any rescue by exception from *R.A.V.*’s general rule.

## II

*R.A.V.* defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made “entirely” on the “basis” of “the very reason” that “the entire class of speech at issue is proscribable” at all. The Court explained that when the subcategory is confined to the most obviously proscribable instances, “no significant danger of idea or viewpoint discrimination exists,” and the explanation was rounded out with some illustrative examples. None of them, however, resembles the case before us.

The first example of permissible distinction is for a prohibition of obscenity unusually offensive “in its prurience” . . . . [D]istinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the President, the second of *R.A.V.*’s examples of the virulence exception and the one the majority relies upon. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning.

I thus read *R.A.V.*’s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R.A.V.*’s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. Actually, another way of looking at today’s decision would see it as a slight modification of

*R.A.V.*'s third exception, which allows content-based discrimination within a proscribable category when its “nature” is such “that there is no realistic possibility that official suppression of ideas is afoot.” The majority’s approach could be taken as recognizing an exception to *R.A.V.* when circumstances show that the statute’s ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others.

### III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R.A.V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R.A.V.* without a high probability that no “official suppression of ideas is afoot.” I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

Virginia’s statute provides that burning a cross on the property of another, a highway, or other public place is “prima facie evidence of an intent to intimidate a person or group of persons.” . . .

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. . . .

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute’s prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute’s terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute’s prohibition some expression that is doubtfully threatening though certainly distasteful. . . .

Since no *R.A.V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content. . . .

#### **Justice Thomas, dissenting.**

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, *see Texas v. Johnson* (1989) (Rehnquist, C.J., dissenting) (describing the unique position of the American flag in our Nation’s 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

### I

Although I agree with the majority’s conclusion that it is constitutionally permissible to “ban . . . cross burning carried out with the intent to intimidate,” I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.



## A

“In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’” *Texas v. Johnson* (1989) (Rehnquist, C.J., dissenting) (quoting *New York Trust Co. v. Eisner* (1921)).

[Justice Thomas then summarized the Klan’s history of terrorism and the role of cross burnings in conveying such terror and intimidation.] . . . In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

## B

Virginia’s experience has been no exception. . . .

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, “long considered dead in Virginia, is being revitalized in Richmond,” Governor Battle announced that “Virginia ‘might well consider passing legislation’ to restrict the activities of the Ku Klux Klan.” As newspapers reported at the time, the bill was “to ban the burning of crosses and other similar evidences of terrorism.” The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. “Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*.” . . .

Strengthening Delegate Godwin’s explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. And, just two years after the enactment of this statute, Virginia’s General Assembly embarked on a campaign of “massive resistance” in response to *Brown v. Board of Education* (1954).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

## II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality. . . .

The plurality laments the fate of an innocent cross burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits “the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.” . . . [But] the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *New York v. Ferber* (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California* (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This “chilling” effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality’s analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado* (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from “unwanted advice” and “unwanted communication.” In so concluding, the Court placed heavy reliance on the “vulnerable physical and emotional conditions” of patients. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on “unwanted advice,” which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as “unwanted communication,” but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality’s view, physical safety will be valued less than the right to be free from unwanted communications.

**[The concurring opinions of Justices Stevens and Scalia are omitted.]**

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### Notes and Questions

1. Notice that Justice O’Connor wrote an opinion for the majority with respect to the constitutionality of banning cross burnings with intent to intimidate. Justice Souter, joined by Justices Kennedy and Ginsburg, dissented from that holding. Why did Justice O’Connor think that bans on cross burnings with intent to intimidate are constitutional under *R.A.V.*? How did she distinguish that case? Was her argument persuasive? How did Justice Souter reply?

2. In the first part of his opinion—a dissenting opinion because it concluded that Black’s conviction should be upheld—Justice Thomas argued that Black’s claim should be treated as beyond the *scope* of the First Amendment. Why? Do you agree?

3. Justice Thomas also brought up the specter of *Hill v. Colorado* (2000) and a charge of inconsistency. Are the opinions of the various justices in *Virginia v. Black* consistent with their other opinions that you’ve read in this course?

4. In a separate concurring opinion, Justice Scalia addressed the “prima facie evidence” provision of the statute. That opinion is not excerpted above, but it is worth highlighting one aspect of Scalia’s reasoning. He agreed with O’Connor that the prima-facie-evidence provision was constitutionally problematic because it could facilitate convictions even when a defendant lacked the intent to intimidate. But he insisted that such an argument had to be made “on a case-by-case basis,” and that there was no warrant for “facial invalidation of the statute.” He explained:

In order to identify *any* protected conduct that is affected by Virginia’s cross-burning law, the plurality is compelled to focus not on the statute’s core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury. And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone*. As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense [since the ‘prima facie’ presumption is rebuttable].

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia’s cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under § 18.2-423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense.

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment overbreadth doctrine. For this Court has emphasized repeatedly that “where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute’s plainly legitimate sweep.” *Osborne v. Ohio* (1990). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of “marginal applications” of a statute in light of which “facial invalidation is inappropriate.” *Parker v. Levy* (1974).<sup>4</sup>

Perhaps more alarming, the plurality concedes that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in respondent Black’s case. This would all be well and good were it not for the fact that the plurality *facially invalidates* § 18.2-423. (“[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black’s case, is unconstitutional on its face”). I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction. . . .

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. . . . We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2-423 is “unconstitutional *on its face*,” (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2-423 is possible, then facial invalidation is inappropriate. . . . Words cannot express my wonderment at this virtuoso performance. . . .

<sup>4</sup> Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad*. . . .

This passage reflects a common misunderstanding. As used in the plurality, the terms “facial” and “as-applied” referred to a *mode or logic of constitutional analysis*, not to the *remedy*. So, for instance, when the plurality concluded that the prima-facie-evidence provision was facially invalid, it did not issue a remedy that “struck down” that provision. Rather, the plurality held that the rule was legally inoperative because the rule violated the First Amendment. Yet at the end of her opinion, Justice O’Connor recognized that her *interpretation* of the rule might be wrong, in which case Virginia courts could correct her mistaken understanding of Virginia law. Notwithstanding Justice Scalia’s incredulity, all of this was fine. There is nothing improper about a federal court recognizing the facial invalidity of a state-law rule while also acknowledging that its interpretation of that rule might be subsequently rejected by a state court, thus making the federal court’s facial-invalidity precedent inapplicable.

It is a separate question whether Justice O’Connor properly used facial analysis as opposed to as-applied analysis. What is the best argument in favor of using facial analysis? Would any of the more recent opinions that you’ve read support that approach?

5. Beyond the black-letter-law debates, it is also worth noting a perspective that is missing in the various opinions in *R.A.V.* and *Virginia v. Black*, which do not directly challenge the central importance of neutrality in current doctrine. Along these lines, consider Catharine MacKinnon’s critique:<sup>\*</sup>

Claiming freedom of speech, practices of inequality are converted into expressions of ideas about inequality, transforming actionable discrimination into protectable “speech.” Opposition to discriminatory practices becomes censorship of thoughts or ideas on one side of a discussion. In this light, because discrimination, including through expressive acts of the powerful and advantaged, silences the speech of disadvantaged and subordinated groups as well as promotes their disadvantage and actualizes their subordination, neutrality as a doctrinal approach supports the status quo distribution of social power under the First Amendment just as effectively as it largely does under the Equal Protection Clause . . . .

The vaunted tradition of speech-protective First Amendment case law, beginning in Justices Holmes’s and Brandeis’s dissents and growing through those by Justices Black and Douglas, arose to protect political advocacy critical of the government—expression of opinion on matters of public debate—from the power of the government to silence dissent through criminal law: censorship. . . .

The Court’s dissenters in these cases, laying the foundation of modern First Amendment law, clearly saw who needed protection and why in who had power and who did not, measured in part by speech whose protection could be afforded because it had been widely rejected and was not hegemonic. The relation between the parties was not expressed as an inequality, although it was one. . . .

Formal equality, seeking neutrality in the sense of outcomes on no one’s side, is actually not possible in real inequality situations. It tilts toward power winning because neutrality favors non-intervention, meaning not disrupting the arrangement that power has established. At best, it can go either way. Indifferent between substantive equality and inequality, it is not an equality rule at all. First Amendment neutrality has thus become a shibboleth for fairness in the guise of equal treatment while overwhelmingly siding with inequality in substance, as well as the form in which the ever-elusive holy grail of high groundlessness is sought, when what is actually needed is an injection of context, substance, history: inequality’s reality.

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<sup>\*</sup> Catharine A. MacKinnon, *Weaponizing the First Amendment*, Va. L. Rev. (2020); see also Kimberlé Williams Crenshaw, Richard Delgado, Charles R. Lawrence III, & Mari J. Matsuda, *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (1993).

## 4.12. Commercial Speech

As the Supreme Court began to distinguish “protected” speech from “unprotected” speech in the 1940s, it put “commercial speech”—that is, speech proposing a commercial transaction—in the *unprotected* group. “[T]he Constitution imposes no such restraint on government as respects purely commercial advertising,” the Court explained in *Valentine v. Crestensen* (1942). “Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.” The Court began to back off that view in the following case.

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### Va. State Bd. of Pharm. v. Va. Citizens Consumer Council (1976)

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

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments, that portion of [Virginia law] which provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he “publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.” . . .

#### IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is “commercial speech.” There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. . . . Moreover, the Court several times has stressed that communications to which First Amendment protection was given were *not* “purely commercial.” *New York Times Co. v. Sullivan* (1964). Since the decision in *Breard v. Alexandria* (1951), however, the Court has never *denied* protection on the ground that the speech in issue was “commercial speech.” . . .

Last Term, in *Bigelow v. Virginia* (1975), the notion of unprotected “commercial speech” all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. . . . We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen*’s continued validity was questioned, and its holding was described as “distinctly a limited one” that merely upheld “a reasonable regulation of the manner in which commercial advertising could be distributed.” . . . [W]e observed that the “relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.” . . .

#### V

. . . Our question is whether speech which does no more than propose a commercial transaction is so removed from any “exposition of ideas,” *Chaplinsky v. New Hampshire* (1942), and from “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,” *Roth v. United States* (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser’s interest is a purely economic one. That hardly

disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. . . .

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs. . . .

Moreover, . . . [s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. . . .

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism. It is exercised in a number of ways for the consumer's benefit. . . .

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. . . . It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring—impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer. . . .

The Court [has] regarded justifications of this type sufficient to sustain the advertising bans challenged on due process and equal protection grounds.

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is

to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the “professional” pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the “professional” pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

## VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. . . .

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem.<sup>24</sup> The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream[s] of commercial information flow cleanly as well as freely. . . .

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<sup>24</sup> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does “no more than propose a commercial transaction” and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also,

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions,<sup>25</sup> we conclude that the answer to this one is in the negative.

**Justice Rehnquist, dissenting.**

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. . . .

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that "society also may have a strong interest in the free flow of commercial information." One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. . . .

The Court concedes that legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal. In a final footnote the opinion tosses a bone to the traditionalists in the legal and medical professions by suggesting that because they sell services rather than drugs the holding of this case is not automatically applicable to advertising in those professions. But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged. Nor is it apparent how the pharmacists in this case are less engaged in a regulatable profession than were the opticians in *Williamson v. Lee Optical* (1954). . . .

There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected

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commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints.

<sup>25</sup> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.



speech a no more satisfactory line of its own—that between “truthful” commercial speech, on the one hand, and that which is “false and misleading” on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is “primarily an instrument to enlighten public decisionmaking in a democracy.” I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. *See New York Times Co. v. Sullivan* (1964). But it is another thing to say that because that line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a “‘merchant’ who goes from door to door ‘selling pots.’” *Breard v. City of Alexandria* (1951) (dissenting). . . .

This case presents a fairly typical First Amendment problem—that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment. . . . Here the rights of the appellees seem to me to be marginal at best. There is no ideological content to the information which they seek and it is freely available to them—they may even publish it if they so desire. The only persons directly affected by this statute are not parties to this lawsuit. On the other hand, the societal interest against the promotion of drug use for every ill, real or imaginary, seems to me extremely strong. I do not believe that the First Amendment mandates the Court’s “open door policy” toward such commercial advertising.

**[The concurring opinions of Chief Justice Burger and Justice Stewart are omitted.]**

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### Notes and Questions

1. The majority clearly held that commercial speech—that is, speech proposing a commercial transaction—was not wholly *unprotected* under the First Amendment. Why not? Notice that *Virginia State Board* was decided in 1976. What method did the Court use at that time to distinguish “protected” and “unprotected” speech? Does the reasoning in *Virginia State Board* exhibit that method? If so, how? Why exactly did the Court conclude that restrictions of commercial speech are within the scope of the First Amendment?

In Unit 4.10, we saw the Justices in more recent cases use a different method for drawing a line between protected and unprotected speech. How might that method apply to commercial speech?

2. Although *Virginia State Board* held that restrictions of commercial speech were within the scope of the First Amendment, the Court also hinted that such speech might not enjoy the same degree of protection as other forms of speech. Why not? Why might the government have broader leeway to restrict commercial speech?

3. How did countervailing governmental interests factor into the Court's analysis in *Virginia State Board*? At the strength stage of the analysis, what method did the Court use for deciding who should win?

4. Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), the Supreme Court settled on a form of intermediate scrutiny for evaluating restrictions of commercial speech:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Although this passage mentions that the restriction must "directly advance" the government's interest, which cannot "be served as well by a more limited restriction," subsequent cases make clear that *Central Hudson* does *not* articulate a "least restrictive means" test. Rather, the restriction only needs to be "narrowly tailored" to achieving the governmental interest.

But subsequent decisions have not been consistent on other aspects of commercial-speech doctrine. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* (1986), the Supreme Court upheld a ban on gambling advertisements, concluding that the advertising ban's suppression of demand would serve the state's interest in limiting lawful gambling activity. In *44 Liquormart, Inc. v. Rhode Island* (1996), however, a plurality decision questioned the applicability of intermediate scrutiny when the state interest was based on manipulating consumer demand through the *suppression* of information. "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands," Justice Stevens wrote for the plurality. "[S]uch bans," he continued, "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech. . . . Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

Nonetheless, the plurality in *44 Liquormart* concluded that it need not decide whether to abandon intermediate scrutiny in such cases because the Rhode Island advertising restriction could not even survive the more deferential review under *Central Hudson*. In a concurring opinion, Justice Thomas stated that the governmental interest in suppressing demand for products by limiting advertising was "*per se* illegitimate" under the First Amendment. Moreover, he did "not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."

As a doctrinal matter, commercial speech continues to occupy a middle position between "protected" and "unprotected" speech. But as the following case illustrates, the Supreme Court has recently shown little patience for many restrictions of commercial speech.

5. What do you think of Justice Rehnquist's dissent in *Virginia State Board*?

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**Sorrell v IMS Health Inc. (2011)**

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**Justice Kennedy delivered the opinion of the Court.**

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

**I**

Pharmaceutical manufacturers promote their drugs to doctors through a process called “detailing.” This often involves a scheduled visit to a doctor’s office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the “details” and potential advantages of various prescription drugs. Interested physicians listen, ask questions, and receive follow-up data. Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician’s prescription practices—called “prescriber-identifying information”—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message. Detailing is an expensive undertaking, so pharmaceutical companies most often use it to promote high-profit brand-name drugs protected by patent. Once a brand-name drug’s patent expires, less expensive bioequivalent generic alternatives are manufactured and sold.

Pharmacies, as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions. Many pharmacies sell this information to “data miners,” firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.

In 2007, Vermont enacted the Prescription Confidentiality Law [that prohibits] pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber’s consent. . . . The provision then goes on to prohibit pharmacies, health insurers, and similar entities from allowing prescriber-identifying information to be used for marketing, unless the prescriber consents. This prohibition in effect bars pharmacies from disclosing the information for marketing purposes. Finally, the provision’s second sentence bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing, again absent the prescriber’s consent. The Vermont attorney general may pursue civil remedies against violators. . . .

[This law] was accompanied by legislative findings. Vermont found, for example, that the “goals of marketing programs are often in conflict with the goals of the state” and that the “marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest

in expensive pharmaceutical marketing campaigns to doctors.” . . . Because they “are unable to take the time to research the quickly changing pharmaceutical market,” Vermont doctors “rely on information provided by pharmaceutical representatives.” The legislature further found that detailing increases the cost of health care and health insurance; encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives; and fosters disruptive and repeated marketing visits tantamount to harassment. The legislative findings further noted that use of prescriber-identifying information “increase[s] the effect of detailing programs” by allowing detailers to target their visits to particular doctors. Use of prescriber-identifying data also helps detailers shape their messages by “tailoring” their “presentations to individual prescriber styles, preferences, and attitudes.”

*[The drug companies and data-mining companies then sued.]*

## II

. . . The questions now are whether § 4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law.

### A

#### 1

On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser’s speech. For example, those who wish to engage in certain “educational communications” may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision’s second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers. . . . The law on its face burdens disfavored speech by disfavored speakers. . . .

Formal legislative findings accompanying § 4631(d) confirm that the law’s express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the “inevitable effect of a statute on its face may render it unconstitutional,” a statute’s stated purposes may also be considered. *United States v. O’Brien* (1968). Here, the Vermont Legislature explained that detailers, in particular those who promote brand-name drugs, convey messages that “are often in conflict with the goals of the state.” The legislature designed § 4631(d) to target those speakers and their messages for disfavored treatment. “In its practical operation,” Vermont’s law “goes even beyond mere content discrimination, to actual viewpoint discrimination.” *R.A.V. v. St. Paul* (1992). Given the legislature’s expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint. . . .

The Court has recognized that the “distinction between laws burdening and laws banning speech is but a matter of degree” and that the “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *United States v. Playboy Entm’t Grp., Inc.* (2000). Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.

The First Amendment requires heightened scrutiny whenever the government creates “a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism* (1989). A government bent on frustrating an impending demonstration might pass a law demanding two years’ notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. *Id.* Commercial speech is no exception. A “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Bates v. State Bar of Ariz.* (1977). That reality has great relevance in the fields of medicine and public health, where information can save lives.

## 2

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove “White Applicants Only” signs, why “an ordinance against outdoor fires” might forbid “burning a flag,” and why antitrust laws can prohibit “agreements in restraint of trade.”

But § 4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker. While the burdened speech results from an economic motive, so too does a great deal of vital expression. Vermont’s law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution “does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York* (1905) (Holmes, J., dissenting). It does enact the First Amendment. . . .

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. . . . This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes. . . .

## B

In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory. The State argues that a different analysis applies here because, assuming § 4631(d) burdens speech at all, it at most burdens only commercial speech. As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. For the same reason there is no need to determine whether all speech hampered by § 4631(d) is commercial, as our cases have used that term.

Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment. . . . [T]he State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.* (1980). . . . As in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.

The State's asserted justifications for § 4631(d) come under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. Second, the State argues that § 4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs. Neither justification withstands scrutiny.

## 1

Vermont argues that its physicians have a “reasonable expectation” that their prescriber-identifying information “will not be used for purposes other than . . . filling and processing” prescriptions. It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But § 4631(d) is not drawn to serve that interest. Under Vermont's law, pharmacies may share prescriber-identifying information with anyone for any reason save one: . . . marketing. . . .

The State also contends that § 4631(d) protects doctors from “harassing sales behaviors.” . . . It is doubtful that concern for “a few” physicians who may have “felt coerced and harassed” by pharmaceutical marketers can sustain a broad content-based rule like § 4631(d). Many are those who must endure speech they do not like, but that is a necessary cost of freedom. *See Erznosnik v. Jacksonville* (1975); *Cohen v. California* (1971). In any event the State offers no explanation why remedies other than content-based rules would be inadequate. Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. Doctors who wish to forgo detailing altogether are free to give “No Solicitation” or “No Detailing” instructions to their office managers or to receptionists at their places of work. . . .

Vermont argues that detailers' use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. . . . [T]his asserted interest is contrary to basic First Amendment principles. Speech remains protected even when it may “stir people to action,” “move them to tears,” or “inflict great pain.” *Snyder v. Phelps* (2011). The more benign and, many would say, beneficial speech of pharmaceutical marketing is also entitled to the protection of the First Amendment. If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. . . .

## 2

The State contends that § 4631(d) advances important public policy goals by lowering the costs of medical services and promoting public health. If prescriber-identifying information were available for use by detailers, the State contends, then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives. . . .

[T]he premise of § 4631(d) is that the force of speech can justify the government's attempts to stifle it. Indeed the State defends the law by insisting that “pharmaceutical marketing has a strong influence on doctors' prescribing practices.” This reasoning is incompatible with the First Amendment. In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers. . . . The choice “between the dangers of suppressing information, and the dangers of its misuse if it is freely available” is one that “the First Amendment makes for us.” *Virginia Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976).

Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction. . . .

It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from "commercial harms" explains "why commercial speech can be subject to greater governmental regulation than noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.* (1993). The Court has noted, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *R.A.V.* (citing *Virginia Bd.*). Here, however, Vermont has not shown that its law has a neutral justification. . . .

If Vermont's statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information's use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

When it enacted § 4631(d), the Vermont Legislature found that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brandname companies invest in expensive pharmaceutical marketing campaigns to doctors." . . . The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

**Justice Breyer, with whom Justices Ginsburg and Kagan join, dissenting.**

The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical and data-mining companies of data, collected pursuant to the government's regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special "heightened" standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech. For any or all of these reasons, the Court should uphold the statute as constitutional. . . .

**II**

. . . I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives. And in doing so, I would give significant weight to legitimate commercial regulatory objectives . . . . The far stricter, specially "heightened" First Amendment standards that the majority would apply to this instance of commercial regulation are out of place here.

Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, this Court has distinguished for First Amendment purposes among different contexts in which speech takes place. Thus, the First Amendment imposes tight constraints upon government efforts to restrict, *e.g.*, "core" political speech, while imposing looser constraints when the government seeks to

restrict, *e.g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.

These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to “social, political, esthetic, moral, and other ideas and experiences.” *Red Lion Broad. Co. v. FCC* (1969); *see Abrams v. United States* (1919) (Holmes, J., dissenting). Without such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people’s informed will.

At the same time, our cases make clear that the First Amendment offers considerably less protection to the maintenance of a free marketplace for goods and services. And they also reflect the democratic importance of permitting an elected government to implement through effective programs policy choices for which the people’s elected representatives have voted.

Thus this Court has recognized that commercial speech including advertising has an “informational function” and is not “valueless in the marketplace of ideas.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.* (1980). But at the same time it has applied a less than strict, “intermediate” First Amendment test when the government directly restricts commercial speech. Under that test, government laws and regulations may significantly restrict speech, as long as they also “directly advance” a “substantial” government interest that could not “be served as well by a more limited restriction.” *Id.* . . . The Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways. In doing so, the Court has taken account of the need in this area of law to defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause. . . .

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm’s ability to shape a commercial message) would work at cross-purposes with this more basic constitutional approach. Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a “heightened” First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives. To apply a “heightened” standard of review in such cases as a matter of course would risk what then-Justice Rehnquist, dissenting in *Central Hudson*, described as a “retur[n] to the bygone era of *Lochner v. New York* (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.” . . .

Regulators will often find it necessary to create tailored restrictions on the use of information subject to their regulatory jurisdiction. A car dealership that obtains credit scores for customers who want car loans can be prohibited from using credit data to search for new customers. *See* 15 U.S.C. § 1681b. Medical specialists who obtain medical records for their existing patients cannot purchase those records in order to identify new patients. *See* 45 CFR § 164.508(a)(3) (2010). Or, speaking hypothetically, a public utilities commission that directs local gas distributors to gather usage information for individual customers might permit the distributors to share the data with researchers (trying to lower energy costs) but forbid sales of the data to appliance manufacturers seeking to sell gas stoves. . . .

[U]ntil today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it. Nor has this Court *ever* previously applied any form of “heightened” scrutiny in any even roughly similar case. . . .

If the Court means to create constitutional barriers to regulatory rules that might affect the *content* of a commercial message, it has embarked upon an unprecedented task—a task that threatens



significant judicial interference with widely accepted regulatory activity. Nor would it ease the task to limit its “heightened” scrutiny to regulations that only affect certain speakers. As the examples that I have set forth illustrate, many regulations affect only messages sent by a small class of regulated speakers, for example, electricity generators or natural gas pipelines.

The Court also uses the words “aimed” and “targeted” when describing the relation of the statute to drug manufacturers. But, for the reasons just set forth, to require “heightened” scrutiny on this basis is to require its application early and often when the State seeks to regulate industry. . . . The related statutes, regulations, programs, and initiatives . . . often aim at, and target, particular firms that engage in practices about the merits of which the Government and the firms may disagree. Section 2 of the Sherman Act, for example, which limits the truthful, nonmisleading speech of firms that, due to their market power, can affect the competitive landscape, is directly aimed at, and targeted at, monopolists. . . .

Moreover, given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists. *See Lochner v. New York* (1905) (Holmes, J., dissenting). . . . [T]oday’s majority risks repeating the mistakes of the past in a manner not anticipated by our precedents. *See Central Hudson* (Rehnquist, J., dissenting). . . .

### III

Turning to the constitutional merits, I believe Vermont’s statute survives application of *Central Hudson*’s “intermediate” commercial speech standard as well as any more limited “economic regulation” test. . . .

The legitimate state interests that the statute serves are “substantial.” Vermont enacted its statute to advance the state’s interest in protecting the public health of Vermonters, protecting the privacy of prescribers and prescribing information, and to ensure costs are contained in the private health care sector, as well as for state purchasers of prescription drugs, through the promotion of less costly drugs and ensuring prescribers receive unbiased information.

These objectives are important. And the interests they embody all are “neutral” in respect to speech. . . .

[T]he record evidence is sufficient to permit a legislature to conclude that the statute “directly advances” each of these objectives. The statute helps to focus sales discussions on an individual drug’s safety, effectiveness, and cost, perhaps compared to other drugs (including generics). These drug-related facts have . . . have little, if anything, to do with the name or prior prescription practices of the particular doctor to whom a detailer is speaking. Shaping a detailing message based on an individual doctor’s prior prescription habits may help sell more of a particular manufacturer’s particular drugs. But it does so by diverting attention from scientific research about a drug’s safety and effectiveness, as well as its cost. This diversion comes at the expense of public health and the State’s fiscal interests. Vermont compiled a substantial legislative record to corroborate this line of reasoning. . . .

The record also adequately supports the State’s privacy objective. Regulatory rules in Vermont make clear that the confidentiality of an individual doctor’s prescribing practices remains the norm. . . .

The majority cannot point to any adequately supported, similarly effective “more limited restriction.” *Central Hudson*. It says that doctors “can, and often do, simply decline to meet with detailers.” This fact, while true, is beside the point. Closing the office door entirely has no similar tendency to lower costs (by focusing greater attention upon the comparative advantages and disadvantages of generic drug alternatives). And it would not protect the confidentiality of information

already released to, say, data miners. In any event, physicians are unlikely to turn detailers away at the door, for those detailers, whether delivering a balanced or imbalanced message, are nonetheless providers of much useful information. Forcing doctors to choose between targeted detailing and no detailing at all could therefore jeopardize the State's interest in promoting public health. . . .

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### Notes and Questions

1. Why did the restriction in this case fall within the scope of the First Amendment?
  2. In terms of strength analysis, what level of scrutiny did the Court apply? Why?
  3. Notice that the Court did not resolve whether this case involved only a restriction of commercial speech. Why not? How might you argue that the state law did not restrict commercial speech?
  4. What were the government's asserted interests? Why were they insufficient?
  5. One of the concerns that underpinned the law at issue in *Sorrell* was subconscious bias—that doctors might be unduly influenced by drug companies. Should First Amendment doctrine permit the government to protect people from receiving certain information in order to address motivated reasoning and other forms of subconscious bias? (Notice that this paternalistic logic underpins state and federal evidence law, which limits which forms of evidence can be presented to a jury because of concerns about how the jury will use that information.)
  5. How did the majority opinion seem to conceptualize the underlying value of expressive freedom? Would alternative approaches to expressive freedom lead to the same outcome?
  6. What are the most persuasive criticisms of *Sorrell*?
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## 4.13. Public Forum Doctrine

Public forum doctrine addresses how the First Amendment applies to governmental restrictions of *private* speech on (or using) *public* property.

Historically, the judicial response to this problem was to recognize governmental authority to control its property in any manner that it pleased. In *Commonwealth v. Davis* (Mass. 1895), for example, Oliver Wendell Holmes, Jr.—then a justice on the Massachusetts Supreme Judicial Court—firmly rejected the notion that citizens have a right to speak on public property notwithstanding the limits imposed by the law. “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park,” Justice Holmes explained, “is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.” The Supreme Court of the United States unanimously affirmed, stating that “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.” *Davis v. Massachusetts* (1897).

The onset of legal realism and the decline of social-contract theory, however, challenged the prevailing distinction between “rights” and “privileges”—and between what is “public” and what is “private.” Combined with a generally more robust approach to First Amendment doctrine, this shift led to new “public forum” doctrines that constrained how governments could limit private speech on public property.

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To help better understand modern public-forum doctrine, here is a flow chart:

### Scope

At this stage, courts assess whether the government has opened public property for *private* uses and is restricting (or compelling) *private speech* on that property. If so, then some form of public-forum doctrine usually applies. But the government may control *its own* speech using public property, so long as governmental use of that property does not compel private speech. If so, then the government's control of its own speech (called "government speech") is not subject to First Amendment limits; the case falls outside the scope of the First Amendment.

We will consider the distinction between "public forums" and "government speech" in *Pleasant Grove City v. Sumnum* (2009) and a subsequent Note case, *Walker v. Sons of Confederate Veterans* (2015).

### Strength

If the government has opened public property for private uses and is restricting (or compelling) private speech on that property, courts next ask what type of "forum" the government has created. Different rules apply to different types of forums (or "fora"):

#### *Traditional Public Forums:*

When public property has been traditionally open to private speech, the government must comply with "traditional public forum" doctrine. Examples of traditional public forums include most sidewalks and public parks. In this type of forum, restrictions of private speech are mostly subject to the same rules that apply to restrictions of private speech that don't involve limits on the use of public property. Thus, courts begin by asking whether the restriction is "content based" or "content neutral." Content-based restrictions are subject to strict scrutiny, and content-neutral restrictions are subject to intermediate scrutiny. The only wrinkle is that content-neutral "time, place, or manner" restrictions, in addition to being narrowly tailored to advance a substantial interest, must also leave open "adequate alternative channels" for the expression of the speaker's message.

#### *Designated Public Forums:*

Even outside the context of a traditional public forum, the government must comply with the same set of requirements whenever it opens public property to private speech. The key difference between "designated public forums" and "traditional public forums" is that the government, if it chooses to do so, can either eliminate the forum entirely or establish it as a "limited public forum" (see below) by specifying that the property is only available for use by certain speakers and/or for speech on certain subjects. But otherwise the same doctrinal rules apply to designated public forums as apply to traditional public forums.

#### *Limited Public Forums:*

A limited public forum is a designated public forum that the government has limited for use by certain speakers and/or for speech on certain subjects. In limited public forums, the government may impose speaker-based restrictions and content-based restrictions that are (1) reasonable and (2) viewpoint-neutral. These requirements are absolute *per se* rules, not triggers for heightened scrutiny.

#### *Nonpublic Forums:*

Nonpublic forums are treated precisely the same way as limited public forums. But it is not clear whether “nonpublic forums” should even be considered a separate category. As we will see in *Sumnum*, for example, the Court sometimes refers only to three types of forums: *traditional* public forums, *designated* public forums, and *limited* public forums. In other cases, however, the Justices have used a different tripartite schema. As Chief Justice Roberts wrote for the majority in *Minnesota Voters Alliance v. Mansky* (2018):

Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have “not traditionally been regarded as a public forum” but which the government has “intentionally opened up for that purpose.” *Id.* In a nonpublic forum, on the other hand—a space that “is not by tradition or designation a forum for public communication”—the government has much more flexibility to craft rules limiting speech. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* (1983). The government may reserve such a forum “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Id.*

The Court’s simultaneous embrace of two different tripartite schemas—without clarifying the relationship between them—is obviously a recipe for confusion. Some cases suggest that “limited” public forums are a *subcategory* of “designated” public forums. Moreover, the terminology seems to indicate that “limited public forums” are distinct from “nonpublic forums.” *Cf. Cornelius v. NAACP* (1985) (“[the lower court] did not decide whether the CFC was a limited public forum or a nonpublic forum”). At the same time, however, the doctrinal test that applies to limited public forums is identical to the one that applies to nonpublic forums. And it seems possible that some justices have conceptualized the doctrine in terms of a single tripartite framework—albeit with shifting terminology.\* Go figure! Perhaps the justices will offer clarity someday.

For the time being (including for outlining purposes), I suggest dividing “forum” doctrine into *four* categories: *traditional* public forums, *designated* public forums, *limited* public forums, and *nonpublic* forums, using the definitions discussed above. But as you probably noticed, the equivalent treatment of limited public forums and nonpublic forums means that there is no point in trying to distinguish between them—even if such a distinction exists.

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Now that we’ve considered the different steps of public-forum analysis, let’s take a closer look at the Court’s approach to the *scope* analysis in the following case.

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\* Consider, for instance, Justice Blackmun’s acknowledgment in *Cornelius v. NAACP* (1985) (Blackmun, J., dissenting) that the term “forum by designation” is a synonym for a “limited public forum.” If so, then perhaps some justices think that there is *one* tripartite schema as follows: (1) traditional public forum (or “public forum”); (2) designated public forum (or “limited public forum”); (3) limited public forum (or “nonpublic forum”). If so, then the haphazard use of terminology is obviously a recipe for confusion—and linguistic and conceptual slippage.

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**Pleasant Grove City v. Summum (2009)**

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**Justice Alito delivered the opinion of the Court.**

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

**I****A**

Pioneer Park (or Park) is a 2.5-acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include a historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" and be similar in size and nature to the Ten Commandments monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics. . . .

**B**

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. . . .

A panel of the Tenth Circuit . . . held that the City [had created a public forum and] could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means. . . .

**II**

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public

park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

### A

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. . . .

Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of Cal.* (1990).

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. *Johanns v. Livestock Marketing Assn.* (2005) (where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) (a government entity may "regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message").

This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. . . .

### B

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) (quoting *Hague v. Committee for Industrial Org.* (1939) (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985). Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited.

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.

The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral.

### III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. . . . When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. . . .

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land. . . .

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks—ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City—commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

### IV

#### A

In this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has “effectively controlled” the messages sent by the monuments in the Park by exercising “final approval authority” over their selection. *Johanns*. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent’s concern; and the City has now expressly set forth the criteria it will use in making future selections.

**B**

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate. . . .

[Moreover,] it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. . . .

**C**

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." *United States v. Am. Library Assn., Inc.* (2003) (plurality opinion). The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. . . . A public university's student activity fund can provide money for many campus activities. *See Rosenberger*. A public university's buildings may offer meeting space for hundreds of student groups. . . .

By contrast, public parks can accommodate only a limited number of permanent monuments. . . .

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (1) declining France's offer or (2) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia). . . .

If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. . . . The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of



forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place. . . .

**Justice Stevens, with whom Justice Ginsburg joins, concurring.**

. . . To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. *See, e.g., Garcetti v. Ceballos* (2006); *Johanns v. Livestock Marketing Ass’n* (2005); *Rust v. Sullivan* (1991). The Court’s opinion in this case signals no expansion of that doctrine. And by joining the Court’s opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. *Cf. Garcetti* (Souter, J., dissenting); *Rust* (Blackmun, J., dissenting). Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means. *Cf. Johanns* (Souter, J., dissenting). Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today’s decision will be limited.

**Justice Breyer, concurring.**

. . . In my view, courts must apply categories such as “government speech,” “public forums,” “limited public forums,” and “nonpublic forums” with an eye toward their purposes—lest we turn “free speech” doctrine into a jurisprudence of labels. *Cf. United States v. Kokinda* (1990) (Brennan, J., dissenting). Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.

Were we to do so here, we would find—for reasons that the Court sets forth—that the City’s action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum’s freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum’s members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. . . .

**[The concurring opinions of Justices Scalia and Souter are omitted.]**

### Notes and Questions

1. Why did the Court consider the monuments to be “government speech”? What was the doctrinal significance of that designation?
2. Notice from Justice Stevens’s concurring opinion that “government speech” doctrine is somewhat controversial. Why? What is potentially problematic about taking this approach to the First Amendment?

3. After *Sumnum*, the Court considered another case involving the boundary between “government speech” and “public forums” in the context of a Texas program that allowed individuals to design their own license plates, subject to review by the state. The dispute in *Walker v. Sons of Confederate Veterans* (2015) arose when the Texas Department of Motor Vehicles Board rejected a custom license-plate design featuring the Confederate battle flag. Justice Breyer wrote for the majority, joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan. He concluded that no First Amendment review applied because the license plates were “government speech.” Here is his rationale:

First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. . . .

Second, Texas license plate designs “are often closely identified in the public mind with the [State].” *Pleasant Grove v. Sumnum* (2009). Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. . . . Texas license plates are, essentially, government IDs. And issuers of ID typically do not permit” the placement on their IDs of “message[s] with which they do not wish to be associated.” *Id.* Consequently, persons who observe” designs on IDs “routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.” *Id.* . . .

Third, Texas maintains direct control over the messages conveyed on its specialty plates. . . . This final approval authority allows Texas to choose how to present itself and its constituency. . . . Texas offers plates that say “Fight Terrorism.” But it need not issue plates promoting al Qaeda. . . .

Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State’s selected license plate designs convey the messages communicated through those designs. *See Wooley v. Maynard* (1977) (observing that a vehicle “is readily associated with its operator” and that drivers displaying license plates “use their private property as a ‘mobile billboard’ for the State’s ideological message”). And we have recognized that the First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees. *See id.* But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey “the State’s ideological message,” *id.*, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

Justice Alito, writing for the four dissenters, criticized the majority for stretching the notion of “government speech” past the breaking point:

[T]he Court’s decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) . . . As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming

games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? And when a car zipped by with a plate that reads “NASCAR—24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

The Court says that all of these messages are government speech. . . . This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State’s coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? . . . What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today’s precedent remain to be seen.

Which argument is most persuasive? What was concerning Justice Alito? Why did he think that the boundaries of “government speech” doctrine need to be so carefully circumscribed?

4. By classifying as “government speech” the monuments in *Summum* and the custom license plates in *Walker*, did the Court suggest that the government was the *only* “speaker”? Or were the artists who created the monuments and the motorists who created the license plates *also* “speakers” for First Amendment purposes? Should it matter whether there were two “speakers” as opposed to just one?

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So far, we have mostly been focused on the threshold question of *whether* the government has created a public forum in the first place. In the following case, however, everybody agreed that the government had created a public forum. The dispute focused, instead, on whether the restrictions that the government created on speech within that forum were constitutional.

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### Rosenberger v. Rector & Visitors of Univ. of Va. (1995)

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#### **Justice Kennedy, delivered the opinion of the Court.**

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University’s regulation

and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

## I

. . . Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a “Contracted Independent Organization” (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University and that the University is not responsible for the CIO. CIO’s enjoy access to University facilities, including meeting rooms and computer terminals. A standard agreement signed between each CIO and the University provides that the benefits and opportunities afforded to CIO’s “should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations’ contracts or other acts or omissions, or that the University approves of the organizations’ goals or activities.”

All CIO’s may exist and operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities that “are related to the educational purpose of the University.” . . . The SAF receives its money from a mandatory fee of \$14 per semester assessed to each full-time student. The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body . . .

Some, but not all, CIO’s may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they “are related to the educational purpose of the University of Virginia.” One of these is “student news, information, opinion, entertainment, or academic communications media groups.” The Guidelines also specify, however, that the costs of certain activities of CIO’s that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses. The prohibition on “political activities” is defined so that it is limited to electioneering and lobbying. The Guidelines provide that “[t]hese restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which . . . espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted.” A “religious activity,” by contrast, is defined as any activity that “primarily promotes or manifests a particular belief[f] in or about a deity or an ultimate reality.” . . .

Petitioners’ organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established “[t]o publish a magazine of philosophical and religious expression,” “[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,” and “[t]o provide a unifying focus for Christians of multicultural backgrounds.” WAP publishes *Wide Awake: A Christian Perspective at the University of Virginia*. The paper’s Christian viewpoint was evident from the first issue, in which its editors wrote that the journal “offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia.” The editors committed the paper to a two-fold mission: “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.” The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis’ ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured

stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of *Wide Awake*, and the end of each article or review, is marked by a cross. The advertisements carried in *Wide Awake* also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. By June 1992, WAP had distributed about 5,000 copies of *Wide Awake* to University students, free of charge.

WAP had acquired CIO status soon after it was organized. This is an important consideration in this case, for had it been a “religious organization,” WAP would not have been accorded CIO status. As defined by the Guidelines, a “[r]eligious [o]rganization” is “an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.” At no stage in this controversy has the University contended that WAP is such an organization.

A few months after being given CIO status, WAP requested the SAF to pay its printer \$5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP’s request on the ground that *Wide Awake* was a “religious activity” within the meaning of the Guidelines, *i.e.*, that the newspaper “promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” It made its determination after examining the first issue. . . .

[*WAP then appealed, lost, and eventually filed a lawsuit.*] They alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law. . . .

[*The District Court and Court of Appeals ruled for the University.*] The Court of Appeals . . . conclud[ed] that the discrimination by the University was justified by the “compelling interest in maintaining strict separation of church and state.” We granted certiorari.

## II

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dep’t v. Chicago v. Mosley* (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent* (1984). Discrimination against speech because of its message is presumed to be unconstitutional. *See Turner Broadcasting Sys., Inc. v. FCC* (1994). . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul* (1992). Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* (1983).

These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district’s provision of school facilities for private uses, we declared that “[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.* (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum,” *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985), nor may it discriminate

against speech on the basis of its viewpoint, *Lamb's Chapel*. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. See *Perry Educ. Ass'n*

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. See, e.g., *Perry Educ. Ass'n* (forum analysis of a school mail system); *Cornelius* (forum analysis of charitable contribution program). The most recent and most apposite case is our decision in *Lamb's Chapel*. There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective." There was no indication in the record in *Lamb's Chapel* that the request to use the school facilities was "denied, for any reason other than the fact that the presentation would have been from a religious perspective." Our conclusion was unanimous: "[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."

The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts," but insists that this case does not present that issue because the Guidelines draw lines based on content, not viewpoint. As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., *R. A. V.* And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake*. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid. The church group in *Lamb's Chapel* would have been qualified as

a social or civic organization, save for its religious purposes. Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. It bears only passing mention that the dissent's attempt to distinguish *Lamb's Chapel* is entirely without support in the law. . . . [T]he dissent seems to argue that we found viewpoint discrimination in that case because the government excluded Christian, but not atheistic, viewpoints from being expressed in the forum there. The Court relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. There is no indication . . . that exclusion or inclusion of other religious or antireligious voices from that forum had any bearing on [our] decision.

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. . . .

To this end the University relies on our assurance in *Widmar v. Vincent* (1981). There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan* (1991), we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. . . .

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints. . . .

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses. . . .

*[The Court then concluded by explaining why the University's funding of WAP's activities would not violate the Establishment Clause.]*

**Justice Souter, with whom Justices Stevens, Ginsburg, and Breyer join, dissenting.**

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. I would therefore affirm.

**I**

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. *[Justice Souter then evaluated the Establishment Clause issue at length, concluding that funding for the student magazine violated a rule against public funding for religious advocacy. That discussion is omitted, but we will see cases in the next Unit highlighting why the Court has rejected that view.] . . .*

**II**

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. *Widmar v. Vincent* (1981) (university's compliance with its Establishment Clause obligations can be a compelling interest justifying speech restriction). But the Court's speech analysis may have independent application, and its flaws should not pass unremarked. . . .

[T]he Court recognizes that the relevant enquiry in this case is not merely whether the University bases its funding decisions on the subject matter of student speech; if there is an infirmity in the basis for the University's funding decision, it must be that the University is impermissibly distinguishing among competing viewpoints.

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. As when deciding whether a speech restriction is content based or content neutral, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism* (1989). So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. . . .

[T]he prohibition on viewpoint discrimination [T] serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. . . . It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a "religious activit[y]," which is not eligible for



funding, is “an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality.” It is clear that this is the basis on which Wide Awake Productions was denied funding. . . .

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only “in” but “about” a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists . . . . The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that “primarily promotes or manifests” any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Court, of course, reads the Guidelines differently, but while I believe the Court is wrong in construing their breadth, the important point is that even on the Court’s own construction the Guidelines impose no viewpoint discrimination. In attempting to demonstrate the potentially chilling effect such funding restrictions might have on learning in our Nation’s universities, the Court describes the Guidelines as “a sweeping restriction on student thought and student inquiry,” disorienting a vast array of topics to funding. As the Court reads the Guidelines to exclude “any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality,” as well as “those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality,” the Court concludes that the major works of writers from Descartes to Sartre would be barred from the funding forum. The Court goes so far as to suggest that the Guidelines, properly interpreted, tolerate nothing much more than essays on “making pasta or peanut butter cookies.”

Now, the regulation is not so categorically broad as the Court protests. The Court reads the word “primarily” (“primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality”) right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion. But, as I said, that is not the important point. Even if the Court were indeed correct about the funding restriction’s categorical breadth, the stringency of the restriction would most certainly not work any impermissible viewpoint discrimination under any prior understanding of that species of content discrimination. If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone’s viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

The Guidelines are thus substantially different from the access restriction considered in *Lamb’s Chapel*, the case upon which the Court heavily relies in finding a viewpoint distinction here. *Lamb’s Chapel* addressed a school board’s regulation prohibiting the afterhours use of school premises “by any group for religious purposes,” even though the forum otherwise was open for a variety of social, civic, and recreational purposes. “Religious” was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a nonreligious or expressly antireligious point of view on any subject. With this understanding, it was unremarkable that in *Lamb’s Chapel* we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from

a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court’s decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court’s reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university’s decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court’s contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums. . . .

**[The concurring opinions of Justices O’Connor and Thomas are omitted.]**

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### Notes and Questions

1. Why did *Rosenberger* pose a First Amendment problem in the first place? The students were free to publish the magazine on their own, using their own money. All that the University did was to deny funds that students had transferred to the University through the student-activities fee.

In thinking about this question, consider *National Endowment for the Arts v. Finley* (1998), which addressed the constitutionality of a public funding program for support of the arts. Eligibility for the grants was based in part on whether proposed projects were consistent with “general standards of decency and respect for the diverse beliefs and values of the American public.” Writing for the majority, Justice O’Connor upheld the scheme as viewpoint neutral while also emphasizing the discretionary nature of the grant decisions.

Justice Scalia, joined by Justice Thomas, concurred on separate grounds, explaining that he would have denied the speech claim at the scope stage of the analysis. He wrote: “I regard the distinction between ‘abridging’ speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable.” Consequently, he thought that the restrictions on access to public arts funding did not implicate the First Amendment at all.

Nonetheless, Justice Scalia insisted that *Rosenberger* was rightly decided, “because [in that case] the government had established a limited public forum.” What do you make of the distinction that Justice Scalia drew between non-access to governmental subsidies for speech (which he treated as *outside* the scope of the First Amendment) and non-access to a “public forum”? Even if the Court classifies a spending program as a “public forum,” as in 4.18*Rosenberger*, why should the denial of funding count as an “abridgment” of speech rather than simply as a non-subsidy?

2. The previous note focuses on whether the government’s decision not to fund someone’s speech should count as an “*abridg[ment]*” of their speech within the meaning of the First Amendment. But what about the speech interests of the University and of other students who have to pay the student-activities fee? In Unit 4.18, we will briefly encounter constitutional limits on compelled subsidies for objectionable speech. Would it have made sense to describe the magazine at issue in *Rosenberger* as “government speech” and/or as the “speech” of the other students who were forced to pay for it? Why or why not?

3. In considering *strength* analysis, *Rosenberger* relied on a distinction between *viewpoint-based* restrictions and *topic-based* restrictions. On what basis did the majority conclude that the funding rule

was a viewpoint-based restriction rather than a topic-based restriction? What are the strengths and weaknesses in that view? Was the majority or the dissent more persuasive?

4. In considering the impermissibility of viewpoint discrimination, should the *educational* context of *Rosenberger* have mattered? Along these lines, consider the following hypothetical:

The University of Virginia agrees to fund student-created pamphlets on why Americans won the Revolutionary War. University rules state that “students with differing perspectives are eligible for funding but all pamphlets must be based on reason and evidence.” Four students then apply for funding based on the following rationales for why the Americans won the war:

1. The Americans had home-field advantage.
2. The French intervened in favor of the Americans.
3. God was on the Americans’ side.
4. There was no American Revolution; we are all living in the Matrix.

The University approves funding for the first two students but not the latter two based on its conclusion that the latter two projects did not qualify as being based on “reason and evidence.”

In this hypothetical, has the University discriminated based on viewpoint? If so, should that be considered a violation of the First Amendment?

#### 4.14. Unconstitutional Conditions

As briefly discussed at the end of Unit 3.3 in relation to the Due Process Clause, the problem of “unconstitutional conditions” arises when the government offers private actors a benefit—such as a grant of money—but imposes a condition that impinges on their constitutional rights. Crucially, *many such conditions are okay!* For instance, prosecutors can offer a benefit to criminal defendants (an agreement to charge them only with Crime X, not Crime Y) if they agree not to exercise their right to a jury trial. So it is worth repeating: *Many conditions that impinge upon constitutional rights are allowed!* But not *all* such conditions are okay. As usual, we will separately consider issues of *scope* and *strength*.

##### Scope Analysis

The First Amendment applies when the government restricts private speech. Up to this point, the cases that we’ve read have mostly involved exercises of coercive power through government-imposed criminal or civil liability. So it was obvious that the government was *restricting* private behavior. The hard question was whether that behavior counted as “speech” (or whether the rule targeted “speech”).

By contrast, unconstitutional-conditions cases raise the same puzzle that underlies public-forum cases—namely, whether the government has *restricted* private behavior at all. For instance, does it restrict private speech to offer somebody \$100 to stop speaking? If the answer is “no,” then the First Amendment does not apply at all. This is a *scope* issue.

In cases not involving the First Amendment, the Court has held that that unconstitutional-conditions doctrine does not apply at all when the government is limiting how a funding recipient is allowed to use government-allocated funds. For example, if the government allocates funds for individuals to obtain certain health procedures but *not abortions*, that condition does not implicate unconstitutional-conditions

doctrine, even assuming that individuals have a constitutional right to abort a non-viable fetus (as the Court had held between 1973 and 2022). That’s because the no-public-funding-for-abortion rule merely specifies how public funds may be used. *See Harris v. McRae* (1980). (Notice that this reasoning bolsters the concern expressed in Note 1 after *Rosenberger*—namely, why is the denial of *public* funding for a religious magazine an “abridg[ment]” of speech within the meaning of the First Amendment?)

Unconstitutional-conditions doctrine thus only applies if the government is *leveraging* the receipt of a benefit (such as the receipt of public funding) against some *other* change in the recipient’s behavior, aside from how the recipient may use the funds. (For those of you who have taken Constitutional Law, this is why Chief Justice Roberts said in *N.F.I.B. v. Sebelius* (2012) that “old Medicaid” and “new Medicaid” were different programs; otherwise, telling the states how to use federal funds would not have implicated unconstitutional-conditions doctrine, which was Justice Ginsburg’s view.)

The following speech cases raised the same problem. Was the government simply instructing how its funds could be used—thus raising no First Amendment problem—or was it *leveraging* the receipt of funds against some *other* change in the recipient’s behavior in a way that implicated the First Amendment?

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### Rust v. Sullivan (1991)

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

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments to the Constitution. We granted certiorari to resolve a split among the Courts of Appeals. We affirm.

#### I

#### A

In 1970, Congress enacted Title X of the Public Health Service Act (Act), which provides federal funding for family-planning services. The Act authorizes the Secretary to “make grants to and enter into contracts with public or non-profit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.” Grants and contracts under Title X must “be made in accordance with such regulations as the Secretary may promulgate.” Section 1008 of the Act, however, provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” That restriction was intended to ensure that Title X funds would “be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities.” H. R. Conf. Rep. (1970).

In 1988, the Secretary promulgated new regulations . . .

The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a “Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.” . . . The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that “the

project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.”

Second, the regulations broadly prohibit a Title X project from engaging in activities that “encourage, promote or advocate abortion as a method of family planning.” Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.

Third, the regulations require that Title X projects be organized so that they are “physically and financially separate” from prohibited abortion activities. To be deemed physically and financially separate, “a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient.” The regulations provide a list of nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities.

## B

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients . . . , challenging the facial validity of the regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations. . . .

## II

We begin by pointing out the posture of the cases before us. Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations . . . can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.” *United States v. Salerno* (1987). . . .

## III

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit “all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.” They assert . . . that while the Government may place certain conditions on the receipt of federal subsidies, it may not “discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.’” *Regan v. Taxation with Representation of Washington* (1983) (quoting *Cammarano v. United States* (1959)). . . .

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed

to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; “no funds appropriated for the project may be used in programs where abortion is a method of family planning,” and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government “suppressing a dangerous idea,” but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners’ assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan; Maher v. Roe* (1977); *Harris v. McRae* (1980). Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program. . . .

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v. Sindermann* (1972) and *FCC v. League of Women Voters of California* (1984), petitioners argue that “even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” *Perry*.

Petitioners’ reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. The regulations govern the scope of the Title X *project’s* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

In contrast, our “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC v. League of Women Voters of California*, we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Under that law, a recipient of federal funds was “barred absolutely from all editorializing” because it “is not able to segregate its activities according to the source of its funding” and thus “has no way of limiting the use of its federal funds to all noneditorializing activities.”

The effect of the law was that “a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing” and “barred from using even wholly private funds to finance its editorial activity.” We expressly recognized, however, that were Congress to permit the recipient stations to “establish ‘affiliate’ organizations which could then use the station’s facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid.” Such a scheme would permit the station “to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.”

Similarly, in *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that . . . a charitable organization could create . . . an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and at the same time establish . . . a separate affiliate to pursue its lobbying efforts without such contributions. Given that alternative, the Court concluded that “Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee’s] lobbying.” . . . The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. “Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures.”

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program. . . .

**Justice Blackmun, with whom Justices Marshall . . . [and] Stevens join . . . , dissenting.**

. . . II

A

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government’s power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient’s cherished freedom of speech based solely upon the content or viewpoint of that speech. *Speiser v. Randall* (1958) (“To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. . . . The denial is ‘frankly aimed at the suppression of dangerous ideas,’” quoting *Am. Commc’ns Ass’n v. Douds* (1950)). This rule is a sound one, for, as the Court often has noted: “A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a ‘law . . . abridging the freedom of speech, or of the press.’” *FCC v. League of Women Voters of Cal.* (1984). “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley* (1972).

Nothing in the Court’s opinion in *Regan v. Taxation with Representation of Washington* (1983), can be said to challenge this long-settled understanding. In *Regan*, the Court upheld a content-neutral provision of the Internal Revenue Code that disallowed a particular tax-exempt status to organizations that “attempt[ed] to influence legislation,” while affording such status to veteran’s organizations

irrespective of their lobbying activities. Finding the case controlled by *Commarrano v. United States* (1959), the Court explained: “The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.’ . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.” The separate concurrence in *Regan* joined the Court’s opinion precisely “[b]ecause [the statute’s] discrimination between veterans’ organizations and charitable organizations is not based on the content of their speech.”

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion.

The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other. For example, the Department of Health and Human Services’ own description of the regulations makes plain that “Title X projects are *required* to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process.” Fed. Reg. (1988) (emphasis added).

Moreover, the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman’s expressed desire to continue or terminate her pregnancy. If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. Both requirements are antithetical to the First Amendment. *See Wooley v. Maynard* (1977).

The regulations pertaining to “advocacy” are even more explicitly viewpoint based. These provide: “A Title X project may not *encourage, promote or advocate* abortion as a method of family planning.” They explain: “This requirement prohibits actions to *assist* women to obtain abortions or *increase* the availability or accessibility of abortion for family planning purposes.” (emphasis added). The regulations do not, however, proscribe or even regulate antiabortion advocacy. These are clearly restrictions aimed at the suppression of “dangerous ideas.”

Remarkably, the majority concludes that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” But the majority’s claim that the regulations merely limit a Title X project’s speech to preventive or preconceptional services, rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide. By refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint. The majority’s reliance on the fact that the regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race. *See, e.g., Yick Wo v. Hopkins* (1886). As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

The majority’s reliance upon *Regan* in this connection is also misplaced. That case stands for the proposition that government has no obligation to subsidize a private party’s efforts to petition the legislature regarding its views. Thus, if the challenged regulations were confined to nonideological limitations upon the use of Title X funds for lobbying activities, there would exist no violation of the First Amendment. The advocacy regulations at issue here, however, are not limited to lobbying but extend to all speech having the effect of encouraging, promoting, or advocating abortion as a method of family planning. Thus, in addition to their impermissible focus upon the viewpoint of regulated speech,



the provisions intrude upon a wide range of communicative conduct, including the very words spoken to a woman by her physician. . . .

### C

Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. “But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” *West Virginia State Bd. of Educ. v. Barnette* (1943). . . .

**[The dissenting opinions of Justices Stevens and O’Connor are omitted.]**

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### Notes and Questions

1. *Rust* addressed whether the First Amendment applied at all to the restrictions on Title X funds. The majority held that it did not. Why not?

2. How did the dissenting Justices differ in their understanding of the nature of the First Amendment right? For them, what is the point of the First Amendment, and how did the government’s policy violate it?

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In the next case, the Court held that the funding restriction was within the *scope* of the First Amendment. Why? What distinguished this case from *Rust*?

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### U.S.A.I.D. v. Alliance for Open Society Int'l (2013)

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

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act) outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C. § 7631(e). And second, no funds may be used by an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.” 22 U.S.C. § 7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient’s First Amendment rights. . . .

## III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government’s policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. FAIR* (2006) (citing *West Virginia State Bd. of Educ. v. Barnette* (1943) and *Wooley v. Maynard* (1977)). . . . Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

## A

The Spending Clause of the Federal Constitution grants Congress the power “[t]o 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.” Art. I, § 8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the “general Welfare,” including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan* (1991) (“Congress’ power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.”).

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights. *See, e.g., United States v. Am. Library Ass’n, Inc.* (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries’ installing filtering software violated their First Amendment rights, explaining that “[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”); *Regan v. Taxation With Representation of Wash.* (1983) (dismissing “the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State”).

At the same time, however, we have held that the Government “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *FAIR* (quoting *Am. Lib. Ass’n*). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. *See FAIR* (the First Amendment supplies “a limit on Congress’ ability to place conditions on the receipt of funds”).

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Legal Service Corp. v. Velazquez* (2001).

A comparison of two cases helps illustrate the distinction: In *Regan v. Taxation With Representation of Washington*, the Court upheld a requirement that non-profit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, “ha[d] much the same effect as a cash grant to the organization.” And by limiting § 501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely “chose[n] not to subsidize lobbying.” In rejecting the non-profit’s First Amendment claim, the Court

highlighted . . . the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a “dual structure” it had used in the past—separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization—the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. Maintaining such a structure, the Court noted, was not “unduly burdensome.” The condition thus did not deny the organization a government benefit “on account of its intention to lobby.”

In *FCC v. League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was “barred absolutely from all editorializing.” Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds “to make known its views on matters of public importance.” The prohibition thus went beyond ensuring that federal funds not be used to subsidize “public broadcasting station editorials,” and instead leveraged the federal funding to regulate the stations’ speech outside the scope of the program.

Our decision in *Rust v. Sullivan* elaborated on th[is] approach . . . .

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds [are] spent for the purposes for which they were authorized.” *Rust*.

In making this determination, the Court stressed that “Title X expressly distinguishes between a Title X *grantee* and a Title X *project*.” The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” *Id.* “The Title X *grantee* can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” *Id.* Because the regulations did not “prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment. *Id.*

## B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, “Definition more precise must abide the wisdom of the future.” *Steward Machine Co. v. Davis* (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C. § 7631(e). The Government concedes that § 7631(e) by itself ensures that federal funds will not be used for the prohibited purposes.

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. In any event, as the Government acknowledges, it is not simply

seeking organizations that oppose prostitution. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, and it wants recipients *to adopt* a similar stance.” This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” *Rust*. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. *See id.* (“our ‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program”).

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain “objective integrity and independence” from the unfettered affiliates. 45 CFR § 89.3. The Government suggests the guidelines alleviate any unconstitutional burden on respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with the Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby “cabin[ing] the effects” of the Policy Requirement within the scope of the federal program.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. *See Rust*. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. *See* 45 CFR § 89.3 (allowing funding recipients to work with affiliates whose conduct is “inconsistent with *the recipient’s opposition* to the practices of prostitution and sex trafficking” (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient’s private funds “to be used to promote prostitution or sex trafficking.” That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government’s argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

The Government cites but one case to support that argument, *Holder v. Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations’ non-violent operations was funneled to support their violent activities.

Pressing its argument further, the Government contends that “if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the

government's program and confuse its message opposing prostitution and sex trafficking." But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*. . . .

**Justice Scalia, with whom Justice Thomas joins, dissenting.**

The Leadership Act provides that "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking" may not receive funds appropriated under the Act. 22 U.S.C. § 7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example: One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U.S. food assistance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) "without federal assistance," *United States v. Am. Library Ass'n, Inc.* (2003) (plurality opinion), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude

from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate *inside* a spending program and those that control speech *outside* of it. I am at a loss to explain what this central pillar of the Court's opinion—this distinction that the Court itself admits is “hardly clear” and “not always self-evident”—has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust v. Sullivan* (1991), but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to “inside the program” speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by “outside the program” pro-abortion speech. The purpose of the limitation was to prevent Government funding from providing the *means* of pro-abortion propaganda, which the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution *is* an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in *all* cases, demanding “record indica[tion]” that “federal funding will simply supplant private funding, rather than pay for new programs.” This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk. . . .

The Court makes a head-fake at the unconstitutional conditions doctrine, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute's valid purpose and that is not in itself unconstitutional (*e.g.*, a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine. Moreover, as I suggested earlier, the contention that the condition here “coerces” respondents' speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution “are as unconstrained now as they were before the enactment of [the Leadership Act].” *Nat'l Endowment for Arts v. Finley* (1998) (Scalia, J., concurring in judgment). As the Court acknowledges, “[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds” and to draw on its own coffers.

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for “*requiring* recipients to profess a specific belief” and “*demanding* that funding recipients adopt—as their own—the Government's view on an issue of public concern.” (emphasis mine). But like King Cnut's commanding of the tides, here the Government's “requiring” and “demanding” have no coercive effect. In the end, and in the circumstances of this case, “compell[ing] *as a condition* of federal funding the affirmation of a belief,” (emphasis mine), is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. Section 7631(f) “defin[es] the recipient” only to the extent he decides that it is in his interest to be so defined. . . .

If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today's opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court's opinion contains stirring quotations from cases like *West Virginia State Bd. of Educ. v. Barnette* (1943) . . . . They serve only to distract attention from the elephant in the room: that the Government is not forcing *anyone* to say *anything*. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But “[t]he Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution.” U.S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government's work. And so should we.

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### Notes and Questions

1. Drawing on *Rust v. Sullivan* (1991), the majority in *Alliance for Open Society* distinguished between restrictions of speech *inside* the federal spending program and those *outside* the federal spending program. Clearly, this analysis makes it crucial to identify the scope of the program.

Without focusing on the analysis in the opinions, what methods *could* the Court have used to determine the scope of a federal spending program? In particular, which source or sources of law *could* it have used to make that determination? What would be the benefits and drawbacks of different approaches?

Now, returning to the Supreme Court's decisions in *Rust* and *Alliance for Open Society*, what method *did* the Court use to determine the scope of the federal spending programs? What source or sources of law did the Court consider in making that determination? Why did the Court deem the restriction to be “inside” the program in *Rust* but “outside” the program in *Alliance for Open Society*? What are the strengths and weaknesses of its approach?

2. In considering *scope* analysis, was it consistent for Justices Scalia and Thomas to join the decision in *Rosenberger* but dissent in *Alliance for Open Society*?

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### Strength Analysis

Although leveraging is generally a *necessary* condition for identifying an unconstitutional condition, it is not a *sufficient* condition. Rather, if the government leverages the receipt of an otherwise available benefit against the recipient's sacrifice of a constitutional right, the government may still attempt to defend the condition in either (or both) of the following two ways:

First, the government can prevail if it could impose the condition directly, even without considering the recipient's (otherwise voluntary) decision to receive funds. (*Note*: We will see an example of this approach in *Rumsfeld v. FAIR* (2006).)

Second, the government can prevail if it satisfies each of the three aspects of unconstitutional-conditions doctrine. Those are:

- a) *Germaneness*: Is the condition related to the benefit’s purpose? In cases outside the First Amendment context, the Court has usually been very lenient about which conditions are “germane.” See *South Dakota v. Dole* (1987) (holding that a condition that states raise the drinking age to 21 was germane to the purpose of federal highway funds, since raising the drinking age was related to highway safety). But see *Nollan v. Cal. Coastal Comm’n* (1987) (strictly requiring that, for purposes of the Takings Clause, land-use exactions must have the “same purpose” as the land-use restriction that the government agrees to waive).
- b) *Coercion*: Is the governmental benefit “too good to refuse”? In other words, does the rights holder lack any realistic choice not to accept the funds—and therefore effectively must accept the condition? See *N.F.I.B. v. Sebelius* (2012) (Roberts, C.J.) (holding that states lacked any realistic opportunity to decline all Medicaid funding). Importantly, this prong of the analysis is all about the coerciveness of the *funds*, not the coerciveness of the *condition*. For instance, it would not be coercive for the government to say: “If you choose to receive \$100, you *must* do X, Y, and Z,” because even though the *condition* is obligatory, the decision to receive the funds in the first place (which triggers the condition) is not coercive.
- c) *Governmental purpose*: In speech cases, this prong of the analysis usually asks whether the condition suppresses or compels the expression of certain *viewpoints*. Notice that this was the basis for the Court’s holding in *U.S.A.I.D. v. Alliance for Open Society* (2013) that the condition was unconstitutional.

Remember, unconstitutional-conditions doctrine only comes into play if there’s *leveraging*. Without leveraging, the condition is outside the scope of speech doctrine.

One note of caution: Unconstitutional-conditions doctrine is famously difficult and opaque. The three prongs outlined above are based on my own effort to synthesize current caselaw, drawing on First Amendment cases and non-First Amendment cases. Although in my view this synthesis is generally accurate, it is not widely recognized. Most judges won’t know what you mean if you refer to the “three prongs of unconstitutional-conditions analysis.” Rather, you will need to build the framework for the judge by explaining each prong and offering supportive cases.

Finally, although the prongs of unconstitutional-conditions analysis include “coercion”—asking essentially whether the benefit is “too good to refuse”—it is worth noting that the Court’s framing of this prong is deeply problematic. A few simple examples illustrate the point. If the government creates an *extremely good* public-schooling system, does that violate the Constitution by effectively coercing parents not to exercise their constitutional right to send their kids to private schools? Or if the government offers employment to persons in *dire financial straits*, does their effective inability to decline the offer indicate that the government’s condition—an agreement to work in exchange for money—violates the Thirteenth Amendment’s ban on involuntary labor? These questions answer themselves. And the basic point here is that, at least from a philosophical standpoint, one can’t properly identify what counts as “coercion” without taking account of whether it is *rightful* to make certain offers. At least for now, though, coercion in the “too good to refuse” sense remains one of the ways of identifying an unconstitutional condition.

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## 4.15. Public Employees

As we just saw, speech doctrine can be *context sensitive*. The government has broader latitude to regulate speech on its own property than it does on private property. This contrasts with equal-protection law, which no longer differentiates between various domains of governmental action.



Another domain-specific branch of speech doctrine is the set of cases involving public employees. As the Supreme Court has recognized, “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” *Garcetti v. Ceballos* (2006). Moreover, there are some instances where discrimination based on viewpoint is an inherent and *desirable* feature of public-employment decisions. Surely, for instance, the President may select cabinet officials who will ably administer and defend the Administration’s positions on a variety of political issues.

Most First Amendment cases involving adverse employment decisions against public employees are litigated under the Speech Clause. In such cases, doctrine turns on the *capacity* in which the employee was speaking—essentially whether the employee was speaking “off the job” or “on the job”—and whether the speaker was addressing a matter of public concern. We will consider those distinctions, followed by a brief look at speech-related cases involving hiring decisions.

### Public Employee Speech

We will not delve into this area of law in any depth, but here is a brief summary of the doctrine from *Board of Commissioners v. Umbehr* (1996) as it relates to adverse employment actions taken in retaliation for a public employee’s off-the-job speech:

[We] have long since rejected Justice Holmes’ famous dictum, that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford* (Mass. 1892). . . . We have held that government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, for publicly or privately criticizing their employer’s policies, for expressing hostility to prominent political figures, or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party.

While protecting First Amendment freedoms, we have, however, acknowledged that the First Amendment does not create property or tenure rights, and does not guarantee absolute freedom of speech. The First Amendment’s guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern. To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination. If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. And even termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong. Government employees’ First Amendment rights depend on the “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.* (1968). In striking that balance, we have concluded that “[t]he government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” *Waters v. Churchill* (1994) (plurality opinion). We have, therefore, “consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.”

As the Court put it in *Garcetti*, “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate

efficiently and effectively.” (Note: Although the phrase “as a citizen” ostensibly refers to citizenship, what the Court really means is “in a private capacity”; non-citizen public employees have speech rights.) In other words, if the person is speaking “as a citizen,” and if their speech is on a “matter of public concern,” then the claim is within the *scope* of the First Amendment, and at the *strength* stage courts employ a context-specific balancing test to assess whether the employment decision is justified. This balancing test is often known as “*Pickering* balancing,” named after the seminal case of *Pickering v. Bd. of Educ.* (1968). Notice that this area of law does not employ a “tiers of scrutiny” approach.

As you have just read, a public employee has a claim falling within the *scope* of the First Amendment when her employer takes an adverse employment action based on her (1) *off-the-job speech* on (2) a *matter of public concern*.

The converse is also true. A public employee does *not* have a claim falling within the scope of the First Amendment when her employer takes an adverse employment action based on her (1) *on-the-job speech*, and/or where that speech was *not on a matter of public concern*. Let’s take a close look at these two issues in turn.

*On-the-Job Speech.* “[T]he First Amendment,” the Court held in *Garcetti v. Ceballos* (2006), does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.” In other words, if the speech at issue is part of the employee’s *job* (say, a police officer’s speech to individuals during a traffic stop), the freedom of speech does not apply at all.

But the Court has reserved judgment on whether that bright-line rule applies in the context of higher education. *See id.* (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

*Garcetti* was a controversial decision, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting. These justices differed somewhat amongst themselves, but they agreed that claims arising from restrictions of on-the-job speech could be within the *scope* of the First Amendment, even though the government also should have broader leeway to restrict such speech.

Although *Garcetti* clarified that discipline relating to on-the-job speech is outside the scope of the Speech Clause, difficult questions remain about what counts as on-the-job speech. Consider, for instance, the Court’s recent decision in *Kennedy v. Bremerton School District* (2022), which involved a First Amendment claim brought by a public-high-school football coach for a public school’s decision not to allow him to pray at midfield after the game. Here is Justice Gorsuch’s analysis for the majority:

Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. In *Garcetti*, the Court concluded that a prosecutor’s internal memorandum to a supervisor was made “pursuant to [his] official duties,” and thus ineligible for First Amendment protection. In reaching this conclusion, the Court relied on the fact that the prosecutor’s speech “fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case.” In other words, the prosecutor’s memorandum was government speech because it was speech the government “itself ha[d] commissioned or created” and speech the employee was expected to deliver in the course of carrying out his job.

By contrast, in *Lane [v. Franks]* (2014) a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. The Court held that the employee’s speech was protected by the First

Amendment. In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. Instead, the Court explained, the “critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee’s duties.” *Id.* It is an inquiry this Court has said should be undertaken “practical[ly],” rather than with a blinkered focus on the terms of some formal and capacious written job description. *Garcetti*. To proceed otherwise would be to allow public employers to use “excessively broad job descriptions” to subvert the Constitution’s protections. *Id.*

Applying these lessons here, it seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech “ordinarily within the scope” of his duties as a coach. *Lane*. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy’s prayers did not “ow[e their] existence” to Mr. Kennedy’s responsibilities as a public employee. *Garcetti*.

The timing and circumstances of Mr. Kennedy’s prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy’s prayers took place “within the office” environment—here, on the field of play. *Garcetti*. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy’s speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model “clothed with the mantle of one who imparts knowledge and wisdom.” The court emphasized that Mr. Kennedy remained on duty after games. Before us, the District presses the same arguments. And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an “excessively broad job descriptio[n]” by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court’s conclusion (and the District’s concession) that Mr. Kennedy’s actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court’s repeated promise that teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*.

Of course, acknowledging that Mr. Kennedy’s prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his

threshold burden. Under the *Pickering-Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern.<sup>2</sup>

What do you think of this reasoning? Notice that footnote 2 reserved judgment on whether public-employee claims under the Free Exercise Clause should be analyzed in the same way as speech claims. Justice Sotomayor wrote a lengthy dissent, but it focused almost entirely on the Establishment Clause.

*Matters of Public Concern.* Even if the public employee's speech was not on-the-job, "the employee has no First Amendment cause of action" if the speech was not on a matter of public concern. *Garcetti v. Ceballos* (2006). In *Garcetti*, the majority cited to *Connick v. Myers* (1983), which had indicated that in this situation the strength analysis was very weak—*i.e.*, that the government should win "absent the most unusual circumstances." But as a practical matter, the absence of speech on a matter of public concern was always fatal to public-employee speech claims. And *Garcetti* clarifies that this principle now operates as a categorical threshold rule.

Once again, we will not delve into what counts as a "matter of public concern." But it is worth noting that we have seen this category before—namely, in our discussion of how the First Amendment applies in a variety of tort cases, such as defamation cases. This reflects another way in which older doctrinal categories that we encountered in Unit 1 continue to linger in current First Amendment law.

Importantly, asking whether an employee's off-the-job speech is on a "matter of public concern" is *not* the same as asking whether that speech falls outside of the "unprotected" speech categories discussed in Units 4.9 through 4.11. In *Roe v. San Diego* (9th Cir. 2004), the Court of Appeals had failed to appreciate that distinction, holding that because a police officer's off-the-job homemade films did not count as obscenity, he had thus engaged in speech on a matter of public concern. Roe had filmed videos of himself taking off his police uniform and masturbating, and he then offered them for sale using the email address "Code3stud@aol.com." In a short *per curiam* opinion, the Supreme Court acknowledged that "the boundaries of the public concern test are not well defined" but concluded that "there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test." *San Diego v. Roe* (2004). The key lesson of *Roe* is that it was a mistake for the Court of Appeals to view "matters of public concern" as encompassing all expression that is not within an "unprotected" speech category.

### Hiring Decisions

In the so-called "political patronage" cases, the Court has similarly eschewed any rigid use of the tiers of scrutiny—instead asking "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel* (1980). In general, this means that governmental officials *can* engage in viewpoint-based discrimination when making decisions about officials who exercise significant amounts of discretion but *cannot* make political affiliation (or other speech-related activities) a condition of employment for low-level employees. (Similar doctrinal principles apply to government contracting. *See, e.g., Bd. of Comm'rs v. Umbehr* (1996).)

Justice Scalia rejected this approach, preferring instead a rule that would give the government broad latitude to engage in political patronage without being constrained by the First Amendment. *See, e.g., Rutan v. Republican Party of Ill.* (1990) (Scalia, J., dissenting). In part, Justice Scalia grounded his view in historical practice. *Id.* ("There can be no dispute that, like rewarding one's allies, the

<sup>2</sup> Because our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework.

correlative act of refusing to reward one's opponents . . . is an American political tradition as old as the Republic.”). In part, he defended his view based on the potential *benefits* that can emerge through patronage. *Id.* (“[E]liminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. . . . Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups.”). And, in part, he argued that the practical difficulties of adjudicating patronage cases militated in favor of narrowing the doctrine. *Id.* (“[T]here is no right line—or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs.”).

#### 4.16. Campaign Finance

In *Buckley v. Valeo* (1976)—the foundational First Amendment decision relating to campaign finance—the Supreme Court struck down federal limits on election-related *expenditures* (by private individuals, by campaigns, and by parties) but upheld limits on campaign *contributions*. Two rationales supported this divided outcome:

First, limits on *expenditures* are more burdensome, the Court reasoned, because they effectively cap the quantity of campaign-related speech, whereas contribution limits impose “only a marginal restriction” since they simply prohibit giving money to a candidate—not using that money directly for speech purposes. On this basis, the Court held that *strict scrutiny* applies to campaign expenditure limits, whereas only *intermediate scrutiny* applies to contribution limits.

Second, the Court explained that the governmental interest in “the prevention of corruption and the appearance of corruption” was sufficient to sustain *contribution* limits, where an individual gives money directly to a campaign, thus posing a heightened risk of corruption. With respect to *expenditures*, however, the Court viewed this risk as not being compelling: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” Additionally, the Court rejected the government’s asserted interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.” This idea, it held, ran directly counter to the First Amendment:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure the widest possible dissemination of information from diverse and antagonistic sources,” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *New York Times Co. v. Sullivan* (1964). The First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.

*Buckley* did not involve a challenge to a variety of limits on corporate election-related expenditures that existed under federal law. And the Supreme Court later sustained those corporate expenditure limits in *Austin v. Michigan Chamber of Commerce* (1990), recognizing a compelling governmental interest in combatting “the corrosive and distorting effects of immense aggregations of wealth that are

accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." In dissent, Justice Kennedy excoriated the majority for permitting an attempt "to equalize the relative influence of speakers on elections."

During the next fifteen years, the Supreme Court upheld—at least in part—a variety of campaign-finance regulations, sometimes over forceful dissents by Justices Scalia, Kennedy, and Thomas. *See, e.g., Nixon v. Shrink Missouri Govt. PAC* (2000). But with the replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito, the Court became far more likely to hold that campaign-finance regulations were unconstitutional.

As you read the following case, certainly try to identify the core features of current doctrine, but please also pay attention to the broader themes raised in these materials. We will also begin considering an issue that will reappear: Do groups have their own constitutional rights, or are they derivative of the rights of their members? Does it matter?

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### Citizens United v. FEC (2010)

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

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. Limits on electioneering communications were upheld in *McConnell v. FEC* (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce* (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles," *FEC v. Wisconsin Right to Life, Inc.* (2007) (*WRTL*) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

#### I

Citizens United is a nonprofit corporation . . . [with] an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie* . . . [that was] quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available [for free] through video-on-demand [and by advertising the film on broadcast and cable channels]. . . .

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. BCRA § 203 amended 2 U.S.C. § 441b to prohibit any "electioneering communication" as well. An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general

election. . . . Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a “separate segregated fund” (known as a political action committee, or PAC) for these purposes. The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.

[Fearing that] the film and the ads would be covered by § 441b’s ban on corporate-funded independent expenditures, [Citizens United brought a pre-enforcement challenge]. . . .

## II

Before considering whether *Austin* should be overruled, we first address whether Citizens United’s claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds. [*The Court considered a variety of arguments and concluded that the statute could not be construed to avoid constitutional problems.*]

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, “must give the benefit of any doubt to protecting rather than stifling speech.” *WRTL* (opinions of Roberts, C.J.).

[*The Court then considered and rejected other grounds for narrowing the scope of the constitutional challenge. In doing so, it explained at length its reasons for issuing a “facial” holding even though Citizens United had waived such a challenge. In large part, the Court relied on the chilling effects that continued uncertainty about the statute’s unconstitutionality would have on speakers. “A speaker’s ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit.” Additionally, the Court argued, difficulties interpreting the statute effectively gave the FEC a licensing power, thus making a facial ruling even more urgent. “Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.”*]

## III

. . . . The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b’s expenditure ban does not allow corporations to speak. Even if a PAC could

somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur. . . . PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. . . .

Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech. . . . If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *See Buckley v. Valeo* (1976) (“In a Republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. . . .

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny. . . .

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See First National Bank of Boston v. Bellotti* (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. . . .

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

## A

The Court has recognized that First Amendment protection extends to corporations. [*The Court then cited 23 cases.*] . . .

[P]olitical speech does not lose First Amendment protection “simply because its source is a corporation.” *Bellotti*. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.” *Id.*

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management



Relations Act 1947. In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a “dangerous intrusion on free speech.”

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. . . . [The Court then discussed a few cases that highlighted but did not resolve constitutional questions relating to restrictions of speech activities by labor unions.]

In *Buckley v. Valeo* (1976), the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. . . . *Buckley* invalidated § 608(e)’s restrictions on independent expenditures, with only one Justice dissenting.

*Buckley* did not consider § 610’s separate ban on corporate and union independent expenditures . . . . Had § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. . . .

Notwithstanding this precedent, Congress recodified § 610’s corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* . . . .

Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

We thus find no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

*Bellotti* did not address the constitutionality of the State’s ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*’s central principle: that the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.

Thus the law stood until *Austin*. *Austin* “up[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history.” *Austin* (Kennedy, J., dissenting). There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

**B**

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. . . .

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest and a shareholder-protection interest. We consider the three points in turn.

**1**

. . . If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. . . . This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” *Bellotti*. This protection for speech is inconsistent with *Austin*'s antidistortion rationale. . . . *Buckley* rejected the premise that the Government has an interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Buckley* was specific in stating that “the skyrocketing cost of political campaigns” could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's “financial ability to engage in public discussion.” . . .

*Austin*'s antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. Media corporations are now exempt from § 441b's ban on corporate expenditures. Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public's support” for those views. . . .

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Austin* (Scalia, J., dissenting). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred. . . .

The censorship we now confront is vast in its reach. The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” *McConnell* (opinion of Scalia, J.). . . . By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. . . .

[L]obbying and corporate communications with elected officials occur on a regular basis. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality. . . .

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." . . .

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in *Bellotti*'s footnote suggested that "a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." [*Bellotti involved a law banning corporate spending on a referendum, so there was no possibility of any corruption or appearance of corruption regarding a candidate.*] Citing the portion of *Buckley* that invalidated the federal independent expenditure ban, and a law review student comment, *Bellotti* surmised that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Buckley*, however, struck down a ban on independent expenditures to support candidates that covered corporations, and explained that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Bellotti*'s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*. See Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, U. Pa. L. Rev. (1977) (suggesting that "corporations and labor unions should be held to different and more stringent standards than an individual or other associations under a regulatory scheme for campaign financing").

Seizing on this aside in *Bellotti*'s footnote, the Court in *NRWC* did say there is a "sufficient" governmental interest in "ensur[ing] that substantial aggregations of wealth amassed" by corporations would not "be used to incur political debts from legislators who are aided by the contributions." *NRWC*, however, . . . involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption. . . .

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the

voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. *McConnell* (opinion of Kennedy, J.).

Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.” *Id.*

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. . . .

[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. . . .

### 3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*’s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. . . . There is, furthermore, little evidence of abuse that cannot be corrected by shareholders “through the procedures of corporate democracy.” *Bellotti*.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder’s interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

### 4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

### C

[Justice Kennedy then considered whether to overrule *Austin*.]

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. . . . These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court’s earlier precedents in *Buckley* and *Bellotti*. . . .

*Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate

identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. . . .

**Justice Stevens, with whom Justices Ginsburg, Breyer, and Sotomayor join, concurring in part and dissenting in part.**

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United’s nor any other corporation’s speech has been “banned.” All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. . . . It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority’s approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907. We have unanimously concluded that this “reflects a permissible assessment of the dangers posed by those entities to the electoral process.” *FEC v. Nat’l Right to Work Comm’n* (1982) (*NRWC*), and have accepted the “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.” The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce* (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.* (2007) (*WRTL*), *McConnell v. FEC* (2003); *FEC v. Beaumont* (2003), *FEC v. Massachusetts Citizens for Life, Inc.* (1986) (*MCFL*), *FEC v. National Right to Work Comm’n* (1982) (*NRWC*), and *California Medical Association v. FEC* (1981). . . .

## I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.

*[Justice Stevens criticized the majority for considering a facial challenge after the plaintiff had agreed to dismiss its facial challenge in the District Court. "Essentially," he stated, "five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law." He dismissed concerns about the chilling effects of leaving the expenditure ban in effect, stating that corporations had not been "cowed in quiescence by FEC 'censorship.' . . . [T]he majority's critique of line-drawing collapses into a critique of the as-applied review method generally."]*

*[Justice Stevens then criticized the majority for construing the statute as being applicable to video-on-demand services, instead of limiting it to things like television or radio advertising; for not recognizing that nonprofit corporations could receive "de minimis" funding from for-profit corporations; and for not ruling in favor of the plaintiff on an as-applied basis. Justice Stevens concluded: "The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain Austin, is its disdain for Austin."]*

## II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. . . .

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. . . .

## III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

### The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. . . . This characterization is highly misleading, and needs to be corrected. . . .

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. A significant and growing number of corporations avail themselves of this option; during the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds. . . . To the extent the majority is worried about this issue, it

is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. . . .

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising—a category of corporate speech Congress found to be far more substantial than election-related advertising—or to Internet, telephone, and print advocacy.<sup>31</sup> Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate. . . .

At the time *Citizens United* brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a . . . nonmedia corporation; (5) paid for with general treasury funds; and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] . . . altogether" [and] that corporations have been "exclu[ded]. . . from the general public dialogue" . . . is nonsense. . . .

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all *Citizens United* needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC. . . .

[T]he majority's incessant talk of a "ban" aims at a straw man.

### Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's . . . identity." The case on which it relies for this proposition is *First National Bank of Boston v. Bellotti* (1978). As I shall explain, the holding in that case was far narrower than the Court implies. Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

[I]n a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. . . .

It is fair to say that our First Amendment doctrine has "frowned on" certain identity-based distinctions, particularly those that may reflect invidious discrimination or preferential treatment of a

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<sup>31</sup> Roaming far afield from the case at hand, the majority worries that the Government will use § 203 to ban books, pamphlets, and blogs. Yet by its plain terms, § 203 does not apply to printed material. . . . [W]e highly doubt that § 203 could be interpreted to apply to a Web site or book that happens to be transmitted at some stage over airwaves or cable lines, or that the FEC would ever try to do so. . . .

politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close. . . .

As we have unanimously observed, legislatures are entitled to decide “that the special characteristics of the corporate structure require particularly careful regulation” in an electoral context. *NRWC*. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also “furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information. *FEC v. Beaumont* (2003). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the “speakers” are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism. . . .

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

### **Our First Amendment Tradition**

A third fulcrum of the Court’s opinion is the idea that *Austin* and *McConnell* are radical outliers, “aberration[s],” in our First Amendment tradition. The Court has it exactly backwards. It is today’s holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

#### **1. Original Understandings**

Let us start from the beginning. The Court . . . makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers’ views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority’s position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, *see* Robert Bork, *Neutral Principles and Some First Amendment Problems*, Ind. L.J. (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. . . . The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. . . .

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But . . . in light of the Court’s effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today’s outcome. . . .

#### **2. Legislative and Judicial Interpretation**

A century of more recent history puts to rest any notion that today’s ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual



political spending on elections stretches back to 1907, when Congress passed the Tillman Act, banning all corporate contributions to candidates. The Senate Report on the legislation observed that “[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.” . . .

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. . . . The Taft-Hartley Act of 1947 . . . extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. The bar on contributions “was being so narrowly construed” that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. *WRTL* (Souter, J., dissenting).

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to say, their position failed to command a majority. Prior to today, this was a fact we found significant in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization’s stockholders or members, receives greater protection than speech financed with general treasury funds. . . . [*Justice Stevens then described subsequent cases, too.*]

The corporate/individual distinction was not questioned by the Court’s disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *FEC v. Massachusetts Citizens for Life, Inc.* (1986) (*MCFL*), we stated again “that the special characteristics of the corporate structure require particularly careful regulation,” and again we acknowledged that the Government has a legitimate interest in “regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form.” Those aggregations can distort the “free trade in ideas” crucial to candidate elections . . . .

It is worth remembering for present purposes that the four *MCFL* dissenters, led by Chief Justice Rehnquist, thought the Court was carrying the First Amendment *too far*. They would have recognized congressional authority to bar general treasury electioneering expenditures even by this class of nonprofits . . . . Not a single Justice suggested that regulation of corporate political speech could be no more stringent than of speech by an individual.

Four years later, in *Austin*, we considered whether corporations falling outside the [nonprofit] exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of “the integrity of the marketplace of political ideas” in candidate elections, we noted that corporations have “special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets”—that allow them to spend prodigious general treasury sums on campaign messages that have “little or no correlation” with the beliefs held by actual persons. In light of the corrupting effects such spending might have on the political process, we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations’ PACs, which rely on voluntary contributions and thus “reflect actual public support for the political ideals espoused by corporations.” . . .

In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times . . . . When we asked in *McConnell* “whether a compelling governmental interest justify[ed]” § 203, we

found the question “easily answered”: “We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’” *McConnell* (quoting *Austin*). . . .

### 3. Buckley and Bellotti

. . . In the Court’s view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970’s; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley*’s statement that “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous “restrictions on the speech of some in order to prevent a few from drowning out the many”: for example, restrictions on ballot access and on legislators’ floor time. *Nixon v. Shrink Missouri Gov’t PAC* (2000) (Breyer, J., concurring). For another, the *Buckley* Court used this line in evaluating “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.” It is not apparent why this is relevant to the case before us. The majority suggests that *Austin* rests on the foreign concept of speech equalization, but we made it clear in *Austin* (as in several cases before and since) that a restriction on the way corporations spend their money is no mere exercise in disfavoring the voice of some elements of our society in preference to others. Indeed, we expressly ruled that the compelling interest supporting Michigan’s statute was not one of “equaliz[ing] the relative influence of speakers on elections,” *Austin*, but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars. . . .

The case on which the majority places even greater weight than *Buckley*, however, is *Bellotti*, claiming it “could not have been clearer” that *Bellotti*’s holding forbade distinctions between corporate and individual expenditures like the one at issue here. The Court’s reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority’s position[, stating in a footnote:] “our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” . . .

The majority attempts to explain away the distinction *Bellotti* drew . . . as inconsistent with the rest of the opinion and with *Buckley*. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections . . . do not apply equally to regulations of corporate participation in referenda [*since the referendum is a yes/no vote—not an election of those who might “owe a political debt”*]. The Court’s critique . . . puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent. . . .

*Bellotti* . . . involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. . . . To make matters worse, the law at issue did not make any allowance for corporations to spend money through PACs. This really was a complete ban on a specific, preidentified subject.

The majority grasps a quotational straw from *Bellotti*, that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. Of course not, but no one suggests the contrary and neither *Austin* nor *McConnell* held otherwise. They held that even though

the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. . . .

#### IV

. . . I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

#### The Anticorruption Interest

Undergirding the majority’s approach to the merits is the claim that the only “sufficiently important governmental interest in preventing corruption or the appearance of corruption” is one that is “limited to *quid pro quo* corruption.” This is the same “crabbed view of corruption” that was espoused by Justice Kennedy in *McConnell* and squarely rejected by the Court in that case. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress’ legitimate interest in preventing the money that is spent on elections from exerting an “undue influence on an officeholder’s judgment” and from creating “the appearance of such influence,” beyond the sphere of *quid pro quo* relationships. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum . . . . Our “undue influence” cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, “that officeholders will decide issues . . . on the merits or the desires of their constituencies,” and not “according to the wishes of those who have made large financial contributions”—or expenditures—“valued by the officeholder.” *McConnell*. . . .

[W]hereas we have no evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance. . . . When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.

#### *Quid Pro Quo* Corruption

. . . The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan’s restriction on corporate electioneering. Concurring in that opinion, I took the position that “the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation” of these independent expenditures. . . . Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting “issue ads” to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; “candidates and officials knew who their friends were.” *McConnell*. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. . . .

[Moreover,] on account of the extreme difficulty of proving corruption, “prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption.” *Buckley*. . . .

### Deference and Incumbent Self-Protection

. . . Today’s opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than “an incumbency protection plan,” *McConnell* (Kennedy, J., concurring in part and dissenting in part); *id.* (Scalia, concurring in part and dissenting in part), a disreputable attempt at legislative self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy of our political system. This possibility, the Court apparently believes, licenses it to run roughshod over Congress’ handiwork.

In my view, we should instead start by acknowledging that “Congress surely has both wisdom and experience in these matters that is far superior to ours.” *Colorado Republican Fed. Campaign Comm’n v. FEC* (1996) (Stevens, J., dissenting). . . . To apply a level of scrutiny that effectively bars them from regulating electioneering whenever there is the faintest whiff of self-interest, is to deprive them of the ability to regulate electioneering.

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process. [*Justice Stevens then cited his own non-controlling opinions in earlier political gerrymandering cases.*] Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress’ years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition. . . .

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. . . .

### *Austin* and Corporate Expenditures

. . . The majority fails to appreciate that *Austin*’s antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations. Understood properly, “antidistortion” is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an “equalizing” ideal in disguise.

#### 1. Antidistortion

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic

differences. Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.” . . .

*Austin* recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations “unfai[r] influence” in the electoral process and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, [prioritizes] the corporation’s economic interests . . . [W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears “little or no correlation” to the ideas of natural persons or to any broader notion of the public good. *Austin*. The opinions of real people may be marginalized. . . .

When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders “call the tune” and a reduced “willingness of voters to take part in democratic governance.” *McConnell*. . . [A] legislature is entitled to credit these concerns and to take tailored measures in response. . . .

All of the majority’s theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, “that there is no such thing as too much speech.” *Austin* (Scalia, J., dissenting).<sup>74</sup> If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority’s premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to participate in the democratic process. . . .

*Austin*’s “concern about corporate domination of the political process” reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral “marketplace” of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves. . . .

Our colleagues have raised some interesting and difficult questions about Congress’ authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us*. . . . There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United’s as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all “identity”-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors.<sup>75</sup> . . .

<sup>74</sup> Of course, no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally.

<sup>75</sup> Under the majority’s view, the legislature is thus damned if it does and damned if it doesn’t. If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.

The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no “reason to think the market ordering is intrinsically good at all.” David Strauss, *Corruption, Equality, and Campaign Finance Reform*, Colum. L. Rev. (1994). . . .

## 2. Shareholder Protection

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*’s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not “reflec[t] [their] support.” When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions. . . .

**[The concurring opinions of Chief Justice Roberts and Justices Scalia and Thomas are omitted.]**

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### Notes and Questions

1. The excerpt above briefly summarizes why the majority used *facial* analysis. What do you think of its arguments? What difference would it have made if the Court used *as-applied* analysis instead?
2. How did Justice Kennedy interpret the Court’s earlier decision in *Belotti*? Based on the passage quoted in his opinion, does his interpretation seem accurate? How might you critique it?
3. How did Justice Kennedy’s majority opinion and Justice Stevens’s dissenting opinion define the rights holder? How, if at all, did their views on that issue impact the outcome of the case?
4. What were the governmental interests that the Court identified? How did it address each of those interests? Was its analysis persuasive? Why or why not?
5. In addition to considering the limit on corporate expenditures immediately before an election, the Justices in *Citizens United* evaluated a federal requirement that required *disclosure* of other corporate expenditures on political activity. Eight of the Justices voted to uphold this requirement. Justice Kennedy reasoned:

Citizens United next challenges BCRA’s disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements . . . .

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” *Buckley*, and “do not prevent anyone from speaking,” *McConnell*. The Court has subjected these requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest. . . .

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. [*The Court then cited two other cases.*] For these reasons, we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy. . . .

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. . . . Citizens United, however, has offered no evidence that its members may face . . . threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation. . . .

Writing alone, Justice Thomas dissented on this point:

I join all but Part IV of the Court’s opinion. . . . I dissent from Part IV . . . because the Court’s constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional.

Congress may not abridge the “right to anonymous speech” based on the “simple interest in providing voters with additional relevant information.” *McConnell v. FEC* (2003) (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *McIntyre v. Ohio Elections Comm’n* (1995)). . . .

[I]nstances of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements. [Moreover, mandatory disclosure raises a] threat of retaliation from *elected officials*. . . . [*Justice Thomas then described prior instances of retaliation for disclosed political participation.*]

Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of [speech] rights. . . .

The Court nevertheless insists that as-applied challenges to disclosure requirements will suffice . . . . But the Court’s opinion itself proves the irony in this compromise. . . . [The logic of the Court’s rejection of as-applied challenges regarding the expenditure rule] applies equally to as-applied challenges to §§ 201 and 311. . . .

I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in “core political speech” . . . .

Justice Thomas’s dissent on this issue references his concurring opinion in *McIntyre v. Ohio Elections Comm’n* (1995), in which he concurred alone, over a dissent by Justice Scalia, joined by Chief Justice Rehnquist. It is one of the most famous instances where Scalia and Thomas disagreed on originalist grounds.

The issue in *McIntyre* was whether to uphold an Ohio law that required persons engaged in distributing campaign-related literature to disclose the author. Writing for the majority, Justice Stevens explained that having to disclose authorship of political leaflets presented an especially onerous burden on speakers:

A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre’s handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender’s political views. Nonetheless, even though money may “talk,” its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation. . . .

What do you make of this reasoning? It was not entirely original; the Court in *Buckley v. Valeo* (1976) had previously referred to compelled disclosure as an “invasion of privacy of belief.” Should individuals be able to maintain privacy of their views while also disseminating those views? Assuming that privacy is a valid interest, should the same reasoning apply to corporations? Why or why not?

6. *McIntyre* and the disclosure aspect of *Citizens United* also raised two other issues that are worth noting—and that we will come back to shortly. First, should constitutional analysis in this area be facial or as-applied? Second, to what extent should the *degree of the burden* on speakers matter? What does Justice Kennedy’s analysis of the disclosure issue suggest about each of these issues?

7. There are dozens of other campaign-finance cases, and we do not have time to cover them all. But two in particular are worth mentioning.

*Davis v. F.E.C.* (2008) involved the so-called “Millionaire’s Amendment” to the Bipartisan Campaign Finance Reform Act of 2002. Under other provisions of federal law, campaign contributions to federal candidates are capped at a certain amount. Under the Millionaire’s Amendment, however, those caps were tripled for candidates running against opponents who spent more than \$350,000 of their own money. In a 5-4 decision, the Supreme Court held that this provision was facially invalid because it forced candidates “to choose between the First Amendment right to engage in unfettered political and subjection to discriminatory fundraising limitations.” Candidates who spent in excess of \$350,000 from their own funds were forced to “shoulder a special and potentially significant burden” that constituted an “unprecedented penalty” and “impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech.”

The Supreme Court issued a related decision three years later in *Arizona Free Enterprise Club’s Freedom PAC v. Bennett* (2011). Under Arizona law, candidates had the following choice: Either they could (1) accept public funding, along with a cap on their overall expenditures, or (2) privately fund their campaign, without any cap. But *Bennett* involved an additional twist when privately-financed candidates ran against publicly-financed candidates. In particular, whenever *privately*-financed candidates spent in excess of the public-financing cap, their *publicly*-financed opponent would receive a dollar-for-dollar increase in public “matching funds.” For instance, suppose that a publicly-financed candidate received \$100,000 (and had her spending capped at that amount) but ran against a privately-financed candidate who spent \$150,000. Under the Arizona statute, the publicly-financed candidate would then receive an additional \$50,000 from the government. (*Note: The statute was actually more complicated, but we need not delve into all the details.*)

The Supreme Court held in a 5-4 decision that this framework violated the First Amendment. It did so, Chief Justice Roberts explained, in essentially the same way as the federal statute at issue in *Davis*. The statute, Robert wrote, “plainly forces the privately financed candidate to ‘shoulder a special and potentially significant burden’ when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.” To be sure, he acknowledged that the Arizona rule differed in some respects from the Millionaire’s Amendment. But according to the Chief,

[T]hose differences make the Arizona law *more* constitutionally problematic, not less. First, the penalty in *Davis* consisted of raising the contribution limits for one of the candidates. The candidate who benefited from the increased limits still had to go out and raise the funds. . . . Here the benefit to the publicly financed candidate is the direct and automatic release of public money. That is a far heavier burden than in *Davis*.

Second, [when multiple publicly-financed candidates are running in a single race], the matching funds provision can create a multiplier effect. . . . [E]ach dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate’s publicly financed opponents. In such a situation, the matching funds provision forces privately funded candidates to fight a political hydra of sorts. Each dollar they spend



generates two adversarial dollars in response. Again, a markedly more significant burden than in *Davis*. . . .

The State argues that the matching funds provision actually results in more speech by “increas[ing] debate about issues of public concern” in Arizona elections and “promot[ing] the free and open debate that the First Amendment was intended to foster.” In the State’s view, this promotion of First Amendment ideals offsets any burden the law might impose on some speakers.

Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. . . . Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates . . . . This sort of “beggar thy neighbor” approach to free speech—“restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others”—is “wholly foreign to the First Amendment.” *Buckley*.

What do you think about *Davis* and *Bennett*? How does the government’s decision to fund someone’s speech count as an “abridg[ment]” of someone else’s speech?

## 4.17. Compelled Speech

One year after three justices from the *Gobitis* majority signaled their interest in overturning that decision, the opportunity arose. The case began when the parents of Marie and Gathie Barnett (later misspelled in the official report) challenged West Virginia’s requirement that flag salutes become “a regular part of the program of activities in the public schools” and that all teachers and pupils “shall be required to participate in the salute honoring the Nation represented by the Flag.” The Barnetts, who were members of the Jehovah’s Witness group, challenged the law and regulations as violating the First Amendment freedoms of speech and religion and the Fourteenth Amendment Due Process Clause and Equal Protection Clause.

### West Va. State Bd. of Education v. Barnette (1943)

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

. . . The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

[W]e are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . .

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . . If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. . . . It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed* . . . that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. . . .

Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution. . . .

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.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. . . . [C]hanged conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed. . . .

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of

a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. . . .

**Justice Frankfurter, dissenting:**

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. . . . [T]herefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another . . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions. *United States v. Carolene Products Co.* n.4 (1938). But . . . the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments. . . .

[R]esponsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of

authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered. . . .

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. . . . If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. . . .

We have been told that such [legal] compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables. . . .

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours. . . .

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. . . .

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. . . .

### Notes and Questions

1. *Barnette* is a foundational decision for several reasons. First, it recognizes that the First Amendment protects not only a right to speak but also a right to *not* speak—*i.e.*, a right against “compelled speech.” (In taking this approach, *Barnette* grounded its decision on the Speech Clause rather than the Free Exercise Clause.) Second, *Barnette* articulates a view of constitutional rights that puts federal judges front and center in determining their meaning, including the task of “translating” the meaning of those rights into a modern era. Finally, *Barnette* articulates the idea—which Justice Jackson eloquently describes as a “fixed star in our constitutional constellation”—that the state and federal governments cannot “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

This last principle is often associated with the idea of “viewpoint neutrality”—*i.e.*, that the government cannot restrict private speech based on the perceived harmfulness of the view that the speaker is expressing. It is worth noting, though, that this interpretation of *Barnette* may overread what Justice

Jackson was trying to say. A narrower interpretation embraced by some scholars (including me)\* posits that *Barnette* disallows compelled *uniformity* in the realm of private speech—not that the government can never impose *boundaries* on private speech based on the harmfulness of the views expressed.

It is clear, however, that Justice Jackson and his colleagues at least embraced neutrality in a more limited sense: namely, that the government could not seek to suppress ideas simply because it thought that those ideas were *offensive* or *wrong*. See, e.g., *Terminiello v. Chicago* (1949) (Jackson, J., dissenting) (“It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State’s policy or as untrue . . . .”); *Niemotko v. Maryland* (1951) (Frankfurter, J., concurring) (“The State cannot of course forbid public proselyting or religious argument merely because public officials disapprove the speaker’s views.”). At a minimum, the government had to show that the expression of certain views was causing harm to others.

2. What are different ways of thinking about the constitutionally relevant *harm* in compelled-speech cases? Are those the same harms that we worry about in cases involving speech restrictions (rather than compulsions)?

3. What do you think of Justice Frankfurter’s view? Is reliance on the democratic process an appealing option in these cases? Why or why not?

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The Supreme Court continued to wrestle with compelled-speech doctrine in the following case. As you read, try to identify the various steps of the Court’s analysis. And it is also worth thinking about the underlying point of compelled-speech doctrine. What harm or harms is the doctrine supposed to address?

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### Wooley v. Maynard (1977)

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#### Chief Justice Burger delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto “Live Free or Die” on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, “Live Free or Die.” Another New Hampshire statute makes it a misdemeanor “knowingly [to obscure] . . . the figures or letters on any number plate.” The term “letters” in this section has been interpreted by the State’s highest court to include the state motto.

Appellees . . . are followers of the Jehovah’s Witnesses faith [and] consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles. Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates. [*George Maynard was then arrested on three separate occasions for violating the statute and refused, on conscience-based grounds, to pay the applicable fines. He was sentenced to jail for 15 days.*]

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\* See Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, FIU L. Rev. (2019); Steven D. Smith, “*Fixed Star*” or *Twin Star*?: *The Ambiguity of Barnette*, FIU L. Rev. (2019); Jud Campbell, *The Emergence of Neutrality*, Yale L.J. (2022).

On March 4, 1975, appellees brought the present action [seeking] injunctive and declaratory relief against enforcement of [New Hampshire's license-plate laws], insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto. . . .

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellee's] constitutionally protected expression." We find it unnecessary to pass on the "symbolic speech" issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to . . . whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See West Virginia State Bd. of Educ. v. Barnette* (1943). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. . . .

The Court in *Barnette* was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville Dist. v. Gobotis* (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. . . .

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message . . . . As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. *See, e.g., United States v. O'Brien* (1968). The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto. . . .

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

We conclude that the State of New Hampshire may not require appellees to display the state motto<sup>15</sup> upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

**Justice Rehnquist, with whom Justice Blackmun joins, dissenting.**

... The State has not forced appellees to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that *all* noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

[T]he Court relies almost solely on *Board of Education v. Barnette* (1943). The Court cites *Barnette* for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The Court also relies upon the "right to decline to foster [religious, political, and ideological] concepts," and treats the state law in this case as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, unfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from *Barnette*, in which schoolchildren were forced to recite the pledge of allegiance while giving the flag salute. However, the Court states "the difference is essentially one of degree." But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of *Barnette*. In that case, as in this case, there is no *affirmation* of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of *Barnette*, and clearly distinguishes this case from that one. . . .

As found by the New Hampshire Supreme Court . . . , there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker

<sup>15</sup> It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.



explaining in no uncertain terms that they do not profess the motto “Live Free or Die” and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

The logic of the Court’s opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes “In God We Trust” and “E Pluribus Unum” appear on the coin and currency of the United States. I cannot imagine that the statutes proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto “In God We Trust.” Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

**[The opinion of Justice White is omitted.]**

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### Notes and Questions

1. What were the asserted state interests, and why did the majority reject them?
2. In his dissent, Justice Rehnquist suggested that the Maynards could simply disclaim any support for the motto by putting up a bumper sticker. What are the strengths and weaknesses of that approach? Supposing that Justice Rehnquist were right, would a similar disclaimer have been sufficient in *Barnette*? Why or why not?

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### Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston (1995)

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

The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment. . . .

[For decades,] petitioner South Boston Allied War Veterans Council [“the Council”], an unincorporated association of individuals elected from various South Boston veterans groups, . . . has applied for and received a permit for [a St. Patrick’s day] parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. . . .

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York’s St. Patrick’s Day Parade. Although the Council denied GLIB’s application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched “uneventfully” among that year’s 10,000 participants and 750,000 spectators.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John

J. “Wacko” Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits “any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.” . . . [T]he state trial court ruled that the parade fell within the statutory definition of a public accommodation . . . .

The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council’s right to expressive association was only “incidental” and “no greater than necessary to accomplish the statute’s legitimate purpose” of eradicating discrimination. . . . The Supreme Judicial Court of Massachusetts affirmed . . . .

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers’ own choosing violates the First Amendment. We hold that it does and reverse. . . .

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. . . . [W]e use the word “parade” to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade’s dependence on watchers is so extreme that nowadays, as with Bishop Berkeley’s celebrated tree, “if a parade or demonstration receives no media coverage, it may as well not have happened.” Parades are thus a form of expression, not just motion . . . .

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia State Bd. of Educ. v. Barnette* (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even “[m]arching, walking or parading” in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a “particularized message,” *cf. Spence v. Washington* (1974), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. . . . To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. *See New York Times v. Sullivan* (1964). The selection of contingents to make a parade is entitled to similar protection.

Respondents’ participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it . . . in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.

. . . GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. 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. . . . As with many public accommodations statutes across the Nation, the [Massachusetts] legislature continued to broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of “race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry” in “the admission of any person to, or treatment in any place of public accommodation, resort or amusement.” Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners’ speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . .

[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide “what not to say.” . . . [Government] may not compel affirmance of a belief with which the speaker disagrees. *See Barnette*. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre v. Ohio Elections Comm’n* (1995); *Riley v. Nat’l Fed’n of Blind of N.C., Inc.* (1988), subject, perhaps, to the permissive law of defamation, *New York Times v. Sullivan* (1964); *Gertz v. Robert Welch, Inc.* (1974); *Hustler Magazine, Inc. v. Falwell* (1988). . . .

Petitioners’ claim to the benefit of this principle of autonomy to control one’s own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its

expression by speaking on one subject while remaining silent on another. The message it disfavors is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access for expressive purposes, *Turner Broad. Sys., Inc. v. FCC* (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. . . . [W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

In *Turner Broadcasting*, we found this problem absent in the cable context, because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." We stressed that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility."

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. Cf. *PruneYard Shopping Center v. Robins* (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"). Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

An additional distinction between *Turner Broadcasting* and this case points to the fundamental weakness of any attempt to justify the state-court order's limitation on the Council's autonomy as a speaker. A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. . . .

In this case, of course, there is no assertion comparable to the *Turner Broadcasting* claim that some speakers will be destroyed in the absence of the challenged law. True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators. . . .

The [Massachusetts] statute is a piece of protective legislation [designed] to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. . . . When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. *See, e.g., Barnette*. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. . . .

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### Notes and Questions

1. *Barnette*, *Wooley*, and *Hurley* all involved "as-applied" challenges. The claimants did not assert that governments lack authority to lead the recital of the pledge of allegiance and flag salute in school, to put the state motto on license plates, or to enforce anti-discrimination laws. Instead, they claimed that the freedom of speech barred the state from enforcing these laws *against them*—forcing them to "speak" in ways that they opposed.

If one evaluated these cases from the standpoint of the *laws* at issue, rather than the *individual conduct*, would the results differ?

2. What are the limits of the rule against compelled speech? Would it violate the First Amendment for a public high school to compel students to write an essay about the importance of the First Amendment? What about forcing someone called for jury duty to describe her views about the death penalty? Or forcing a nudist to clothe himself in public? If these restrictions are constitutional, what might distinguish them from the cases that you've read?

3. What is the constitutional harm in compelling expression? In *Hurley*, the Court seemed to emphasize the problem of mistaken attribution, noting that "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." But what if Massachusetts had done a successful public-relations campaign to publicize the state law, including the fact that public parades could no longer discriminate on the basis of sexual orientation? Should that change the outcome?

4. *Barnette*, *Wooley*, and *Hurley* involved compelled statements of *views*. But what standard of review should apply to compelled statements of *fact*? In some instances, the Court has suggested that any *content-based* disclosure requirement should generally be evaluated using strict scrutiny. See, e.g., *NIFLA v. Becerra* (2018). Along these lines, the Court has also stated that compelled statements of *fact* are not categorically distinct from compelled statements of *opinion*. Consider the following discussion in *Riley v. National Federation of the Blind of North Carolina, Inc.* (1988):

We turn next to the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech. See *Miami Herald Publishing Co. v. Tornillo* (1974) (statute compelling newspaper to print an editorial reply “exact[s] a penalty on the basis of the content of a newspaper”). . . .

North Carolina asserts that . . . the First Amendment interest in compelled speech is different than the interest in compelled silence; the State accordingly asks that we apply a deferential test to this part of the Act. There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what *not* to say.

The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in *Miami Herald Publishing Co. v. Tornillo*. There, the Court considered a Florida statute requiring newspapers to give equal reply space to those they editorially criticize. We unanimously held the law unconstitutional as content regulation of the press, expressly noting the identity between the Florida law and a direct prohibition of speech. “The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.” That rule did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally. For example, in *Wooley v. Maynard* (1977), we held that a person could not be compelled to display the slogan “Live Free or Die.” In reaching our conclusion, we relied on the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind,” as illustrated in *Tornillo*.

These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of “fact”: either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate’s recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

We believe, therefore, that North Carolina’s content-based regulation is subject to exacting First Amendment scrutiny.

This passage could reasonably be read to reject a distinction between compelled statements of *fact* and compelled statements of *opinion*.

Yet the Supreme Court often treats compelled statements of *fact* differently than compelled statements of one’s *views*. We will see an example of this distinction in *Rumsfeld v. FAIR* (2006). Another example comes up in the context of commercial speech, where the Court has held that compelled disclosures—like disclosures of ingredients or health effects—trigger only a “reasonable relationship” test, not the intermediate scrutiny that ordinarily applies to restrictions of commercial speech. See *Zauderer v. Office of Disciplinary Counsel* (1985). Notably, however, the “*Zauderer* test” only applies to “purely factual and uncontroversial information.” *Id.*; see also *NIFLA v. Becerra* (2018) (declining to apply *Zauderer* in a case requiring private healthcare providers to disseminate information about state-provided abortions).

And rather than using strict scrutiny to evaluate mandatory disclosures, the Supreme Court has usually called for “exacting scrutiny.” See, e.g., *Citizens United v. FEC* (2010). But what is this “exacting scrutiny”? In a portion of the opinion that is not quoted above, the majority in *Riley* explained that the disclosure requirement should be assessed according to the standards that apply to “fully protected expression,” not commercial speech. This might suggest that “exacting scrutiny” is essentially the same as strict scrutiny.

In the years since, however, the Court has treated “exacting scrutiny” as a different test. As explained in *Doe v. Reed* (2010), exacting scrutiny demands “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” Moreover, “To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* Notice that this means that the degree of scrutiny depends on the degree of the burden on First Amendment rights—something that First Amendment doctrine generally avoids.

In *Americans for Prosperity v. Bonta* (2021), the Court continued to debate the demands of exacting scrutiny, this time in the context of a California law requiring non-profit groups to disclose the names of their largest donors to the state Attorney General. Writing for the plurality, Chief Justice Roberts argued that the appropriate standard of review for considering a facial challenge was exacting scrutiny. Then, in a portion of his opinion joined by a majority, he explained that this level of scrutiny demanded narrowing tailoring:

The Law Center (now joined by the Foundation) argues in the alternative that even if exacting scrutiny applies, such review incorporates a least restrictive means test similar to the one imposed by strict scrutiny. The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the “substantial relation” requirement noted above. We think that the answer lies between those two positions. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest. . . .

[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. This requirement makes sense. Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—“[b]ecause First Amendment freedoms need breathing space to survive.” *NAACP v. Button* (1963). . . .

[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring. . . .

The Chief’s discussion of the standard of review prompted interesting rebuttals from competing sides. Suggesting that the majority’s standard of review was insufficiently rigorous, Justice Alito historicized the embrace of “exacting” scrutiny:

I do not read our cases to have broadly resolved the question in favor of exacting scrutiny. This Court decided its seminal compelled disclosure cases before it developed modern strict scrutiny doctrine. *See* Richard Fallon, *Strict Judicial Scrutiny*, UCLA L. Rev. (2007) (“Before 1960, what we would now call strict judicial scrutiny . . . did not exist”); *id.* (contending that modern strict scrutiny’s “first unambiguous appearance” in a majority opinion occurred in 1969). Accordingly, nothing in those cases can be understood as rejecting strict scrutiny. If anything, their language and reasoning—requiring a compelling interest and a minimally intrusive means of advancing that interest—anticipated and is fully in accord with contemporary strict scrutiny doctrine. . . .

Although Justice Alito was equivocal about the proper level of scrutiny, Justice Thomas called for strict scrutiny. By contrast, Justice Sotomayor criticized the majority for being *too strong* in its ends/means analysis. She wrote,

Disclosure requirements burden associational rights only indirectly and only in certain contexts. For that reason, this Court has never necessarily demanded such requirements to be narrowly tailored. Rather, it has reserved such automatic tailoring for state action that “directly and immediately affects associational rights.” *Boy Scouts of Am. v. Dale* (2000). When it comes to reporting and disclosure requirements, the Court has instead employed a more flexible approach, which it has named “exacting scrutiny.”

Exacting scrutiny requires two things: first, there must be “a substantial relation between the disclosure requirement and a sufficiently important government interest,” and second, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Doe v. Reed* (2010). Exacting scrutiny thus incorporates a degree of flexibility into the means-end analysis. The more serious the burden on First Amendment rights, the more compelling the government’s interest must be, and the tighter must be the fit between that interest and the government’s means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent). In other words, to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?

This approach reflects the longstanding principle that the requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights. *See, e.g., Burdick v. Takushi* (1992) (“[T]he rigorousness of our inquiry . . . depends upon the extent to which a challenged regulation burdens” First Amendment rights); *Board of Trustees of State Univ. of N.Y. v. Fox* (1989) (“[C]ommercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is [thus] subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” . . .

Justice Sotomayor may have a good point to make, but she stretches in claiming a “longstanding principle that the requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights.” That principle has considerable purchase in the context of voting rights (as in *Burdick v. Takushi*) and in campaign-finance law (as in *Buckley v. Valeo*), but usually the degree of the burden is irrelevant. For the most part, modern First Amendment law has assessed the *neutrality* of the law with respect to content, regardless of the extent of the burden on speakers, in determining what level of scrutiny to apply.

But what about Justice Sotomayor’s other critique of the Chief’s reasoning in *Bonta*? Does it make sense to evaluate the ends/means fit *before* determining what level of scrutiny to apply? Why or why not?



5. What did the Court in *Hurley* say about whether the reduction in social bias is a legitimate basis for curtailing speech rights? In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), a self-described “cake artist” argued that the application of the state’s anti-discrimination law—forcing him to make a cake for a gay couple’s wedding ceremony—violated his First Amendment rights of free-exercise and expression. Justice Kennedy’s majority opinion, which resolved the case by ascribing anti-religious bias to the Colorado Civil Rights Commission, had this to say about the compelled speech claim:

When 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. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Is this discussion consistent with *Hurley*? What do you make of Phillips’s emphasis on “us[ing] his artistic skills to make an expressive statement . . . in his own voice and of his own creation”? Do *Barnette*, *Wooley*, and *Hurley* suggest any distinction between scripted and non-scripted compelled statements? On what grounds might that distinction be justified?

Although the Supreme Court mostly ducked the speech issues in *Masterpiece Cakeshop*, it returned to the issue a few years later in *303 Creative LLC v. Elenis* (2023). However, the opinions in that case frequently refer to associational rights cases, so it makes sense to consider *303 Creative* after reading those cases in Unit 5.

## 4.18. Compelled Subsidies

Compelled-subsidy cases arise when individuals—rather than being forced to speak themselves—are legally compelled to fund someone else’s speech. Here is how the Court summarized the doctrine in *Janus v. American Federation of State, County, & Municipal Employees, Council 31* (2018):

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence. *West Virginia State Bd. of Educ. v. Barnette* (1943).

Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” A Bill for Establishing Religious Freedom, *Papers of Thomas Jefferson* (1950).

Is this reasoning persuasive? Is forcing someone to give money to someone else a *speech* problem? If so, when?

The Supreme Court has struggled to come up with coherent doctrine in this area, as illustrated in a trio of cases involving collective advertising schemes, where the government—or an entity acting with governmental authorization—compels participants in a particular industry to pay for joint advertising. In *Glickman v. Wileman Brothers & Elliott, Inc.* (1997), some California producers of nectarines, plums, and peaches objected on First Amendment grounds to a compelled payment that would support generic advertising of California nectarines, plums, and peaches. A five-justice majority rejected the claim:

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. . . .

Respondents advance several arguments in support of their claim that being required to fund the generic advertising program violates the First Amendment. Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by a marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm’s advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler’s individual advertising budget does not itself amount to a restriction on speech. . . .

[T]he Court of Appeals apparently accepted respondents' argument that the assessments infringe First Amendment rights because they constitute compelled speech. Our compelled speech case law, however, is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, *cf. West Virginia State Bd. of Educ. v. Barnette* (1943), require them to use their own property to convey an antagonistic ideological message, *cf. Wooley v. Maynard* (1977), . . . or require them to be publicly identified or associated with another's message, *cf. PruneYard Shopping Center v. Robins* (1980). Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits."

Although this regulatory scheme may not compel speech as recognized by our case law, it does compel financial contributions that are used to fund advertising. As the Court of Appeals read our [compelled-subsidy] decision in *Abood v. Detroit Board of Education* (1977), just as the First Amendment prohibits compelled speech, it prohibits—at least without sufficient justification by the government—compelling an individual to "render financial support for others' speech." However, *Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." We considered, in *Abood*, whether it was constitutional for the State of Michigan to require government employees who objected to unions or union activities to contribute to an "agency shop" arrangement requiring all employees to pay union dues as a condition of employment. We held that compelled contributions to support activities related to collective bargaining were "constitutionally justified by the legislative assessment of the important contribution of the union shop" to labor relations. Relying on our compelled-speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[—]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. . . .

Moreover, rather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group. Thus, in *Lehnert v. Ferris Faculty Association* (1991), while we held that the cost of certain publications that were not germane to collective-bargaining activities could not be assessed against dissenting union members, we squarely held that it was permissible to charge them for those portions of "the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . , and other miscellaneous matters." That

holding was an application of the rule announced in *Abood* and further refined in *Keller v. State Bar of California* (1990), a case involving bar association activities.

As we pointed out in *Keller*, “*Abood* held that a union could not expend a dissenting individual’s dues for ideological activities not ‘germane’ to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.” This test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities. . . .

Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny. It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising.

Just four years later in *United States v. United Foods, Inc.* (2001), the same nine justices considered a nearly identical regulatory scheme, this time involving mushroom producers. But Justice Kennedy, who had joined the majority opinion in *Glickman*, now joined with the four *Glickman* dissenters to rule against the compelled subsidy:

Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, *see Wooley v. Maynard* (1977); *West Virginia State Bd. of Educ. v. Barnette* (1943), or from compelling certain individuals to pay subsidies for speech to which they object, *see Abood v. Detroit Bd. of Educ.* (1977); *Keller v. State Bar of Cal.* (1990). Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited. The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree. . . .

Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. . . . First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

In the Government’s view the assessment in this case is permitted by *Glickman* because it is similar in important respects. It imposes no restraint on the freedom of an objecting party to communicate its own message; the program does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views. These points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome. The

program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

In *Glickman* . . . [t]he California tree fruits were marketed “pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity.” . . . The market for the tree fruit regulated by the program was characterized by “[c]ollective action, rather than the aggregate consequences of independent competitive choices.” The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising “d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme.” The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

The features of the marketing scheme found important in *Glickman* are not present in the case now before us. . . . [A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no “heavy regulation through marketing orders” in the mushroom market. Mushroom producers are not forced to associate as a group which makes cooperative decisions. “[T]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program,” and “the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.”

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. See, e.g., *Abood v. Detroit Bd. of Educ.* (1977); *Keller v. State Bar of Cal.* (1990).

The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable. We did say in *Glickman* that *Abood* “recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one’s freedom of belief.” We take further instruction, however, from *Abood*’s statement that speech need not be characterized as political before it receives First Amendment protection. A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In *Abood*, the infringement upon First Amendment associational rights worked by a union shop arrangement was “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.” To attain the desired benefit of collective bargaining, union members and

nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association. . . .

[T]here is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.

*Glickman* and *United Foods* reveal a court deeply at odds over the underlying rationale for compelled-subsidy doctrine. Is the goal to preserve a freedom of *conscience*? If so, why is that considered a freedom of *speech* concern? Or is the goal to ensure that the government does not manipulate the proverbial “marketplace of speech”—distorting public debate on pressing issues, like whether branded mushrooms are superior to unbranded mushrooms? If so, you might be puzzled to learn that the third case in this trio, *Johanns v. Livestock Marketing Ass’n* (2005), upheld a nearly identical marketing order—this time requiring beef producers to fund a joint marketing scheme whose advertisements often included the slogan “Beef. It’s What’s for Dinner.” [*If you’re getting whiplash from these decisions, you’re not alone.*] Writing for the majority, Justice Scalia characterized the marketing program as *government speech*. And compelled support for the government’s own speech, Justice Scalia explained, is not subject to any First Amendment review at all: “Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”

Dissenting, Justice Souter (who wrote for the dissenters in *Glickman*), joined by Justice Stevens (who wrote for the majority in *Glickman*) and Justice Kennedy (who switched sides between *Glickman* and *United Foods*), argued that government-speech doctrine was not nearly as rigid as the majority described, and that while a First Amendment exception from general taxation would be out of the question, a narrower claim to an exemption from a special assessment for advertising should be amenable to First Amendment review.

## 5. Associational Rights

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### 5.1. Early History

Unit 4 included some important cases about *group* rights, including *Citizens United* and *Hurley*, but this Unit will give us a chance to think more deeply about associational rights and how they relate to speech rights. We'll also add an important layer to unconstitutional conditions doctrine.

To begin, let's examine where things got started. Based on what you've already learned, how would you expect that the Supreme Court viewed associational rights *before* the onset of the modern rights cases in the 1930s and 40s? Does your expectation line up with the Court's decision in the following case?

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#### New York ex rel. Bryant v. Zimmerman (1928)

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##### **Justice Van Devanter delivered the opinion of the Court.**

The relator, Bryant, [claims that] the [New York] statute which he was charged with violating was unconstitutional . . . because [it is] repugnant to . . . the Fourteenth Amendment to the Constitution of the United States. . . . The material parts of the state statute are as follows:

Sec. 53. Every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order . . . shall file with the secretary of state a sworn copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year. . . .

Sec. 56. . . . Any person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor.

. . . The offense charged against the relator is that he attended meetings and remained a member of the Buffalo Provisional Klan of the Knights of the Ku Klux Klan, an unincorporated association . . . having a membership of more than twenty persons and requiring an oath as a prerequisite or condition of membership, he then having knowledge that such association had wholly failed to comply with the requirement in § 53.

There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship. . . . But no such privilege or immunity is in question here. If to be and remain a member of a secret, oath-bound association within a State be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the Constitution is in no wise affected by its possessor being

a citizen of the United States. Thus there is no basis here for invoking the privilege and immunity clause. [*The Court did not cite any cases, but what earlier decision supports its analysis?*]

The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement in § 53 . . . proceeds on the two-fold theory that the State within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. . . .

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Now let's fast-forward to 1958, when the Supreme Court considered whether a district court in Alabama could order the NAACP to disclose its membership lists as part of a discovery order. Given what you've already learned, how do you think the Court might have responded to the NAACP's constitutional claim?

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### NAACP v. Alabama ex rel. Patterson (1958)

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

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People, in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

*[Alabama statutory law required the local NAACP chapter to register with state authorities, and the local chapter did that. The law did not require any disclosure of membership. Rather, a state judge ordered that the NAACP disclose its membership pursuant to a discovery request in a civil suit filed by the state Attorney General seeking to enjoin the NAACP from operating within Alabama.]*

The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. . . .

*[The Court first addressed the standing issue.]* To require that [the right against disclosure] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in



every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views. . . .

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. . . .

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

We think that the production order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. . . .

Whether there was "justification" in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists. . . . The issues in the litigation . . . were whether the character

of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them.

From what has already been said, we think it apparent that *Bryant v. Zimmerman* (1928) cannot be relied on in support of the State's position, for that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. . . . In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice. . . .

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### Notes and Questions

1. On what constitutional basis did the Court recognize a right to associate? In other words, what constitutional provision(s) did the Court interpret? How did that differ from the constitutional basis of the decision in *Bryant*? Based on the material covered in Units 1 and 2, can you explain the likely reason for this difference?
  2. What was the holding of *NAACP v. Alabama ex rel. Patterson*? Are mandatory disclosures of membership lists ever constitutional? If so, when? The decision remains good law today (with some additional explication in later cases, of course), so it is useful to know.
  3. How might the context of this case have mattered?
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## 5.2. Modern Associational Rights

Many modern associational-rights cases involve a notoriously challenging problem for constitutional law that we have seen before: the intersection of antidiscrimination laws and individual rights claims. As you read the following case, consider these questions: What underlying theory of expressive freedom, if any, does the opinion reflect? How does the Court structure its analysis? Does the Court employ a particular level of scrutiny? What governmental interests are permitted? Does the Court adequately defend its doctrinal conclusions? As with *Citizens United*, it is worth thinking in particular about how conceptualizing the rights holder as the *group* rather than as a collection of humans might have shaped the majority's opinion. In particular, how does this issue affect the deference that the Court gives to the group?

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### Boy Scouts of America, Inc. v. Dale (2000)

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#### Chief Justice Rehnquist delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization

engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

## I

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He . . . eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. . . .

[In 1990], Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. [A subsequent letter clarified that] the Boy Scouts "specifically forbid membership to homosexuals."

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. . . . [*The state court held that the statute applied here.*]

## II

"[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees* (1984). This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. . . . Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Id.*

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. . . .

[T]he general mission of the Boy Scouts is clear: “[T]o instill values in young people.” The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts’ values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts’ ability to advocate public or private viewpoints. . . .

The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms “morally straight” and “clean” [in these creeds]. . . .

The New Jersey Supreme Court analyzed the Boy Scouts’ beliefs and found that the “exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts’ commitment to a diverse and ‘representative’ membership.” . . . The court concluded that the exclusion of members like Dale “appears antithetical to the organization’s goals and philosophy.” But our cases reject this sort of inquiry; it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.

The Boy Scouts asserts that it “teach[es] that homosexual conduct is not morally straight” and that it does “not want to promote homosexual conduct as a legitimate form of behavior.” We accept the Boy Scouts’ assertion. We need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality. [*The Court went ahead and did so anyway to show the group’s sincerity. We’re skipping that part.*] . . .

We must then determine whether Dale’s presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not “promote homosexual conduct as a legitimate form of behavior.” As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression. That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

*Hurley* is illustrative on this point. There we considered whether the application of Massachusetts’ public accommodations law to require the organizers of a private St. Patrick’s Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers’ First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. . . .

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members. . . . As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point

of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings: "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. . . . The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

*[So far, the Court's analysis has been focused on scope—that is, whether the First Amendment applies at all. The majority now switches gears to determine the issue of strength. What legal test does it use? How does that test prioritize the speech interest and the anti-discrimination interest? Are anti-discrimination interests ever sufficiently "compelling" to warrant governmental interference with group membership decisions?]*

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. New Jersey's statutory definition . . . includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location. *[Note: Because this was a question of state law, the Supreme Court did not question the New Jersey courts' interpretation.]* As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in [earlier] cases [from the 1980s] that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we

went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. . . . We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley*, we said that public accommodations laws “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” But we went on to note that in that case “the Massachusetts [public accommodations] law has been applied in a peculiar way” because “any contingent of protected individuals with a message would have the right to participate in petitioners’ speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own.” . . .

Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O’Brien* (1968) to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech—in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey’s public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O’Brien* is inapplicable.

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law. . . .

**Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer join, dissenting.**

. . . The majority holds that New Jersey’s law violates BSA’s right to associate and its right to free speech. But that law does not “impos[e] any serious burdens” on BSA’s “collective effort on behalf of [its] shared goals,” *Roberts v. U.S. Jaycees* (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey’s law, therefore, abridges no constitutional right of BSA.

**I**

In this case, BSA contends . . . it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention . . . requires us to look at what, exactly, are the values that BSA actually teaches. . . .

BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase “morally straight,” which appears in the Oath; the second term is the word “clean,” which appears in a list of 12 characteristics together constituting the Scout Law. The Boy Scout Handbook defines “morally straight,” as such:

To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open.

Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

As for the term “clean,” the Boy Scout Handbook offers the following:

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean. You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water. There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts. Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.

It is plain as the light of day that neither one of these principles—“morally straight” and “clean”—says the slightest thing about homosexuality. . . .

BSAs published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization. . . .

## II

. . . Instead of linking its policy to its central tenets or shared goals—to teach certain definitions of what it means to be “morally straight” and “clean”—BSA chose instead to justify its policy on the “expectatio[n]” that its members preferred to exclude homosexuals. The 1993 policy statement . . . was *not* based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past. . . .

We have never held, however, that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views. At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view. . . .

## III

[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. . . .

In *Roberts v. United States Jaycees* (1984), we addressed just such a conflict. The Jaycees was a nonprofit membership organization . . . “restricted to males between the ages of 18 and 35,” [which policy violated Minnesota's public-accommodations law]. . . . The Jaycees, however, claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy.

We rejected that claim. Cautioning that the right to associate is not “absolute,” we held that “[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” We found the State's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas. We also held that Minnesota's law is the least restrictive means of achieving that interest. The Jaycees had “failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association.” . . . “The Act,” we held, “requires no change in the Jaycees' creed of promoting the interest of young men,

and it imposes no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.” . . .

#### IV

The majority . . . finds that BSA in fact “teach[es] that homosexual conduct is not morally straight.” This conclusion, remarkably, rests entirely on statements in BSA’s briefs. . . .

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, “we are obligated to independently review the factual record.” . . .

An organization can adopt the message of its choice, and it is not this Court’s place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State’s antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group’s litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State’s antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group’s membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant’s claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. . . .

It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey’s law.

#### V

Even if BSA’s right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. . . . And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject. . . . As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send. . . .

Dale’s inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.



It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as “speech” under the First Amendment. See *United States v. O’Brien* (1968). At the same time, however, “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.

The only apparent explanation for the majority’s holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment. Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label “homosexual.” That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. As counsel for BSA remarked [in oral argument], Dale “put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can’t take that banner off. He put it on himself and, indeed, he has continued to put it on himself.” . . .

Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate . . . .

It is . . . farfetched to assert that Dale’s open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being “openly gay” perhaps communicates a message—for example, that openness about one’s sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral—but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, religious minorities, or any other discrete group. Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual’s private beliefs or private conduct. . . .

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### Notes and Questions

1. What is the scope—or the “coverage”—of the First Amendment associational right recognized in *Dale*?
2. How did the majority opinion analyze whether the application of an anti-discrimination law serves a compelling governmental interest? What arguments could you make in favor of, and against, the majority’s reasoning?

3. Who is the rights holder in *Dale*—the Boy Scouts *organization* and/or the *individuals* who belong to that organization? How do the majority and the dissent answer that question? How does their answer affect their analysis?

4. Justice Stevens’s dissent would allow exclusionary policies for groups with an “unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.” This approach, it seems, would effectively limit the exclusionary right to groups that openly and consistently endorse a bigoted policy. Would that rule further constitutional values?

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## Rumsfeld v. FAIR (2006)

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

When law schools began restricting the access of military recruiters to their students because of disagreement with the Government’s policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment. That provision specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. . . .

### **I**

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties. . . . FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation. They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military. The Solomon Amendment, however, forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding. . . .

### **III**

. . . Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress’ decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress’ choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

Congress’ power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds. In *Grove City College v. Bell* (1984), we rejected a private college’s claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. . . . We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government’s funds.

Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Library Ass'n, Inc.* (2003). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in *Grove City* and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

## A

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.

Nevertheless, the Third Circuit concluded that the Solomon Amendment violates law schools' freedom of speech in a number of ways. First, in assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech. The Court of Appeals held that in supplying these services law schools are unconstitutionally compelled to speak the Government's message. Second, military recruiters are, to some extent, speaking while they are on campus. The Court of Appeals held that, by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech. Third, although the Court of Appeals thought that the Solomon Amendment regulated speech, it held in the alternative that, if the statute regulates conduct, this conduct is expressive and regulating it unconstitutionally infringes law schools' right to engage in expressive conduct. We consider each issue in turn.<sup>4</sup>

## 1

Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia State Board of Education v. Barnette* (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard* (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—"Live Free or Die"—on their license plates.

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<sup>4</sup> The Court of Appeals also held that the Solomon Amendment violated the First Amendment because it compelled law schools to subsidize the Government's speech "by putting demands on the law schools' employees and resources." We do not consider the law schools' assistance to raise the issue of subsidizing Government speech as that concept has been used in our cases. The accommodations the law schools must provide to military recruiters are minimal, are not of a monetary nature, and are extended to all employers recruiting on campus, not just the Government. And in *Johanns v. Livestock Marketing Ass'n* (2005) . . . we noted that our previous compelled subsidy cases involved subsidizing private speech, and we held that "[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech." The military recruiters' speech is clearly Government speech.

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. [T]hese compelled statements of fact ("The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."), like compelled statements of opinion, are subject to First Amendment scrutiny. See *Riley v. Nat'l Fed. of Blind of N.C., Inc.* (1988).

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.* (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R.A.V. v. St. Paul* (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

## 2

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.* (1995). . . .

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected . . . . The expressive nature of a parade was central to our holding in *Hurley*. We concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade." As a result, we held that the State's public accommodation law, as applied to a private parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." . . .

In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade . . . ; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school. . . . Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. . . .

## 3

Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of "symbolic speech" were deserving of First Amendment protection. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas v. Johnson* (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment's equal access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." *Johnson*. An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result. . . .

**B**

The Solomon Amendment does not violate law schools' freedom of speech, but the First Amendment's protection extends beyond the right to speak. We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." *See, e.g., Boy Scouts of Am. v. Dale* (2000). . . .

In *Dale*, we held that the Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster. After determining that the Boy Scouts was an expressive association, that "the forced inclusion of Dale would significantly affect its expression," and that the State's interests did not justify this intrusion, we concluded that the Boy Scouts' First Amendment rights were violated.

The Solomon Amendment, however, does not similarly affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "to accept members it does not desire." The law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying

conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot “erect a shield” against laws requiring access “simply by asserting” that mere association “would impair its message.”

FAIR correctly notes that the freedom of expressive association protects more than just a group’s membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity or impose penalties or withhold benefits based on membership in a disfavored group. [These laws] made group membership less attractive, raising the same First Amendment concerns about affecting the group’s ability to express its message.

The Solomon Amendment has no similar effect on a law school’s associational rights. Students and faculty are free to associate to voice their disapproval of the military’s message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school’s First Amendment rights. A military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message. . . .

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### Notes and Questions

1. We have now seen several *successful* compelled-speech and associational-rights claims (*e.g.*, *Wooley*, *Hurley*, and *Dale*) and another set of *unsuccessful* claims in *FAIR*. What distinguishes these decisions?

2. The challengers in *FAIR* raised an “unconstitutional conditions” claim under the First Amendment—that is, even though the universities had no constitutional right to federal funding, the *condition* imposed on their receipt of those funds was unconstitutional. Yet the Court did not seem to refer to any of the modes of analysis that we have previously seen for considering unconstitutional claims (*i.e.*, germaneness, coercion, and impermissible purpose). Why not?

3. What was each of the claims at issue in *FAIR*? Why did the Court reject it?

4. In *Christian Legal Society v. Martinez* (2010), which is excerpted as a main case in Unit 5.4, the Court addressed another collision between associational rights and limits on the use of public resources. The case arose when the University of California Hastings College of Law refused to recognize a student chapter of the Christian Legal Society because that group did not comply with its “all comers” nondiscrimination policy.\* CLS bylaws required that its members and leaders agree to a “Statement of Faith,” which proclaimed Christian beliefs and effectively excluded anyone engaged in “unrepentant homosexual conduct.” CLS alleged that their rejection, depriving them of otherwise available benefits (activity funds, access to bulletin boards, etc.), violated the First Amendment. The majority framed the question presented as follows: “May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students?”

In support of its argument, CLS cited two lines of precedent. First, it argued that the government had created a public forum and therefore could not discriminate on the basis of viewpoint within the

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\* Although the parties disputed the contents of the law school’s policy, the Court accepted the parties’ earlier stipulation that “Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.”

forum. Second, it argued that the burdens placed on CLS's membership policies violated its right of expressive association. The Supreme Court treated these claims as essentially raising the same issue:

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. It therefore makes little sense to treat CLS's speech and association claims as discrete. . . . [S]peech and expressive-association rights are closely linked. When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. . . . [Additionally,] the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may “reserv[e] [them] for certain groups.” . . . [Finally,] this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. *See, e.g., Dale.*

Having determined that Hastings had created a limited public forum, the Court had little trouble sustaining the “all comers” policy as a “reasonable” and viewpoint-neutral restriction: “It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept *all* comers,” Justice Ginsburg wrote. “Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, ‘[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.’” (quoting *R.A.V. v. St. Paul* (1992)).

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented on multiple grounds, including his disagreement with the two aspects of the Court's analysis mentioned above. In terms of the Court's use of public-forum doctrine, he criticized the majority's efforts to draw such a firm line between conditions on the receipt of public benefits and direct regulations. And with respect to viewpoint neutrality, Alito—citing an Equal Protection case—stated that “adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.” In context, he argued, Hastings's policies were designed to exclude CLS based on its espoused views.

The *Christian Legal Society v. Martinez* case thus weaves together many of the threads that appear throughout this casebook. Are rights limited to “negative” deprivations of liberty or property, or can a denial of public resources implicate rights, too? Relatedly, should judges evaluate the *effects* of governmental policies on particular speakers or groups, including potentially *disparate effects*? Or should the doctrinal focus be on the government? If so, is all that matters the facial neutrality of the rule? Or should judges also evaluate the subjective motives of those who drafted the legal rule at issue? And should doctrine be sensitive to context by, say, providing the government more leeway in its role as an operator of public universities than in its role as a regulator of private conduct? Notice that the way that the Court—and that particular justices—have approached these questions across different rights domains has not always been consistent. Is that a problem?

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### 5.3. Nondiscrimination and Compelled Speech

The following case, *303 Creative LLC v. Elenis* (2023), is the Supreme Court’s most recent encounter with the intersection of anti-discrimination law and First Amendment. Neither the claimant nor the majority framed the argument in terms of associational rights, so from an outlining standpoint, the case does not belong in this Unit. But *303 Creative* considers how the First Amendment applies to for-profit businesses. And it is included here because much of the analysis in the Justices’ opinions turns on the cases studied in Unit 5.

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#### 303 Creative LLC v. Elenis (2023)

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

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.

#### I

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to “celebrate” and “conve[y]” the “details” of their “unique love story.” The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be “original,” “customized,” and “tailored” creations. The websites will be “expressive in nature,” designed “to communicate a particular message.” Viewers will know, too, “that the websites are [Ms. Smith’s] original artwork,” for the name of the company she owns and operates by herself will be displayed on every one.

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. But she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism. . . .

[T]he Colorado Anti-Discrimination Act (CADA) . . . defines a “public accommodation” broadly to include almost every public-facing business in the State. In what some call its “Accommodation Clause,” the law prohibits a public accommodation from denying “the full and equal enjoyment” of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Either state officials or private citizens may bring actions to enforce the law. And a variety of penalties can follow.



In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. . . .

To facilitate the district court’s resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts:

- Ms. Smith is “willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,” and she “will gladly create custom graphics and websites” for clients of any sexual orientation.
- She will not produce content that “contradicts biblical truth” regardless of who orders it.
- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction.
- All of the graphic and website design services Ms. Smith provides are “expressive.”
- The websites and graphics Ms. Smith designs are “original, customized” creations that “contribut[e] to the overall messages” her business conveys “through the websites” it creates.
- Just like the other services she provides, the wedding websites Ms. Smith plans to create “will be expressive in nature.”
- Those wedding websites will be “customized and tailored” through close collaboration with individual couples, and they will “express Ms. Smith’s and 303 Creative’s message celebrating and promoting” her view of marriage.
- Viewers of Ms. Smith’s websites “will know that the websites are [Ms. Smith’s and 303 Creative’s] original artwork.”
- To the extent Ms. Smith may not be able to provide certain services to a potential customer, “[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services.”

Ultimately, the district court ruled against Ms. Smith. So did the Tenth Circuit. . . .

The [Tenth Circuit] acknowledged that Ms. Smith’s planned wedding websites qualify as “pure speech” protected by the First Amendment. As a result, the court reasoned, Colorado had to satisfy “strict scrutiny” before compelling speech from her that she did not wish to create. . . . Ultimately, a divided panel concluded that the State had carried these burdens. As the majority saw it, Colorado has a compelling interest in ensuring “equal access to publicly available goods and services,” and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer “unique services” that are, “by definition, unavailable elsewhere.” . . .

## II

The framers designed the Free Speech Clause of the First Amendment to protect the “freedom to think as you will and to speak as you think.” *Boy Scouts of Am. v. Dale* (2000). They did so because they saw the freedom of speech “both as an end and as a means.” *Whitney v. California* (1927) (Brandeis, J., concurring). An end because the freedom to think and speak is among our inalienable human rights. *See, e.g.,* Annals of Cong. (1794) (Rep. Madison). A means because the freedom of thought and speech is “indispensable to the discovery and spread of political truth.” *Whitney* (Brandeis, J., concurring). By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, “[i]f there is any fixed star

in our constitutional constellation,” *West Virginia Bd. of Educ. v. Barnette* (1943), it is the principle that the government may not interfere with “an uninhibited marketplace of ideas,” *McCullen v. Coakley* (2014).

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation’s flag and recite the Pledge of Allegiance. . . . [T]his Court offered a firm response. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had “transcend[ed] constitutional limitations on their powers.” Their dictates “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”

A similar story unfolded in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995). There, veterans organizing a St. Patrick’s Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts’s public accommodations statute entitled it to participate in the parade as a matter of law. Lower courts agreed. But this Court reversed. Whatever state law may demand, this Court explained, the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to “alter the expressive content of their parade.” The veterans’ choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share.

Then there is *Boy Scouts of America v. Dale* (2000). In that case, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey’s public accommodations law required the Scouts to reinstate him. The New Jersey Supreme Court sided with Mr. Dale, but again this Court reversed. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts “is an expressive association” entitled to First Amendment protection. And, the Court found, forcing the Scouts to include Mr. Dale would “interfere with [its] choice not to propound a point of view contrary to its beliefs.”

As these cases illustrate, the First Amendment protects an individual’s right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply “misguided,” and likely to cause “anguish” or “incalculable grief.” . . .

### III

Applying these principles to this case, we align ourselves with much of the Tenth Circuit’s analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as “pure speech” under this Court’s precedents. We agree. It is a conclusion that flows directly from the parties’ stipulations. They have stipulated that Ms. Smith’s websites promise to contain “images, words, symbols, and other modes of expression.” They have stipulated that every website will be her “original, customized” creation. And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to “celebrate and promote the couple’s wedding and unique love story” and to “celebrat[e] and promot[e]” what Ms. Smith understands to be a true marriage. . . .

We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. Again, the parties’ stipulations lead the way to that conclusion. As the parties have described it, Ms. Smith intends to “ve[t]” each prospective project to determine whether it is one she is willing to endorse. She will consult with clients to discuss “their unique stories as source material.” And she will produce a final story for each couple using her own words and her own “original artwork.” Of course, Ms. Smith’s speech may combine with the couple’s in the final product. But for purposes of the First Amendment that changes nothing. An individual “does not forfeit constitutional protection simply by combining multifarious voices” in a single communication. *Hurley*.

As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to “forc[e her] to create custom websites” celebrating other marriages she does not. Colorado seeks to compel this speech in order to “excis[e] certain ideas or viewpoints from the public dialogue.” *Turner Broadcasting Sys., Inc. v. FCC* (1994). Indeed, the Tenth Circuit recognized that the coercive “[e]liminati[on]” of dissenting “ideas” about marriage constitutes Colorado’s “very purpose” in seeking to apply its law to Ms. Smith.

We part ways with the Tenth Circuit only when it comes to the legal conclusions that follow. While that court thought Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents laid out above teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would “affec[t] the[ir] message.” In *Dale*, the Court held that New Jersey intruded on the Boy Scouts’ First Amendment rights when it tried to require the group to “propound a point of view contrary to its beliefs” by directing its membership choices. And in *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs. . . . Under our precedents, that “is enough,” more than enough, to represent an impermissible abridgment of the First Amendment’s right to speak freely.

Consider what a contrary approach would mean. Under Colorado’s logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer’s statutorily protected trait. Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require “an unwilling Muslim movie director to make a film with a Zionist message,” or “an atheist muralist to accept a commission celebrating Evangelical zeal,” so long as they would make films or murals for other members of the public with different messages. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. As our precedents recognize, the First Amendment tolerates none of that. . . .

#### IV

. . . Colorado devotes most of its efforts to advancing an alternative theory for affirmance.

The State’s alternative theory runs this way. To comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all. At bottom, Colorado’s theory rests on a belief that the Tenth Circuit erred at the outset when it said this case implicates pure speech. Instead, Colorado says, this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith’s speech is purely “incidental.” On the State’s telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument.

This alternative theory, however, is difficult to square with the parties’ stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but

intends to create “customized and tailored” speech for each couple. The State has stipulated that “[e]ach website 303 Creative designs and creates is an original, customized creation for each client.” The State has stipulated, too, that Ms. Smith’s wedding websites “will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple’s wedding and unique love story.” As the case comes to us, then, Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers.

Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is “the sole member-owner.” But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world’s great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the “protected characteristics” of certain customers. But once more, the parties’ stipulations speak differently. The parties agree that Ms. Smith “will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites” do not violate her beliefs. That is a condition, the parties acknowledge, Ms. Smith applies to “all customers.” Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor, in any event, do the First Amendment’s protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. *See FEC v. Wisconsin Right to Life, Inc.* (2007) (opinion of Roberts, C.J.) (observing that “a speaker’s motivation is entirely irrelevant”); *National Socialist Party of Am. v. Skokie* (1977) (*per curiam*) (upholding free-speech rights of participants in a Nazi parade); *Snyder v. Phelps* (2011) (same for protestors of a soldier’s funeral).

Failing all else, Colorado suggests that this Court’s decision in *FAIR* supports affirmance. In *FAIR*, a group of schools challenged a law requiring them, as a condition of accepting federal funds, to permit military recruiters space on campus on equal terms with other potential employers. The only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: “The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.” And, the Court reasoned, compelled speech of this sort was “incidental” and a “far cry” from the speech at issue in our “leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say.”

It is a far cry from this case too. To be sure, our cases have held that the government may sometimes “requir[e] the dissemination of purely factual and uncontroversial information,” particularly in the context of “commercial advertising.” *Hurley*; *see also NIFLA v. Becerra* (2018); *Riley v. National Federation of Blind of N.C., Inc.* (1988). But this case involves nothing like that. Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to “utter what is not in [her] mind” about a question of political and religious significance. *Barnette*. And that, *FAIR* reaffirmed, is something the First Amendment does not tolerate. No government, *FAIR* recognized, may affect a “speaker’s message” by “forc[ing]” her to “accommodate” other views; no government may “alter” the “expressive content” of her message; and no government may “interfer[e] with” her “desired message.” *Id.*

## V

... Instead of addressing the parties' stipulations about the case actually before us, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. But those cases are not *this* case. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow. . . .<sup>6</sup>

When it finally gets around to discussing these controlling precedents, the dissent offers a wholly unpersuasive attempt to distinguish them. The First Amendment protections furnished in *Barnette*, *Hurley*, and *Dale*, the dissent declares, were limited to schoolchildren and "nonprofit[s]," and it is "dispiriting" to think they might also apply to Ms. Smith's "commercial" activity. But our precedents endorse nothing like the limits the dissent would project on them. Instead, as we have seen, the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers). If anything is truly dispiriting here, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand. . . .

**Justice Sotomayor, with whom Justices Kagan and Jackson join, dissenting.**

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (2018). The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'"

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. . . .

A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." The business argues, and a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

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<sup>6</sup> The dissent observes that public accommodations laws may sometimes touch on speech incidentally as they work to ensure ordinary, non-expressive goods and services are sold on equal terms. But as *Hurley* observed, there is nothing "incidental" about an infringement on speech when a public accommodations law is applied "peculiar[ly]" to compel expressive activity. . . .

## I

[Justice Sotomayor began by discussing the purposes and history of public-accommodations laws, including ones barring discrimination based on sexual orientation. That discussion is omitted.]

## II

## ... B

The First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination. The First Amendment likewise does not exempt petitioners from the law's prohibition on posting a notice that they will deny goods or services based on sexual orientation.

## 1

This Court has long held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.* (2011). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) (FAIR). This principle explains "why an ordinance against outdoor fires might forbid burning a flag and why antitrust laws can prohibit agreements in restraint of trade." *Sorrell*.

Consider *United States v. O'Brien* (1968). In that case, the Court upheld the application of a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War. The protester's conduct was indisputably expressive. Indeed, it was political expression, which lies at the heart of the First Amendment. *Whitney v. California* (1927) (Brandeis, J., concurring). Yet the *O'Brien* Court focused on whether the Government's interest in regulating the conduct was to burden expression. Because it was not, the regulation was subject to lesser constitutional scrutiny. The *O'Brien* standard is satisfied if a regulation is unrelated to the suppression of expression and "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*.<sup>9</sup>

*FAIR* confronted the interaction between this principle and an equal-access law. . . . The law schools in *FAIR* claimed that the Solomon Amendment infringed the schools' First Amendment freedom of speech. The schools provided recruiting assistance in the form of emails, notices on bulletin boards, and flyers. As the Court acknowledged, those services "clearly involve speech." And the Solomon Amendment required "schools offering such services to other recruiters" to provide them equally "on behalf of the military," even if the school deeply objected to creating such speech. But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." Thus, any speech compulsion was "plainly incidental to the Solomon Amendment's regulation of conduct."

## 2

The same principle resolves this case. . . .

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<sup>9</sup> The majority commits a fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities. This would come as a great surprise to the *O'Brien* Court.

CADA's Accommodation Clause and its application here are valid regulations of conduct. It is well settled that a public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*. Rather, "the focal point of its prohibition" is "on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.* (emphasis added). The State confirms this reading of CADA. The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public.

Crucially, the law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," the company offers "such speech" to other customers. *FAIR*. Colorado does not require the company to "speak [the State's] preferred message." Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman. The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. *FAIR*; see *Hurley*.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks.) Finally, and most importantly, even if the company offers its goods or services to the public, it remains free under state law to decide what messages to include or not to include. To repeat (because it escapes the majority): The company can put whatever "harmful" or "low-value" speech it wants on its websites. It can "tell people what they do not want to hear." All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples. See *Runyon v. McCrary* (1976) (distinguishing between schools' ability to express their bigoted view "that racial segregation is desirable" and the schools' proscribable "*practice* of excluding racial minorities").

Another example might help to illustrate the point. A professional photographer is generally free to choose her subjects. She can make a living taking photos of flowers or celebrities. The State does not regulate that choice. If the photographer opens a portrait photography business to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever services the business chooses to offer. That is so even though portrait photography services are customized and expressive. If the business offers school photos, it may not deny those services to multiracial children because the owner does not want to create any speech indicating that interracial couples are acceptable. If the business offers corporate headshots, it may not deny those services to women because the owner believes a woman's place is in the home. And if the business offers passport photos, it may not deny those services to Mexican Americans because the owner opposes immigration from Mexico.

The same is true for sexual-orientation discrimination. If a photographer opens a photo booth outside of city hall and offers to sell newlywed photos captioned with the words "Just Married," she may not refuse to sell that service to a newlywed gay or lesbian couple, even if she believes the couple is not, in fact, just married because in her view their marriage is "false."

## 3

Because any burden on petitioners' speech is incidental to CADA's neutral regulation of commercial conduct, the regulation is subject to the standard set forth in *O'Brien*. That standard is easily satisfied here because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*. Indeed, this Court has already held that the State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*. The Court has also held that by prohibiting only "acts of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages," the law "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech . . . than is necessary to accomplish that purpose." *Id.* (emphasis added).

## C

The Court reaches the wrong answer in this case because it asks the wrong questions. The question is not whether the company's products include "elements of speech." *FAIR*. (They do.) The question is not even whether CADA would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer "such speech" to the public. *Id.* These questions do not resolve the First Amendment inquiry any more than they did in *FAIR*. Instead, the proper focus is on the character of state action and its relationship to expression. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct. *Id.*

The majority attempts to distinguish this clear holding of *FAIR* by suggesting that the compelled speech in *FAIR* was "incidental" because it was "logistical" (e.g., "The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."). This attempt fails twice over. First, the law schools in *FAIR* alleged that the Solomon Amendment required them to create and disseminate speech propagating the military's message, which they deeply objected to, and to include military speakers in on- and off-campus forums (if the schools provided equally favorable services to other recruiters). The majority simply skips over the Court's key reasoning for why any speech compulsion was nevertheless "incidental" to the Amendment's regulation of conduct: It would occur only "if, and to the extent," the regulated entity provided "such speech" to others. *Id.* Likewise in *O'Brien*, the reason the burden on O'Brien's expression was incidental was not because his message was factual or uncontroversial. O'Brien burned his draft card to send a political message, and the burden on his expression was substantial. Still, the burden was "incidental" because it was ancillary to a regulation that did not aim at expression.

Second, the majority completely ignores the categorical nature of the exemption claimed by petitioners. Petitioners maintain, as they have throughout this litigation, that they will refuse to create *any* wedding website for a same-sex couple. Even an announcement of the time and place of a wedding (similar to the majority's example from *FAIR*) abridges petitioners' freedom of speech, they claim, because "the announcement of the wedding itself is a concept that [Smith] believes to be false." Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse. That is status-based discrimination, plain and simple.

Oblivious to this fact, the majority insists that petitioners discriminate based on message, not status. The company, says the majority, will not sell same-sex wedding websites to anyone. It will sell only opposite-sex wedding websites; that is its service. Petitioners, however, "cannot define their



service as ‘opposite-sex wedding [websites]’ any more than a hotel can recast its services as ‘whites-only lodgings.’” *Telescope Media Group v. Lucero* (8th Cir. 2019) (opinion of Kelly, J.). To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell “passport photos for white people.”

The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing. I suppose the Heart of Atlanta Motel could have argued that Black people may still rent rooms for their white friends. Smith answers that she will sell other websites for gay or lesbian clients. But then she, like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu. This is plain to see, for all who do not look the other way.

The majority, however, analogizes this case to *Hurley* and *Boy Scouts of America v. Dale* (2000). The law schools in *FAIR* likewise relied on *Hurley* and *Dale* to argue that the Solomon Amendment violated their free-speech rights. *FAIR* confirmed, however, that a neutral regulation of conduct imposes an incidental burden on speech when the regulation grants a right of equal access that requires the regulated party to provide speech only if, and to the extent, it provides such speech for others.

*Hurley* and *Dale*, by contrast, involved “peculiar” applications of public accommodations laws, not to “the act of discriminating . . . in the provision of publicly available goods” by “clearly commercial entities,” but rather to private, nonprofit expressive associations in ways that directly burdened speech. *Hurley* (private parade); *Dale* (Boy Scouts). The Court in *Hurley* and *Dale* stressed that the speech burdens in those cases were not incidental to prohibitions on status-based discrimination because the associations did not assert that “mere acceptance of a member from a particular group would impair [the association’s] message.” *Dale*; see also *id.* (explaining that in *Hurley*, “the parade organizers did not wish to exclude the GLIB [Irish-American gay, lesbian, and bisexual group] members because of their sexual orientations, but because they wanted to march behind a GLIB banner”).

Here, the opposite is true. 303 Creative LLC is a “clearly commercial entit[y].” The company comes under the regulation of CADA only if it sells services to the public, and only if it denies the equal enjoyment of such services because of sexual orientation. The State confirms that the company is free to include or not to include any message in whatever services it chooses to offer. And the company confirms that it plans to engage in status-based discrimination. Therefore, any burden on the company’s expression is incidental to the State’s content-neutral regulation of commercial conduct. . . .

So it is dispiriting to read the majority suggest that this case resembles *West Virginia Bd. of Educ. v. Barnette* (1943). A content-neutral equal-access policy is “a far cry” from a mandate to “endorse” a pledge chosen by the Government. *FAIR*. This Court has said “it trivializes the freedom protected in *Barnette*” to equate the two. Requiring Smith’s company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government’s message. It does not “invas[e]” her “sphere of intellect” or violate her constitutional “right to differ.” All it does is require her to stick to her bargain: “The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; to do so is to offer the public marked money. It is to convey the promise of a free and open society and then take the prize away from the despised few.” J. Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, B. U. L. Rev. (2015).

## III

Today is a sad day in American constitutional law and in the lives of LGBT people. The Supreme Court of the United States declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class. The Court does so for the first time in its history. By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: “Some services may be denied to same-sex couples.” . . .

Although the consequences of today’s decision might be most pressing for the LGBT community, the decision’s logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because “Almighty God . . . did not intend for the races to mix.” *Loving v. Virginia* (1967). Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for “traditional” families. And so on. . . .

The unattractive lesson of the majority opinion is this: What’s mine is mine, and what’s yours is yours. The lesson of the history of public accommodations laws is altogether different. It is that in a free and democratic society, there can be no social castes. And for that to be true, it must be true in the public market. For the “promise of freedom” is an empty one if the Government is “powerless to assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother].” *Jones v. Alfred H. Mayer Co.* (1968). Because the Court today retreats from that promise, I dissent.

### Notes and Questions

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1. The majority and dissenting opinions seem to agree that Lori Smith’s speech claim falls within the *scope* of the First Amendment. Why? Do you agree? And how do the Justices disagree about the *strength* analysis? How does Justice Gorsuch’s majority opinion conceptualize the First Amendment right against compelled speech? What are the steps of his analysis? And how does Justice Sotomayor’s dissenting opinion conceptualize the First Amendment right against compelled speech? What are the steps of her analysis?

2. All of the justices in *303 Creative* seem to agree that Colorado may bar discrimination based on *status*, but they disagreed about how to apply that principle. According to Justice Gorsuch, Lori Smith did not plan to discriminate against gay *people*. After all, she would create non-wedding websites for gay customers. According to Justice Sotomayor, however, the *status/conduct* distinction is illusory in this context. Because the relevant *conduct* is definitionally tied to *status* (namely, the sex and sexual orientation of the couple), conduct and status cannot be neatly separated. Notice that Colorado law took Justice Sotomayor’s side. But the key question in *303 Creative* was whether the First Amendment bars that choice.

3. Which opinion is more faithful to the Court’s earlier decisions in *Hurley*, *Dale*, and *FAIR*? How does Justice Sotomayor distinguish *Hurley* and *Dale*? Is her reasoning persuasive? And how does Justice Gorsuch distinguish *FAIR*?

4. Should there be a constitutionally salient difference between a statute requiring a *private person* to create a website promoting a same-sex couple's wedding and a statute requiring a *business open to the public* to create a website promoting a same-sex couple's wedding? Why or why not?

5. Would the Court's holding in *303 Creative* allow a website designer to refuse service to an interracial couple based on the website designer's opposition to interracial marriage? Why or why not? How might you try to distinguish the two cases?

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## 5.4. Government Property and Associational Rights

*Rumsfeld v. FAIR* (2006) involved the intersection between associational rights and limits on the use of public resources. But in that case, the Court resolved the dispute by holding that the government could have imposed the obligation directly, rather than as a condition on the receipt of public benefits.

Four years later, the Court once again considered associational rights and a denial of public benefits in *Christian Legal Society Chapter v. Martinez* (2010). The case arose when a public law school, the University of California Hastings College of Law, refused to recognize a student chapter of the Christian Legal Society because that group did not comply with its "all comers" nondiscrimination policy.\* CLS bylaws required that its members and leaders agree to a "Statement of Faith," which proclaimed Christian beliefs and effectively excluded anyone engaged in "unrepentant homosexual conduct." CLS alleged that their rejection, depriving them of otherwise available benefits (activity funds, access to bulletin boards, etc.), violated the First Amendment. The majority framed the question presented as follows: "May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?"

In support of its argument, CLS cited two lines of precedent. First, it argued that the government had created a public forum and therefore could not discriminate on the basis of viewpoint within the forum. Second, it argued that the burdens placed on CLS's membership policies violated its right of expressive association. As you read the case, pay attention to how the Court addressed these two issues.

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### Christian Legal Society Chapter v. Martinez (2010)

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

In a series of decisions, this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints. *See Rosenberger v. Rector & Visitors of Univ. of Va.* (1995); *Widmar v. Vincent* (1981); *Healy v. James* (1972). This case concerns a novel question regarding student activities at public universities: May a public law school condition its official recognition of a student group—

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\* Although the parties disputed the contents of the law school's policy, the Court accepted the parties' earlier stipulation that "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization."

and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students?

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization’s core beliefs about religion and sexual orientation. . . .

[W]e reject CLS’s First Amendment challenge. Compliance with Hastings’ all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings’ policy. The First Amendment shields CLS against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

## I

. . . Through its “Registered Student Organization” (RSO) program, Hastings extends official recognition to student groups. Several benefits attend this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students . . . . In addition, RSOs may apply for permission to use the Law School’s facilities for meetings and office space. . . .

In exchange for these benefits, RSOs must abide by certain conditions. Only a “non-commercial organization whose membership is limited to Hastings students may become [an RSO].” A prospective RSO must submit its bylaws to Hastings for approval; and if it intends to use the Law School’s name or logo, it must sign a license agreement. Critical here, all RSOs must undertake to comply with Hastings’ “Policies and Regulations Applying to College Activities, Organizations and Students.”

The Law School’s Policy on Nondiscrimination (Nondiscrimination Policy), which binds RSOs, states:

[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings’] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers: School-approved groups must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.” . . .

In 2004, [a group of Christian students at Hastings began] affiliating with the national Christian Legal Society (CLS-National). CLS-National, an association of Christian lawyers and law students, charters student chapters at law schools throughout the country. CLS chapters must adopt bylaws that, *inter alia*, require members and officers to sign a “Statement of Faith” and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from

affiliation anyone who engages in “unrepentant homosexual conduct.” CLS also excludes students who hold religious convictions different from those in the Statement of Faith.

On September 17, 2004, CLS submitted to Hastings an application for RSO status, accompanied by all required documents, including the set of bylaws mandated by CLS-National. Several days later, the Law School rejected the application; CLS’s bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation. . . .

If CLS instead chose to operate outside the RSO program, Hastings stated, the school “would be pleased to provide [CLS] the use of Hastings facilities for its meetings and activities.” CLS would also have access to chalkboards and generally available campus bulletin boards to announce its events. In other words, Hastings would do nothing to suppress CLS’s endeavors, but neither would it lend RSO-level support for them. . . .

On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings’ refusal to grant the organization RSO status violated CLS’s First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. . . .

## II

Before considering the merits of CLS’s constitutional arguments, we must resolve a preliminary issue: CLS urges us to review the Nondiscrimination Policy as written—prohibiting discrimination on several enumerated bases, including religion and sexual orientation—and not as a requirement that all RSOs accept all comers. The written terms of the Nondiscrimination Policy, CLS contends, “target[t] solely those groups whose beliefs are based on religion or that disapprove of a particular kind of sexual behavior,” and leave other associations free to limit membership and leadership to individuals committed to the group’s ideology. For example, “[a] political . . . group can insist that its leaders support its purposes and beliefs,” CLS alleges, but “a religious group cannot.”

CLS’s assertion runs headlong into the stipulation of facts it jointly submitted with Hastings at the summary-judgment stage. In that filing, the parties specified:

Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization. . . .

In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement . . . . We reject CLS’s unseemly attempt to escape from the stipulation and shift its target to Hastings’ policy as written. This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.<sup>10</sup>

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<sup>10</sup> The dissent, in contrast, devotes considerable attention to CLS’s arguments about the Nondiscrimination Policy as written. We decline to address these arguments, not because we agree with the dissent that the Nondiscrimination Policy is “plainly” unconstitutional, but because, as noted, that constitutional question is not properly presented.

## III

## A

In support of the argument that Hastings' all-comers policy treads on its First Amendment rights to free speech and expressive association, CLS draws on two lines of decisions. First, in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985), the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral, *e.g.*, *Rosenberger*.

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced "through . . . significantly less restrictive [means]." *Roberts v. United States Jaycees* (1984); *see also, e.g., Boy Scouts of Am. v. Dale* (2000). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." *Roberts*. Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights." *Dale*.

CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. It therefore makes little sense to treat CLS's speech and association claims as discrete. Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.

First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums. As just noted, speech and expressive-association rights are closely linked. When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association. That result would be all the more anomalous in this case, for CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role.

Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may "reserv[e] [them] for certain groups." *Rosenberger*; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) ("Implicit in the concept" of a limited public forum is the State's "right to make distinctions in access on the basis of . . . speaker identity."); *Cornelius* ("[A] speaker may be excluded from" a limited public forum "if he is not a member of the class of speakers for whose especial benefit the forum was created.").

An example sharpens the tip of this point: Schools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents. *See, e.g., Eugene Volokh, Freedom of Expressive Association and Government Subsidies*, Stan. L. Rev. (2006). The same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to "confi[n]e a [speech] forum to the limited and legitimate purposes for which it was created." *Rosenberger*.

Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. *See, e.g., Dale* (regulation “forc[ed] [the Boy Scouts] to accept members it [did] not desire”); *Roberts* (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than” forced inclusion of unwelcome participants).<sup>14</sup>

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. *See, e.g., Grove City College v. Bell* (1984); *Bob Jones Univ. v. United States* (1983). Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition. *Cf. Norwood v. Harrison* (1973) (“That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.”).

In sum, we are persuaded that our limited-public-forum precedents adequately respect both CLS’s speech and expressive-association rights, and fairly balance those rights against Hastings’ interests as property owner and educational institution. We turn to the merits of the instant dispute, therefore, with the limited-public-forum decisions as our guide.

## B

As earlier pointed out, we do not write on a blank slate; we have three times before considered clashes between public universities and student groups seeking official recognition or its attendant benefits [in *Healy v. James* (1972), *Widmar v. Vincent* (1981), and *Rosenberger v. Rector & Visitors of Univ. of Va.* (1995)]. . . .

In all three cases, we ruled that student groups had been unconstitutionally singled out because of their points of view. “Once it has opened a limited [public] forum,” we emphasized, “the State must respect the lawful boundaries it has itself set.” The constitutional constraints on the boundaries the State may set bear repetition here: “The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.”

## C

We first consider whether Hastings’ policy is reasonable taking into account the RSO forum’s function and “all the surrounding circumstances.” *Cornelius*.

### 1

Our inquiry is shaped by the educational context in which it arises: “First Amendment rights,” we have observed, “must be analyzed in light of the special characteristics of the school environment.”

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<sup>14</sup> CLS also brackets with expressive-association precedents our decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.* (1995). There, a veterans group sponsoring a St. Patrick’s Day parade challenged a state law requiring it to allow gay individuals to march in the parade behind a banner celebrating their Irish heritage and sexual orientation. In evaluating that challenge, the *Hurley* Court focused on the veterans group’s interest in controlling the message conveyed by the organization. Whether *Hurley* is best conceptualized as a speech or association case (or both), however, that precedent is of little help to CLS. *Hurley* involved the application of a statewide public-accommodations law to the most traditional of public forums: the street. That context differs markedly from the limited public forum at issue here: a university’s application of an all-comers policy to its student-organization program.

*Widmar*. This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist “substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.” *Bd. of Educ. v. Rowley* (1982). . . .

Schools, we have emphasized, enjoy “a significant measure of authority over the type of officially recognized activities in which their students participate.” *Bd. of Educ. v. Mergens* (1990). We therefore “approach our task with special caution,” *Healy*, mindful that Hastings’ decisions about the character of its student-group program are due decent respect.

## 2

With appropriate regard for school administrators’ judgment, we review the justifications Hastings offers in defense of its all-comers requirement. First, the open-access policy “ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students.” Just as “Hastings does not allow its professors to host classes open only to those students with a certain status or belief,” so the Law School may decide, reasonably in our view, “that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students.” Brief for Hastings. RSOs, we count it significant, are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO’s motivation for membership restrictions. To bring the RSO program within CLS’s view of the Constitution’s limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?

This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” Our decisions have declined to distinguish between status and conduct in this context. *See Lawrence v. Texas* (2003) (“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.” (emphasis added)); *id.* (O’Connor, J., concurring in judgment) (“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, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, “encourages tolerance, cooperation, and learning among students.” And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.

Fourth, Hastings’ policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School’s decision “to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.” Brief for Hastings. State law, of course,



may not *command* that public universities take action impermissible under the First Amendment. But so long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.

In sum, the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes.

### 3

The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Educ. Ass'n*. If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers. . . .

### 4

CLS nevertheless deems Hastings' all-comers policy "frankly absurd." "There can be no diversity of viewpoints in a forum," it asserts, "if groups are not permitted to form around viewpoints." This catchphrase confuses CLS's preferred policy with constitutional limitation—the *advisability* of Hastings' policy does not control its *permissibility*. Instead, we have repeatedly stressed that a State's restriction on access to a limited public forum "need not be the most reasonable or the only reasonable limitation." *Cornelius*.

CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO hijackings at Hastings. Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. . . .

A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation. If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

Finally, CLS asserts (and the dissent repeats) that the Law School lacks any legitimate interest—let alone one reasonably related to the RSO forum's purposes—in urging "religious groups not to favor co-religionists for purposes of their religious activities." CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.

## D

We next consider whether Hastings' all-comers policy is viewpoint neutral.

## 1

Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, as earlier recounted, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

## 2

Conceding that Hastings' all-comers policy is "nominally neutral," CLS attacks the regulation by pointing to its effect: The policy is vulnerable to constitutional assault, CLS contends, because "it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream." This argument stumbles from its first step because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism* (1989).

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul* (1992); *see also Roberts* (State's non-discrimination law did not "distinguish between prohibited and permitted activity on the basis of viewpoint.").

Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." *Ward*. The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [allcomers condition] over and above mere disagreement with [any student group's] beliefs or biases." *Wisconsin v. Mitchell* (1993). CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status. "In the end," as Hastings observes, "CLS is simply confusing its *own* viewpoint-based objections to . . . nondiscrimination laws (which it is entitled to have and [to] voice) with viewpoint *discrimination*."

Finding Hastings' open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS's free-speech and expressive-association claims.<sup>27</sup> . . .

**Justice Alito, with whom the Chief Justice and Justices Scalia and Thomas join, dissenting.**

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States v. Schwimmer* (1929) (Holmes, J., dissenting). Today's decision

<sup>27</sup> CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.

rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

The Hastings College of the Law, a state institution, permits student organizations to register with the law school and severely burdens speech by unregistered groups. Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS). CLS claims that Hastings refused to register the group because the law school administration disapproves of the group's viewpoint and thus violated the group's free speech rights.

Rejecting this argument, the Court finds that it has been Hastings' policy for 20 years that all registered organizations must admit *any* student who wishes to join. Deferring broadly to the law school's judgment about the permissible limits of student debate, the Court concludes that this "accept-all-comers" policy is both viewpoint neutral and consistent with Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups.

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups—groups to which, as Hastings candidly puts it, these institutions "do not wish to . . . lend their name[s]."

## I

. . . The Court bases all of its analysis on the proposition that the relevant Hastings' policy is the so-called accept-all-comers policy. This frees the Court from the difficult task of defending the constitutionality of either the policy that Hastings actually—and repeatedly—invoked when it denied registration, *i.e.*, the school's written Nondiscrimination Policy, or the policy that Hastings belatedly unveiled when it filed its brief in this Court. Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began. [*Justice Alito's further discussion of this topic is omitted.*] . . .

Finally, I must comment on the majority's emphasis on funding. According to the majority, CLS is "seeking what is effectively a state subsidy," and the question presented in this case centers on the "use of school funds." In fact, funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. As CLS notes: "To university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen."

## II

To appreciate how far the Court has strayed, it is instructive to compare this case with *Healy v. James* (1972), our only First Amendment precedent involving a public college's refusal to recognize a student group. The group in *Healy* was a local chapter of the Students for a Democratic Society (SDS). When the students who applied for recognition of the chapter were asked by a college committee whether they would "respond to issues of violence as other S.D.S. chapters have," their

answer was that their “action would have to be dependent upon each issue.” They similarly refused to provide a definitive answer when asked whether they would be willing to “use any means possible” to achieve their aims. The president of the college refused to allow the group to be recognized, concluding that the philosophy of the SDS was “antithetical to the school’s policies” and that it was doubtful that the local chapter was independent of the national organization, the “published aims and philosophy” of which included “disruption and violence.”

The effects of nonrecognition in *Healy* were largely the same as those present here. The SDS was denied the use of campus facilities, as well as access to the customary means used for communication among the members of the college community. . . .

This Court . . . held that the denial of recognition substantially burdened the students’ right to freedom of association. . . .

Unlike the Court today, the *Healy* Court emphatically rejected the proposition that “First Amendment protections should apply with less force on college campuses than in the community at large.” And on one key question after another—whether the local SDS chapter was independent of the national organization, whether the group posed a substantial threat of material disruption, and whether the students’ responses to the committee’s questions about violence and disruption signified a willingness to engage in such activities—the Court drew its own conclusions, which differed from the college president’s. . . .<sup>2</sup>

[Justice Alito then assessed the constitutionality of Hastings’ written non-discrimination policy. That discussion is omitted.]

## VI

I come now to the version of Hastings’ policy that the Court has chosen to address. . . . [I]t is clear that the accept-all-comers policy is not reasonable in light of the purpose of the RSO forum, and it is impossible to say on the present record that it is viewpoint neutral.

## A

Once a state university opens a limited forum, it “must respect the lawful boundaries it has itself set.” *Rosenberger*. Hastings’ regulations on the registration of student groups impose only two substantive limitations: A group seeking registration must have student members and must be non-commercial. Access to the forum is not limited to groups devoted to particular purposes. . . .

The regulations also make it clear that the registration program is not meant to stifle unpopular speech. They proclaim that “[i]t is the responsibility of the Dean to ensure an ongoing opportunity for the expression of a variety of viewpoints.” They also emphatically disclaim any endorsement of or responsibility for views that student groups may express.

Taken as a whole, the regulations plainly contemplate the creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus. . . .

The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if

<sup>2</sup> The Court attempts to distinguish *Healy* on the ground that there the college “explicitly denied the student group official recognition *because of* the group’s viewpoint.” The same, however, is true here. CLS was denied recognition under the Nondiscrimination Policy because of the viewpoint that CLS sought to express through its membership requirements. And there is strong evidence that Hastings abruptly shifted from the Nondiscrimination Policy to the accept-all-comers policy as a pretext for viewpoint discrimination.

applied off campus. . . . [A] group's First Amendment right of expressive association is burdened by the "forced inclusion" of members whose presence would "affect[t] in a significant way the group's ability to advocate public or private viewpoints." *Dale*. The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (quoting *Roberts*).

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints. The Court lists four justifications offered by Hastings in defense of the accept-all-comers policy and, deferring to the school's judgment, the Court finds all those justifications satisfactory. If we carry out our responsibility to exercise our own independent judgment, however, we must conclude that the justifications offered by Hastings and accepted by the Court are insufficient.

The Court first says that the accept-all-comers policy is reasonable because it helps Hastings to ensure that "leadership, educational, and social opportunities" are afforded to all students. The RSO forum, however, is designed to achieve these laudable ends in a very different way—by permitting groups of students, no matter how small, to form the groups they want. In this way, the forum multiplies the opportunity for students to serve in leadership positions; it allows students to decide which educational opportunities they wish to pursue through participation in extracurricular activities; and it permits them to create the "social opportunities" they desire by forming whatever groups they wish to create. . . .

Second, the Court approves the accept-all-comers policy because it is easier to enforce than the Nondiscrimination Policy that it replaced. . . .

This is a strange argument, since the Nondiscrimination Policy prohibits discrimination on substantially the same grounds as the antidiscrimination provisions of many States, including California, and except for the inclusion of the prohibition of discrimination based on sexual orientation, the Nondiscrimination Policy also largely tracks federal antidiscrimination laws. Moreover, Hastings now willingly accepts greater burdens under its latest policy, which apparently requires the school to distinguish between certain "conduct requirements" that are allowed and others that are not. . . .

Third, the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that Hastings endorses. Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and

advances democratic consensus-building,” not by abridging First Amendment rights. Brief for Gays and Lesbians for Individual Liberty as *Amicus Curiae*.

Fourth, the Court observes that Hastings’ policy “incorporates—in fact, subsumes—state-law proscriptions on discrimination.” Because the First Amendment obviously takes precedence over any state law, this would not justify the Hastings policy even if it were true—but it is not. The only Hastings policy considered by the Court—the accept-all-comers policy—goes far beyond any California antidiscrimination law. Neither Hastings nor the Court claims that California law demands that state entities must accept all comers. Hastings itself certainly does not follow this policy in hiring or student admissions. . . .

In sum, Hastings’ accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints “among”—not within—“registered student organizations.”<sup>9</sup>

## B

The Court is also wrong in holding that the accept-all-comers policy is viewpoint neutral. The Court proclaims that it would be “hard to imagine a more viewpoint-neutral policy,” but I would not be so quick to jump to this conclusion. Even if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext.

The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination. See *Crawford v. Bd. of Educ. of Los Angeles* (1982) (“[A] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose”). A simple example illustrates this obvious point. Suppose that a hated student group at a state university has never been able to attract more than 10 members. Suppose that the university administration, for the purpose of preventing that group from using the school grounds for meetings, adopts a new rule under which the use of its facilities is restricted to groups with more than 25 members. Although this rule would be neutral on its face, its adoption for a discriminatory reason would be illegal.

Here, CLS has made a strong showing that Hastings’ sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school’s unlawful denial of CLS’s registration application under the Nondiscrimination Policy. . . .

The timing of Hastings’ revelation of its new policies closely tracks the law school’s litigation posture. When Hastings denied CLS registration, it cited only the Nondiscrimination Policy. Later, after CLS alleged that the Nondiscrimination Policy discriminated against religious groups, Hastings unveiled its accept-all-comers policy. Then, after we granted certiorari and CLS’s opening brief challenged the constitutionality—and the plausibility—of the accept-all-comers policy, Hastings disclosed a new policy. As is true in the employment context, “[w]hen the justification for an adverse . . . action changes during litigation, that inconsistency raises an issue whether the proffered reason truly motivated the defendant’s decision.” . . .

Since it appears that no one was told about the accept-all-comers policy before July 2005, it is not surprising that the policy was not enforced. The record is replete with evidence that Hastings made no effort to enforce the all-comers policy until after it was proclaimed by the former dean. If the record here is not sufficient to permit a finding of pretext, then the law of pretext is dead. . . .

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<sup>9</sup> Although we have held that the sponsor of a limited public forum “must respect the lawful boundaries it has itself set,” *Rosenberger*, the Court now says that, if the exclusion of a group is challenged, the sponsor can retroactively redraw the boundary lines in order to justify the exclusion. This approach does not respect our prior holding.

## C

One final aspect of the Court's decision warrants comment. In response to the argument that the accept-all-comers-policy would permit a small and unpopular group to be taken over by students who wish to silence its message, the Court states that the policy would permit a registered group to impose membership requirements "designed to ensure that students join because of their commitment to a group's vitality, not its demise." With this concession, the Court tacitly recognizes that Hastings does not really have an accept-all-comers policy—it has an accept-some-dissident-comers policy—and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's "demise" (who may be kept out) is hopelessly vague.

Here is an example. Not all Christian denominations agree with CLS's views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was "vital" but rectified, while CLS, I assume, would take the view that the old group had suffered its "demise." Whether a change represents reform or transformation may depend very much on the eye of the beholder. . . .

In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely would not eliminate this threat.

The possibility of such takeovers, however, is by no means the most important effect of the Court's holding. There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. This is where the Court's decision leads.

\* \* \*

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. Our First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen." *New York Times Co. v. Sullivan* (1964). Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction. Even those who find CLS's views objectionable should be concerned about the way the group has been treated—by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.

**[The concurring opinions of Justices Stevens and Kennedy are omitted.]**

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### Notes and Questions

1. Could the government have imposed the condition as a direct restriction on associational leadership? Why or why not? What difference did it make that the case involved a restriction of access to public resources?

2. How did the Court assess the freedom-of-association claim? What are the best arguments for and against its approach?
  3. What arguments did Justice Ginsburg and Justice Alito make about the reasonability and viewpoint-neutrality of the “all comers” policy? Who had the stronger argument? Why?
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## 6. Freedom of Religion

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. Const., Amdt. I.

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### 6.1. Free Exercise: Accommodations

The first topic regarding free exercise is an issue that has reappeared countless times in American history: Does the Free Exercise Clause require the government to accommodate individuals when their religious views conflict with the law? For instance, if the government instituted a military draft, would it have to exempt individuals who object, for religious reasons, to bearing arms? As we will see, the Supreme Court has vacillated in how it has approached this issue.

#### The Era of Preferred Freedoms

Just as the Supreme Court was beginning to revolutionize rights jurisprudence, the justices rejected the idea that *incidental* restrictions of religiously motivated conduct should trigger heightened judicial scrutiny. In *Minersville School District v. Gobitis* (1940), Justice Frankfurter explained for the eight-justice majority:

The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. 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.

In the ensuing years, however, Justices Black, Douglas, and Murphy had a change of heart and joined the lone *Gobitis* dissenter, Justice Stone (who became Chief Justice in 1941), who thought that the First Amendment applied not only to *targeted* restrictions of religious exercise and speech but also to *incidental* restrictions.

For the next two decades, a group of justices (generally led by Black and Douglas) virulently asserted a right against targeted *and* incidental restrictions of speech and religious exercise. These Justices often prevailed in the 1940s. Another group, generally led by Justices Frankfurter and Jackson, took a different approach. In their view, wholly incidental restrictions of speech and religious exercise should not trigger any elevated judicial scrutiny. This group sometimes prevailed in the 1940s and then consistently did so in the 1950s. *See, e.g., Am. Comm. Ass’n v. Douds* (1950).

But after Justice Frankfurter resigned in 1962, First Amendment doctrine quickly began to change. In *Sherbert v. Verner* (1963), the Supreme Court held that South Carolina could not refuse Adell Sherbert unemployment insurance because of her refusal to work on Saturday, which she as a Seventh-Day Adventist considered to be the Sabbath (a weekly day of religious observance and rest).

Even “indirect” restrictions, the Court explained in *Sherbert*, could impose a burden on the free exercise of religion. Writing for the majority, Justice Brennan noted that the effect of incidental restrictions on religious adherents was profound. “The [state’s rule] 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.” Consequently, Brennan explained, the application of the eligibility rule to *Sherbert* required the state to satisfy a heightened level of judicial review that came to be known as strict scrutiny.

In his opinion, Justice Brennan emphasized that this result did not advance religion. Rather, “the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences.” Was Justice Brennan right? How could the application of a *neutral* rule—one that made no reference to religion—violate the government’s obligation of neutrality?

Justice Harlan—who had often aligned with Justice Frankfurter—dissented in *Sherbert*. He framed the case differently:

The fact that [Sherbert’s] personal considerations sprang from her religious convictions was wholly without relevance to the state court’s application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits because she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not “available for work” for personal reasons. . . .

With this background, this Court’s decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant’s availability for work, it is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions.

In *Sherbert*, the Court suggested that the Free Exercise Clause might not protect *criminal* religiously motivated conduct, noting that *Sherbert*’s “objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.” But the Court did not follow through on this suggestion. In *Wisconsin v. Yoder* (1972), the Court held that states had to exempt Amish students from a *criminal* high-school-attendance law in light of parents’ religious objections. Writing for the majority, Chief Justice Burger summarized the doctrine as follows:

[I]n 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. . . . [O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. *E.g., Sherbert.*

Notice that this passage addressed the *scope* and *strength* of free-exercise rights. In terms of scope, the right applied to targeted and incidental restrictions of *sincere, religiously motivated* conduct. As Burger put it, “to have the protection of the Religion Clauses, the claims must be rooted in religious belief.” This limit was crucial, he observed, because “the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.” And in terms of strength, this passage highlights the applicability of *strict scrutiny*. In contrast to speech doctrine under *O’Brien*, the justices in *Yoder* did not distinguish between targeted

and incidental restrictions when determining the proper level of scrutiny. As Burger put it later in the opinion, “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,” citing *Sherbert v. Verner* (1963).

From 1963 to 1990, *Sherbert* and *Yoder* set out the general doctrinal framework in Free Exercise Clause cases, unless the government was controlling the administration of its own land (against religious objections by Native Americans who viewed the land as sacred) or controlling its own administrative processes (against religious objections by Native Americans who objected to disclosure of a child’s Social Security Number).

In the same period, however, *Sherbert* and *Yoder* were the only decisions in which the Supreme Court ruled in favor of religious claimants. In case after case, the Court applied strict scrutiny but ruled in favor of the government.

The justices reconsidered the basic framework for free-exercise rights in the next case, *Employment Division v. Smith* (1990). How did *Smith* modify the scope of free-exercise rights? What might explain that change?

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## Employment Division v. Smith (1990)

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### **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.

### I

Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. . . . [Among these “controlled substances” is] 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” [namely, criminal drug use]. . . . [After a very complicated procedural history, the Supreme Court granted certiorari to decide whether the Free Exercise Clause provided the respondents with a right of religious exemption from the Oregon criminal statute.]

### II

#### A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell v. Connecticut* (1940), 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.” *Sherbert v. Verner* (1963). 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 *Minersville School District Board of Education v. Gobitis* (1940): “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).” *United States v. Lee* (1982) (Stevens, J., concurring in judgment). . . . 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* (1940) (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); *Follett v. McCormick* (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters* (1925), to direct the education of their children, *see Wisconsin v. Yoder* (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). . . . [This] case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. . . .

## B

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* (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. . . . 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. In *Bowen v. Roy* (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute’s application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. In *Lyng v. Northwest Indian Cemetery Protective Association* (1988), we declined to apply *Sherbert* analysis to the Government’s logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities “could have devastating effects on traditional Indian religious practices.” . . .

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. . . . [O]ur 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. *Bowen v. Roy* (1986). . . .

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] 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.” *Lyng*. 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,” *Reynolds v. United States* (1879), contradicts both constitutional tradition and common sense.<sup>2</sup>

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.<sup>3</sup>

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. *Cf. Lyng* (Brennan, J., dissenting). 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. . . . 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.” *Hernandez v. Commissioner* (1989). 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,” *Braunfeld*, 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

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<sup>2</sup> Justice O’Connor seeks to distinguish *Lyng* and *Bowen* on the ground that those cases involved the government’s conduct of “its own internal affairs,” which is different because, as Justice Douglas said in *Sherbert*, “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” But since Justice Douglas voted with the majority in *Sherbert*, that quote obviously envisioned that what “the government cannot do to the individual” includes not just the prohibition of an individual’s freedom of action through criminal laws but also the running of its programs (in *Sherbert*, state unemployment compensation) in such fashion as to harm the individual’s religious interests. Moreover, it is hard to see any reason in principle or practically why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, or its administration of welfare programs, *Roy*.

<sup>3</sup> Justice O’Connor suggests that “[t]here is nothing talismanic about neutral laws of general applicability,” and that all laws burdening religious practices should be subject to compelling-interest scrutiny because “the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a ‘constitutional nor[m],’ not an ‘anomaly.’” But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore v. Sidoti* (1984), or on the content of speech, see *Sable Commc’ns of Cal. v. FCC* (1989), so too we strictly scrutinize governmental classifications based on religion, see *McDaniel v. Paty* (1978); see also *Torcaso v. Watkins* (1961). But we have held that race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis* (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publ’g Co. v. United States* (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . . The First Amendment’s protection of religious liberty does not require this.<sup>5</sup>

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 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 Justices Brennan, Marshall, and 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. . . .

## II

The Court today extracts from our long history of free exercise precedents the single categorical rule that “if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

## A

. . . “[B]elief and action cannot be neatly confined in logic-tight compartments.” *Wisconsin v. Yoder* (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, 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

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<sup>5</sup> Justice O’Connor contends that the “parade of horrors” in the text only “demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests.” But the cases we cite have struck “sensible balances” only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O’Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the “severe impact” of various laws on religious practice . . . or the “constitutiona[l] significan[ce]” of the “burden on the specific plaintiffs” . . . suffices to permit us to confer an exemption. It is a parade of horrors because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

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. . . . 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.” *Yoder*. . . .

The Court attempts to support its narrow reading of the Clause by claiming that “[w]e 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.” But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts . . . .

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them “hybrid” decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. . . . That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

## B

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. . . . 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. . . . A State that makes criminal an individual’s religiously motivated conduct burdens that individual’s free exercise of religion in the severest manner possible, for it “results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.” *Braunfeld v. Brown* (1961). I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. . . . A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit. . . .

Moreover, we have not “rejected” or “declined to apply” the compelling interest test in our recent cases. . . . In both *Bowen v. Roy* (1986) and *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not “require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” *Bowen*. This distinction makes sense because “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” *Sherbert v. Verner* (1963) (Douglas, J., concurring). Because [this case] . . . plainly falls into the former category, I would apply [*Sherbert*] to the facts of this case. . . .

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 nor[m],” not an “anomaly.” . . . 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. *See, e.g., United States v. O’Brien* (1968). 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. . . . The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. . . .

### III

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 . . . 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. . . .

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." *United States v. Lee* (1982). . . . Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *id.*, 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. . . .

#### **Justice Blackmun, with whom Justices Brennan and Marshall join, dissenting.**

. . . I agree with Justice O'Connor's analysis of the applicable free exercise doctrine. . . . I do disagree, however, with her specific answer to [whether the petitioners should prevail]. . . .

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. . . .

[T]his 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. . . . 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. . . .

Moreover, just as in *Yoder*, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. . . . Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

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. . . .

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. . . .

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. . . .

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### Notes and Questions

1. *Sherbert*, *Yoder*, and *Smith* highlight a conceptual distinction between *beliefs* and *acts*. All three cases are about constitutional protection for religiously inspired action. In none of the three cases was the government punishing individuals merely for what they believed.

But it is worth highlighting the constitutional protection for religious belief. In *Yoder*, the majority opinion noted that “Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State’s control.” Indeed, the Supreme Court has emphasized time and again that a person’s thoughts on *any topic*—not just their *religious* beliefs—are absolutely immune from any direct governmental restriction under the First Amendment. The freedom of thought stands as an *absolute* barrier to direct governmental regulation of what people think, no matter how important the countervailing interest may be.

Yet this absolute protection does not apply when the government regulates belief-inspired *conduct* (the subject of *Sherbert*, *Yoder*, and *Smith*), nor does it apply when the government bans conduct undertaken because of a particular *motive*. Under current doctrine, for example, the government may ban discriminatory employment decisions based on an employee’s race, sex, religion, etc., including when those decisions stem from a particular set of thoughts or beliefs. See *Hishon v. King & Spalding* (1984). Another example is “hate crimes” inspired by the race, sex, religion, etc., of the victim. Although “a defendant’s abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge,” the defendant’s *motives* for committing the crime can be an aggravating factor, and judges can introduce as evidence what the defendant has previously said to establish that motive. See *Wisconsin v. Mitchell* (1993). Both *Hishon* and *Mitchell* were unanimous decisions.

2. But let’s return to religious accommodations. How did Justice Scalia distinguish *Sherbert* and *Yoder*? (Notice that he distinguishes them in different ways.) Were his arguments persuasive? What about Justice O’Connor’s effort to distinguish *Lyng* and *Bowen*? (Justice Scalia’s response appears in footnote 2.)

3. Take another look at the paragraph on page 537 (beginning with “The Court today”) from Justice O’Connor’s opinion in *Smith* (recall that Justice O’Connor was concurring only in the outcome—the *judgment*—not the majority’s reasoning) and then consider the reply in footnote 3 (on page 534) of Justice Scalia’s majority opinion. Who has the better argument?

4. After *Smith*, individual religious accommodation claims were limited to various state and federal *statutory* regimes (or *state* constitutional provisions). The most prominent of those is the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. § 2000bb—1, which provides:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it 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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Congress explained in the statute that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” and that “in *Employment Division v. Smith* (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,” and “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.”

By its original terms, RFRA applied to all levels of government—federal, state, and local. But in *City of Boerne v. Flores* (1997), the Supreme Court held that Congress lacks power to apply RFRA to state and local governments. Consequently, RFRA became enforceable only against the federal government. By default, RFRA applies to *all* federal statutes, but Congress always has the option (which it occasionally exercises) of specifying that certain federal laws are not subject to RFRA. In this way, RFRA functions like the Dictionary Act—creating a defeasible default rule.

But the Free Exercise Clause and RFRA are not the last word. Some states have their own statutes or constitutional provisions (often called “mini RFRAs”) that provide for religious accommodations. These regimes, of course, only apply to that state’s law. And after *Boerne*, Congress passed a narrower statute—the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), providing for religious accommodations in prisons and in zoning cases. In contrast to its decision in *Boerne*, the Supreme Court has upheld the application of RLUIPA to state and local governments. See *Cutter v. Wilkinson* (2005).

But the need for these statutes underscores a key point: Except for the holding in *Yoder*—which *Smith* dubiously recharacterized as a “hybrid rights” decision—and in *Sherbert*, the First Amendment itself no longer provides an *individual* right of religious accommodation from neutral laws.

5. Or maybe not. With Justice Amy Coney Barrett joining the Supreme Court, there now seems to be a majority in favor of overturning *Smith*. In *Fulton v. City of Philadelphia* (2021), Justice Alito, joined by Justices Thomas and Gorsuch, wrote a concurring opinion that called for *Smith* to be overruled. In a concurrence, Justice Barrett, joined fully by Justice Kavanaugh and partly by Justice Breyer, agreed that *Smith* needed to be reexamined. But, she asked, “What should replace *Smith*?” Here, Barrett was more equivocal than Alito in calling for a return to *Sherbert* and *Yoder*:

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. . . . 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. *See Smith* (law not generally applicable “where the State has in place a system of individual exemptions,” citing *Sherbert*).

What does Justice Barrett mean by a “more nuanced” approach? What do you think of her opinion?

We are now in a strange position. *Smith* is still “good law”; it has not yet been overruled. But there has been a very clear signal by five current Supreme Court justices that it *should* and *will* be overruled. But we do not yet know how. As lawyers, you need to now argue *arguendo*—making arguments under *Smith* and arguments predicated on the possibility that *Smith* will be overruled any day.

If *Smith* is overruled, what should replace it? Drawing on the cases that we’ve studied in this course, how would you defend your answer?

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Prior to Justices Kavanaugh and Barrett joining the Court, it was very unlikely that *Smith* would be overruled. In *Hosannah-Tabor v. E.E.O.C.* (2012), however, the Supreme Court recognized a limited First Amendment right of exemption from anti-discrimination law for religious *organizations*. Was that a departure from *Smith*? How could these cases be reconciled? How does the right recognized in *Hosannah-Tabor* differ from associational rights?

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### Hosannah-Tabor v. E.E.O.C. (2012)

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

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group’s ministers.

#### **I**

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School . . . operated a small school in Redford, Michigan, offering a “Christ-centered education” to students in kindergarten through eighth grade.

The [Lutheran] Synod classifies teachers into two categories: “called” and “lay.” “Called” teachers are regarded as having been called to their vocation by God through a congregation. . . . [Becoming a “called” teacher] requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. . . . Once called, a teacher receives the formal title “Minister of Religion, Commissioned.” . . . “Lay” or “contract” teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. . . . Although

teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999 [but later became] a called teacher. . . . Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003-2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. . . .

On January 30, [2005,] Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a “peaceful release” from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22—the first day she was medically cleared to return to work—Perich presented herself at the school. Hoefft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoefft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her “regrettable” actions. Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich’s “insubordination and disruptive behavior” on February 22, as well as the damage she had done to her “working relationship” with the school by “threatening to take legal action.” The congregation voted to rescind Perich’s call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act. The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. It also prohibits an employer from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA]. . . .”

The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act. . . .

Hosanna-Tabor moved for summary judgment. Invoking what is known as the “ministerial exception,” the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod’s belief that Christians should resolve their disputes internally. . . .

## II

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” We have said that these two Clauses “often exert conflicting pressures.” *Cutter v. Wilkinson* (2005). . . . Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.

### A

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” The King in particular accepted the “freedom of elections,” a right “thought to be of the greatest necessity and importance to the English church.”

That freedom in many cases may have been more theoretical than real. . . . The Act of Supremacy of 1534 made the English monarch the supreme head of the Church, and the Act in Restraint of Annates, passed that same year, gave him the authority to appoint the Church’s high officials. Various Acts of Uniformity, enacted subsequently, tightened further the government’s grip on the exercise of religion. . . .

Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship. William Penn, the Quaker proprietor of what would eventually become Pennsylvania and Delaware, also sought independence from the Church of England. The charter creating the province of Pennsylvania contained no clause establishing a religion.

Colonists in the South, in contrast, brought the Church of England with them. But even they sometimes chafed at the control exercised by the Crown and its representatives over religious offices. In Virginia, for example, the law vested the governor with the power to induct ministers presented to him by parish vestries, but the vestries often refused to make such presentations and instead chose ministers on their own. . . .

It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

This understanding of the Religion Clauses was reflected in two events involving James Madison, “the leading architect of the religion clauses of the First Amendment.” *Arizona Christian Sch. Tuition Org. v. Winn* (2011). The first occurred in 1806, when John Carroll, the first Catholic bishop in the United States, solicited the Executive’s opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church “functionaries” was an “entirely ecclesiastical” matter left to the Church’s own judgment. The “scrupulous policy of the Constitution in guarding against a political interference with religious affairs,” Madison explained, prevented the Government from rendering an opinion on the “selection of ecclesiastical individuals.”

The second episode occurred in 1811, when Madison was President. Congress had passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. Madison vetoed the bill, on the ground that it “exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the [Establishment Clause].” . . . Madison explained:

The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises.

## B

Given this understanding of the Religion Clauses—and the absence of government employment regulation generally—it was some time before questions about government interference with a church’s ability to select its own ministers came before the courts. This Court touched upon the issue indirectly, however, in the context of disputes over church property. Our decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers. . . .

Confronting the issue under the Constitution for the first time in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America* (1952), the Court recognized that the “[f]reedom to select the clergy, where no improper methods of choice are proven,” is “part of the free exercise of religion” protected by the First Amendment against government interference. At issue in *Kedroff* was the right to use a Russian Orthodox cathedral in New York City. The Russian Orthodox churches in North America had split from the Supreme Church Authority in Moscow, out of concern that the Authority had become a tool of the Soviet Government. The North American churches claimed that the right to use the cathedral belonged to an archbishop elected by them; the Supreme Church Authority claimed that it belonged instead to an archbishop appointed by the patriarch in Moscow. New York’s highest court ruled in favor of the North American churches, based on a state law requiring every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative.

This Court reversed, concluding that the New York law violated the First Amendment. We explained that the controversy over the right to use the cathedral was “strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America.” By “pass[ing] the control of matters strictly ecclesiastical from one church authority to another,” the New York law intruded the “power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.” Accordingly, we declared the law unconstitutional because it “directly prohibit[ed] the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy.” . . .

This Court reaffirmed these First Amendment principles in *Serbian Eastern Orthodox Diocese for U.S. and Canada v. Milivojevich* (1976), a case involving a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets. The Church had removed Dionisije Milivojevich as bishop of the American-Canadian Diocese because of his defiance of the church hierarchy. Following his removal, Dionisije brought a civil action in state court challenging the Church’s decision, and the Illinois Supreme Court “purported in effect to reinstate Dionisije as Diocesan Bishop,” on the ground that the proceedings resulting in his removal failed to comply with church laws and regulations.



Reversing that judgment, this Court explained that the First Amendment “permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.” When ecclesiastical tribunals decide such disputes, we further explained, “the Constitution requires that civil courts accept their decisions as binding upon them.” We thus held that by inquiring into whether the Church had followed its own procedures, the State Supreme Court had “unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals” of the Church.

## C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right “implicit” in the First Amendment. The EEOC and Perich thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.

[Respondents] also contend that our decision in *Employment Division v. Smith* (1990) precludes recognition of a ministerial exception. In *Smith*, two members of the Native American Church were denied state unemployment benefits after it was determined that they had been fired from their jobs for ingesting peyote, a crime under Oregon law. We held that this did not violate the Free Exercise Clause, even though the peyote had been ingested for sacramental purposes, because 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).”

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.

### III

Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

*[The Court then explained why Perich was a “minister,” considering “the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.”]*

### IV

The EEOC and Perich foresee a parade of horrors that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers “unfettered discretion” to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States. . . .

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

#### **Justice Thomas, concurring.**

I join the Court’s opinion. I write separately to note that, in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister. . . . Judicial attempts to fashion a civil definition of “minister” through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the “mainstream” or unpalatable to some. Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding “ministers” to the prevailing secular understanding. . . .

**Justice Alito, with whom Justice Kagan joins, concurring.**

I join the Court’s opinion, but I write separately to clarify my understanding of . . . “minister” . . . . The term “minister” is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. . . . [I]t would be a mistake if the term “minister” or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies. . . . It should apply to any “employee” who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group’s right to remove the employee from his or her position. . . .

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**Notes and Questions**

1. Nobody would doubt that, as the Court stated in *Kedroff*, “[f]reedom to select the clergy [is] part of the free exercise of religion.” But so is individual religious exercise, and *Smith* rejected a constitutionally guaranteed right of individual accommodation. Does the majority opinion succeed at distinguishing *Smith*?

2. At least for now, *Hosannah-Tabor* is an exception to the general constitutional rule: The Free Exercise Clause provides a right of non-discrimination and does not provide a right of religious accommodation against non-discriminatory laws. But *Hosannah-Tabor* recognizes a limited right of exemption for religious institutions. The Court barely even tries to justify this differential treatment. But if you were defending the holding in *Hosannah-Tabor*, how would you defend a distinction between accommodating *individuals* and *institutions*? Why might it be justifiable to grant a limited form of institutional autonomy to churches, even if individuals do not receive accommodations?

3. How does the right recognized in *Hosannah-Tabor* differ from the freedom of association doctrines covered in Unit 5? Why would the Court structure doctrine in this way?

## 6.2. Free Exercise: Neutrality

How should courts assess whether the government has discriminated on the basis of religion? The foundational case on this topic is *Lukumi*. How does the Court define “neutrality” and “general applicability”? Notice that Justice Kennedy’s opinion in *Lukumi* was a majority opinion *except* in Part II-A-2, which only Justice Stevens joined. Why did that portion of the opinion fail to garner a majority?

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### Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)

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**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.

## I

This case involves practices of the Santeria 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 Santeria, “the way of the saints.” . . . The Santeria faith teaches that every individual has a destiny from God . . . fulfilled with the aid and energy of the *or is has*. The basis of the Santeria religion is the nurture of a personal relation with the *or is has*, and one of the principal forms of devotion is an animal sacrifice. . . .

According to Santeria teaching, the *or is has* 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 Santeria 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. . . .

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 Santeria religion. . . . In April 1987, . . . [t]he Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. . . .

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. . . .

[T]he 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.” . . .

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.

Following enactment of these ordinances, the Church . . . filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. . . . [*The City of Hialeah won below.*] . . .

## II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut* (1940), provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . .” (emphasis added.) The city does not argue that Santeria is not a “religion” within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Review Bd.* (1981). . . . Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners’ professed desire to conduct animal sacrifices for religious reasons. . . .

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 Division v. Smith* (1990). 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.

## A

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. . . .

## 1

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. *See Webster’s Third New International Dictionary* (1971); *see also Encyclopedia of Religion* (“[T]he word *sacrifice* ultimately became very much a secular term in common usage.”). The ordinances, furthermore, define “sacrifice” in secular terms, without referring to religious practices.

We reject the contention advanced by the city 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. . . . 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.” *Walz v. Tax Comm’n of N.Y.C.* (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria 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 Santeria 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 Santeria. 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 Santeria.

It becomes evident that these ordinances target Santeria 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. The design of these laws accomplishes instead a “religious gerrymander,” an impermissible attempt to target petitioners and their religious practices.

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 Santeria 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 Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *or is has*, not food consumption. Indeed, careful drafting

ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished. . . . [The Court then showed how Ordinance 87-52 similarly drew exemptions and definitions that “contribute[ ] to the gerrymander.”] . . .

[The Court then evaluated Ordinance 87-40, which did not draw any explicit exceptions. Rather, it punished “[w]hoever . . . unnecessarily . . . kills any animal.”] The city claims that this ordinance is the epitome of a neutral prohibition. 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. . . . [B]ecause 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,” *Employment Division v. Smith* (1990). 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 Santeria 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 flat prohibition of all Santeria 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, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. . . . 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. . . .

## 2

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.” *Walz v. Tax Comm’n of N.Y.C.* (1970) (Harlan, J., concurring). Here, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence. *Arlington Heights v. Metropolitan Hous. Dev. Corp.* (1977). 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. *Personnel Adm’r of Mass. v. Feeney* (1979).

That the ordinances were enacted “because of,” not merely “in spite of,” their suppression of Santeria 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 Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of [Santeria leader] 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 Santeria was outlawed in Cuba, questioned: “[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?” . . . 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 Santeria 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.” . . . This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation. . . .

## B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Employment Division v. Smith* (1990). . . .

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. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. [*The Court then cited a variety of speech and press cases.*] 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 underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria 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—which occurs in Hialeah—is legal. Extermination of mice and rats within a home is also permitted. . . .

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 Santeria 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. . . .

### III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. . . . 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. . . .

#### **Justice Scalia, with whom the Chief Justice joins, concurring in part and concurring in the judgment.**

The Court analyzes the “neutrality” and the “general applicability” of the Hialeah ordinances in separate sections (Parts II-A and II-B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court’s. But I think it is not necessary, and would frankly acknowledge that the terms are not only “interrelated” but substantially overlap.

The terms “neutrality” and “general applicability” are not to be found within the First Amendment itself, of course, but are used in *Employment Division v. Smith* (1990) and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a “law . . . prohibiting the free exercise” of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits), whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered “nonneutral”; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court’s opinion, . . . I join [Justice Kennedy’s] opinion except section 2 of Part II-A.

I do not join that section because it departs from the opinion’s general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers, *i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular “motive” of a collective legislative body, *see, e.g., Edwards v.*

*Aguillard* (1987) (Scalia, J., dissenting), and this Court has a long tradition of refraining from such inquiries, *see, e.g., Fletcher v. Peck* (1810) (Marshall, C.J.); *United States v. O'Brien* (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. *See, e.g., United States v. Lovett* (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: “Congress shall make no law . . . prohibiting the free exercise [of religion] . . .” This does not put us in the business of invalidating laws by reason of the evil motives of their authors. . . .

**[The concurring opinions of Justices Souter and O’Connor are omitted.]**

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### Notes and Questions

1. Notice that Justice Kennedy’s opinion assesses the law’s underinclusiveness *before* deciding what level of scrutiny to apply. Does this “put the cart before the horse?” Or is underinclusivity (or overinclusivity) relevant to which level of scrutiny should apply? Why?

2. After *Lukumi*, how do free-exercise rights compare to other rights?

3. The most claimant-friendly interpretation of *Smith* and *Lukumi* was adopted in then-Judge Alito’s decision in *Fraternal Order of Police v. Newark* (3d Cir. 1999), in which the Court of Appeals held that a police-department policy that prohibited officers from maintaining a beard could not be waived only for medical reasons but not for religious reasons. According to Alito, “[The] decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.” The reasoning of *Fraternal Order* would suggest that if the government offers any secular accommodations, it must offer religious accommodations.

This approach is often called a “most favored nation” approach to free exercise. This term—“most favored nation”—borrows from international trade law, where treating another country as a “most favored nation” means agreeing to treat that country as good or better than all other countries. As used in the context of free exercise, the basic idea of a “most favored nation” approach is that the government must treat religious activities just as favorably as comparable secular activities.

Issues involving the “most favored nation” approach to the Free Exercise Clause emerged during the global COVID-19 pandemic, as states prohibited all “non-essential” in-person activities, including religious activities, but did not shut down “essential” businesses, including grocery stores, drug stores, and home-improvement stores. In *On Fire Christian Center v. Fischer* (W.D. Ky. 2020), Judge Walker used reasoning similar to that in *Fraternal Order* to bar the application of the closure order to “drive in” churches, writing that “Louisville has targeted religious worship by prohibiting drive-in church services, while not prohibiting a multitude of other non-religious drive-ins and drive-throughs—including, for example, drive-through liquor stores.”

Do these interpretations reflect accurate readings of *Smith* and *Lukumi*?

Decisions by the Supreme Court during the pandemic revealed how a majority of the justices think about these issues. How do the different decisions in the following case define non-discrimination for purposes of the Free Exercise Clause?

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**Roman Catholic Diocese of Brooklyn v. Cuomo (2020)**

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**Per Curiam.**

The application[s] for injunctive relief . . . seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as “red” or “orange” zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak. . . .

The applicants have made a strong showing that the challenged restrictions violate “the minimum requirement of neutrality” to religion. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the “ultra-Orthodox [Jewish] community.” But even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.<sup>1</sup>

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could “literally have hundreds of people shopping there on any given day.” Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID-19, but they are treated less harshly than the Diocese’s churches and Agudath Israel’s synagogues, which have admirable safety records.

Because the challenged restrictions are not “neutral” and of “general applicability,” they must satisfy “strict scrutiny,” and this means that they must be “narrowly tailored” to serve a “compelling” state interest. *Lukumi*. Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as “narrowly tailored.” They are far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter

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<sup>1</sup> Compare *Trump v. Hawaii* (2018) (directive “neutral on its face”).

than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. . . .

Not only is there no evidence that the applicants have contributed to the spread of COVID-19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows. . . .

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure. . . .

**Justice Gorsuch, concurring.**

. . . [T]he Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids. . . .

**Justice Kavanaugh, concurring.**

. . . The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993); *Employment Division v. Smith* (1990). But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here,

therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. The State has not done so. . . .

In light of the devastating pandemic, I do not doubt the State’s authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings alike. But the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake. To reiterate, New York’s restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and *Calvary*, and much more severe than the restrictions that most other States are imposing on attendance at religious services. And New York’s restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses. . . .

**Justice Sotomayor, with whom Justice Kagan joins, dissenting.**

Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York’s public health measures aimed at containing the spread of COVID-19 in areas facing the most severe outbreaks. Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. *See South Bay United Pentecostal Church v. Newsom* (2020); *Calvary Chapel Dayton Valley v. Sisolak* (2020). I see no justification for the Court’s change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation’s suffering.

*South Bay* and *Calvary Chapel* provided a clear and workable rule to state officials seeking to control the spread of COVID-19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York’s safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies “[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.” Likewise, New York “treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.” That should be enough to decide this case.

The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York’s conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. But the District Court rejected that argument as unsupported by the factual record. Undeterred, Justice Gorsuch offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York’s rules (*e.g.*, going to the liquor store or getting a bike repaired). But Justice Gorsuch does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. Unlike religious services, which “have every one of th[ose] risk factors,” Brief for AMA, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. *Id.* (“Epidemiologists and physicians generally agree that religious services are among the riskiest activities”). Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than *South Bay* and *Calvary Chapel*. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular

comparators. And whereas the restrictions in *South Bay* and *Calvary Chapel* applied statewide, New York’s fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID-19 cases.

The Diocese suggests that, because New York’s regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York’s policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.<sup>2</sup>

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York’s regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID-19 cases among New York’s Orthodox Jewish community. The Diocese suggests that these comments supply “an independent basis for the application of strict scrutiny.” I do not see how. . . . Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a “Muslim Ban,” originally conceived of as a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” *Trump v. Hawaii* (2018). If the President’s statements did not show “that the challenged restrictions violate the “minimum requirement of neutrality” to religion, *Lukumi*, it is hard to see how Governor Cuomo’s do. . . .

**[The concurring opinion of Chief Justice Roberts and the dissenting opinion of Justice Breyer are omitted.]**

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### Notes and Questions

1. How do the different justices conceptualize the First Amendment’s requirement of neutrality with respect to religion? What are the strengths and weaknesses in their respective arguments?

2. In *Tandon v. Newsom* (2021), the Court embraced a “most favored nation” view of religious freedom. According to the majority:

This Court’s decisions have made . . . clear [that] government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) (per curiam). It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. *Id.* (Kavanaugh, J., concurring).

Was this a fair description of what the Court had held in *Cuomo*? Is it faithful to *Smith*? How might you critique this approach to religious freedom?

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<sup>2</sup> Justice Kavanaugh cites *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) and *Employment Division v. Smith* (1990) for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship. But those cases created no such rule. *Lukumi* struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a “religious gerrymander” targeted at the Santeria faith. *Smith* is even farther afield, standing for the entirely inapposite proposition 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).”

3. In *Lukumi*, Justice Kennedy treated the law’s “neutrality” and its “general applicability” as separate inquiries—albeit inquiries that are conceptually related. Moreover, scholars have argued that these prongs should be separated, with *neutrality* focusing on whether the government is intentionally discriminating against religion (even if the test for identifying such discrimination is only objective, not subjective) and with *general applicability* focused on whether the law applies broadly in all situations where the asserted governmental interests are comparably implicated. See, e.g., Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, Neb. L. Rev. (2016).

However, as the excerpt above in *Tandon* highlights, courts often do not neatly distinguish “neutrality” and “general applicability.” Even in *Lukumi*, for instance, the Court held that the ordinance against unnecessary animal killings was *non-neutral* because the government considered religious rationales for killing animals as unnecessary (whereas it considered various secular rationales as necessary), and then the Court also held that the ordinance was *non-generally applicable* for essentially the same reason—namely, that the interests in public health and animal protection were present when animals were killed for secular or religious reasons.

For the time being, my two suggestions are, first, be skeptical of any crisp, coherent distinction between “neutrality” and “general applicability,” but also, second, be on the lookout in the future for ways in which separating them might clarify free-exercise law or advance the interests of your clients.

4. The approach in *Tandon* calls for identifying “comparable” secular activities. How did the justices approach this question in *Cuomo*? How might you approach the following hypothetical, posed in Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, J. L. & Pol. (2002), drawing on the facts of *Fraternal Order of Police v. Newark*, where a police department did not allow officers to grow a beard:

Suppose in the *Newark* case, there are two separate grooming standards, one relating to shaving, the other to hair length. Muslims protest the shaving requirement. Native Americans protest the hair length requirement. Both protests are based on religious grounds. There is a medical exemption from the shaving requirement, but there is no exemption from the hair length requirement because there are no medical conditions that preclude cutting one’s hair.

How do you think this case should be resolved under *Tandon*? What are the best arguments on each side?

5. One critique of the Supreme Court’s approach to identifying discrimination in recent cases such as *Cuomo* and *Tandon* is that it differs from the approach that the Court takes in other contexts, such as identifying content discrimination under the Speech Clause or race discrimination under the Equal Protection Clause. Is that a valid critique? Along these lines, consider the response in Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, J. Law & Religion (2022):

Although the Court’s post-*Smith* jurisprudence has drawn on speech and equal protection doctrine in forming its requirements, the Free Exercise Clause is based in concerns separate from both of those areas. And in a context like the COVID-19 church-closure cases, recognizing those unique concerns is the key to understanding the kind of discrimination the Free Exercise Clause prohibits.

Begin with the case about the minority business owner whose movie theater is declared “nonessential” along with other theaters. Under current equal protection law, the owner has a discrimination claim if she can show the state regulated her business “at least in part ‘because of’” race. Yet it seems unlikely that a court would draw that conclusion based on the “nonessential” designation alone. Why would religion be different?

Here, the answer has less to do with the Constitution than it does with a difference between the two cases. In drawing the parallel between the real church-closure cases and the

hypothetical case about race, the argument assumes that labeling a minority-owned movie theater “nonessential” tells us the same thing about government purpose as labeling religious worship that way. But in fact, it does not. In the real church-closure cases, there’s no question that states like New York took religion into account, because the structure of the regulations ensured that worship could be regulated only after officials determined that gathering for *religious reasons* was not “essential.” By contrast, classifying a movie theater as “nonessential” doesn’t give rise to an inference of discrimination (at least without more), because owning movie theaters is not, in itself, a race-specific endeavor. Whereas “worship” is an activity fraught with religious significance, owning movie theaters is an activity that people of all races pursue. In these two cases, regulating the relevant activities with an “essential” designation just works differently. . . .

But what about free speech? As noted above, under the Court’s current doctrine, a protestor can be prosecuted for burning his draft card under a law generally forbidding a card’s destruction, and the same would likely be true even if the law required an official judgment that protest-motivated burnings are not “essential.” The reason . . . is that there’s also a sufficient non-speech-related justification available. And where that’s so, the Court’s expressive conduct doctrine says strict scrutiny doesn’t apply. But that more deferential approach to government motive isn’t just a given. Rather, it’s justified by the specific concerns underlying the Free Speech Clause.

At its heart, the Constitution’s protection of free speech aims to ensure that discourse on public issues remains “uninhibited, robust, and wide open” by limiting government’s power to censor ideas or drive them from the marketplace. Yet in the context of laws regulating conduct, that danger is largely absent. In all but the rarest cases, regulating conduct that is also expressive doesn’t actually prevent an idea from being expressed. Instead, it simply drives it to another medium: the spoken or written word. And to ensure that’s true, even content-neutral regulations of speech must leave open “ample alternative channels.” To be sure, there may be instances where the message carried by some act is so evocative or powerful it can’t be transmuted into speech. But those are precisely the cases in which government will be most tempted to regulate conduct based on its expressive character—and thus, the cases that the Court’s more limited motive inquiry actually takes into account. The Court’s expressive conduct jurisprudence employs a deferential motive analysis because it assumes that, in all but the rarest instances, regulations of conduct alone do not (and really cannot) significantly curtail speech.

The Free Exercise Clause is different, in at least two important respects. First, unlike the Free Speech Clause, it explicitly protects conduct—specifically, religious “exercise.” But just as importantly, it protects conduct that almost always does *not* have a readily identifiable substitute. If a police officer grows a beard to protest what he sees as the department’s draconian grooming policy, enforcing the no-beard rule doesn’t stop him from spreading his message in other ways. But if a police officer’s religion demands he grow a beard and the department forbids it, there’s no alternative means of fulfilling his duty to God—he can either obey the religious command and lose his job, or betray his faith.

Of course, the mere fact that the policy puts the officer to that choice probably isn’t enough to create a free exercise violation—that’s the point of *Smith*. But recognizing that regulations of conduct can have a much more destructive effect on religion than they do on speech provides a reason to treat discrimination in free exercise cases differently, and with less deference to the government. And indeed, at least if the Court’s discussion of the issue in *Lukumi* and elsewhere is our guide, there’s a good argument that this more searching inquiry is the one the Court has already adopted.



What do you think of this argument? Is there adequate justification for applying a different test for identifying discrimination across these different clauses?

6. Non-discrimination with respect to religion has also played a major role in recent Establishment Clause cases, as explored in the next Unit. And it is common for lawyers to draw on Establishment Clause cases in articulating the requirements of free exercise, and vice versa. Indeed, in the *Cuomo* case that you just read, Justice Sotomayor’s dissent noted the parallel between the alleged discrimination by Governor Cuomo and that of President Trump with respect to the so-called “Muslim Ban.” But caution here is warranted in two respects. First, the Court has not been clear about the relationship between the Free Exercise Clause and Establishment Clause with respect to non-discrimination. Second, religious-freedom cases are ones where recent changes in the Court’s membership will surely lead to doctrinal shifts.

7. Based on older decisions that have never been squarely overruled, some lower courts have continued to evaluate claims of religious discrimination under the fundamental-rights strand of equal-protection law. As lawyers, you should be aware of these cases, since that doctrine authorizes analysis of *subjective* motives under *Washington v. Davis* (1976). But you should also recognize that these cases are likely inconsistent with the Supreme Court’s recent decisions, since religious discrimination claims are now analyzed directly under the First Amendment. See *Locke v. Davey* n.3 (2004) (“Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims.”).

### 6.3. Public Monuments and Establishment

The First Amendment bans Congress from making any “law respecting an establishment of religion.” What is an “establishment of religion”? And what is a law “respecting” an establishment? Clearly the Establishment Clause at least bans the government from recognizing and supporting an official national church—something familiar to Americans in the late 1700s because England had established the “Church of England.” But what else might the Establishment Clause do?

People have proposed all sorts of approaches to the Establishment Clause. Many people assert that the government must be “neutral” with respect to religion. Yet “neutrality” is not self-defining. Surely offering police and fire protection to churches is okay. But can religious schools participate in a government-funded voucher program? Can religious mission groups operate inmate reform efforts on behalf of the government? Should the way we answer these questions depend on the operation of the law? The reasons for its enactment? Its probable effects? Its actual effects? And, as we will see, not everyone supports this type of neutrality-based view of the Establishment Clause.

This Unit features two cases about the Establishment Clause—one about the constitutionality of a courthouse display of the Ten Commandments and the other about the display of a large cross erected on public land about a hundred years ago. As with other rights, the Court has struggled both at delineating the *meaning* of the right and at crafting *judicial doctrines* to implement that right.

**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.

**I**

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. . . .

[After an initial round of litigation,] the Counties expanded the displays of the Ten Commandments. . . . 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 . . . 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 Counties . . . then installed another display in each courthouse, the third within a year. . . . 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” . . . .

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 Mayflower 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 court . . . found that the assertion that the Counties’ broader educational goals are secular “crumble[s] . . . upon an examination of the history of this litigation,” [and thus ordered removal of the displays]. . . .

## II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky’s public schools, this Court recognized that the Commandments “are undeniably a sacred text in the Jewish and Christian faiths” and held that their display in public classrooms violated the First Amendment’s bar against establishment of religion. *Stone v. Graham* (1980). *Stone* found a predominantly religious purpose in the government’s posting of the Commandments, given their prominence as “an instrument of religion.” The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court’s conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

## A

Ever since *Lemon v. Kurtzman* (1971) 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. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and “the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function.”<sup>10</sup> *Wallace v. Jaffree* (1985) (O’Connor, J., concurring in judgment).

The touchstone for our analysis is the principle that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson v. Arkansas* (1968). 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. . . . 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 . . . .” *Santa Fe Indep. Sch. Dist. v. Doe* (2000). . . .

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<sup>10</sup> At least since *Everson v. Board of Education* (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. *See, e.g., Marsh v. Chambers* (1983) (upholding legislative prayer despite its religious nature). No such reasons present themselves here.

## B

[T]he 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 Sys., Inc. v. Cline* (2004) (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*, (1976) (discriminatory purpose required for Equal Protection violation); *Hunt v. Wash. State Apple Adver. Comm'n*, (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). 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. *Santa Fe v. Doe* (2000). . . .

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace v. Jaffree* (1985), for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. And in *Edwards v. Aguillard* (1987), we relied on a statute's text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution. . . . In each case, the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action.

Nor is there any indication that the enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. In the past, the test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion. That said, one consequence of the corollary that Establishment Clause analysis does not look to the veiled psyche of government officers could be that in some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the "objective observer" . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.

## C

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 . . . 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. . . .

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 . . . . [R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose."<sup>14</sup>

### III

. . . We take *Stone v. Graham* (1980) as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments. *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion . . . . But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. . . .

*Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). . . . Displaying that text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid [absent sufficient secular context].

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. . . .

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<sup>14</sup> One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters. Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose. The dissent, apparently not giving the reasonable observer as much credit as Holmes's dog, contends that in practice it will be "absur[d]" to rely upon differences in purpose in assessing government action. As an initial matter, it will be the rare case in which one of two identical displays violates the purpose prong. In general, like displays tend to show like objectives and will be treated accordingly. But where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another. While posting the Commandments may not have the effect of causing greater adherence to them, an ostensible indication of a purpose to promote a particular faith certainly will have the effect of causing viewers to understand the government is taking sides.

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. . . .

In this second display, unlike the first, the Commandments were not hung in isolation . . . . 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. . . .

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.” The Counties’ claims did not, however, persuade the [lower courts]. “When both courts [that have already passed on the case] are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.” *Edwards*. [And their conclusions] are well warranted.

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties’ governing boards. . . . 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 . . . [and] the original Constitution of 1787 . . . .

In holding the preliminary injunction adequately supported . . . , 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. . . .

#### IV

. . . The First Amendment contains no textual definition of “establishment,” and the term is certainly not self-defining. . . .

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

The First Amendment has not one but two clauses tied to “religion,” the second forbidding any prohibition on “the free exercise thereof,” and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for

military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. . . .

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. . . .

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. . . . [I]t apparently follows that even rigorous espousal of . . . monotheism is consistent with the establishment ban.

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban . . . .

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion. . . .

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. . . .

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. . . .

[Moreover,] history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. . . . Thus, it appears to be common ground in the interpretation of a Constitution "intended to endure for ages to come," *McCulloch v. Maryland* (1819), that applications unanticipated by the Framers are inevitable.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. . . .

**Justice O'Connor, concurring.**

. . . Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. . . .

When we enforce these restrictions, we do so for the same reason that guided the Framers—respect for religion's special role in society. . . . When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision

about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both. . . .

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. *See W. Va. Bd. of Educ. v. Barnette* (1943). . . . There is no list of approved and disapproved beliefs appended to the First Amendment . . . . The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all. . . .

**Justice Scalia, with whom the Chief Justice and Justice Thomas join, and with whom Justice Kennedy joins as to Parts II and III, dissenting.**

I would uphold McCreary County and Pulaski County, Kentucky’s (hereinafter Counties) displays of the Ten Commandments. I shall discuss, first, why the Court’s oft repeated assertion that the government cannot favor religious practice is false; second, why today’s opinion extends the scope of that falsehood even beyond prior cases; and third, why even on the basis of the Court’s false assumptions the judgment here is wrong.

**I**

On September 11, 2001, I was attending in Rome, Italy, an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses often do, with the prayer “God bless America.” The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country’s loss, sadly observed: “How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address ‘God bless \_\_\_\_.’ It is of course absolutely forbidden.”

That is one model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins, “France is [a] . . . secular . . . Republic.” Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words “so help me God.” The Supreme Court under John Marshall opened its sessions with the prayer, “God save the United States and this Honorable Court.” The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim “a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favours of Almighty God.” President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789, on behalf of the American people “to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,” thus beginning a tradition of offering gratitude to God that continues today. The same Congress also reenacted the Northwest Territory Ordinance of 1787, Article III of which provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall



forever be encouraged.” And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality. . . .

Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words “so help me God.” Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer “God save the United States and this Honorable Court.” Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto, “IN GOD WE TRUST.” And our Pledge of Allegiance contains the acknowledgment that we are a Nation “under God.” . . .

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that the “First Amendment mandates governmental neutrality between . . . religion and nonreligion,” and that “[m]anifesting a purpose to favor . . . adherence to religion generally,” is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words. Surely not even the current sense of our society . . . . Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century. . . .

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate. Today’s opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, the Court acknowledges that the “Establishment Clause doctrine” it purports to be applying “lacks the comfort of categorical absolutes.” What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that “[i]n special instances we have found good reason” to dispense with the principle, but “[n]o such reasons present themselves here.” It does not identify all of those “special instances,” much less identify the “good reason” for their existence. . . .

The only “good reason” for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. . . .

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today’s opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. That is indeed a valid principle where public aid or assistance to religion is concerned, *see Zelman v. Simmons-Harris* (2002), or where the free exercise of religion is at issue, *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993), but it necessarily applies in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. . . .

The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine

prescriptions for a virtuous life. Publicly honoring the Ten Commandments . . . cannot be reasonably understood as a government endorsement of a particular religious viewpoint. . . .

## II

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today’s opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court’s hostility to religion.

First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an “objective observer.” Because in the Court’s view the true danger to be guarded against is that the objective observer would feel like an “outside[r]” or “not [a] full membe[r] of the political community,” its inquiry focuses not on the actual purpose of government action, but the “purpose apparent from government action.” Under this approach, even if a government could show that its *actual purpose* was not to advance religion, it would presumably violate the Constitution as long as the Court’s objective observer would think otherwise.

[I]t is an odd jurisprudence that bases the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so. But that oddity pales in comparison to the one invited by today’s analysis: the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion.

Second, the Court replaces *Lemon*’s requirement that the government have “a secular . . . purpose,” with the heightened requirement that the secular purpose “predominate” over any purpose to advance religion. The Court treats this extension as a natural outgrowth of the longstanding requirement that the government’s secular purpose not be a sham, but simple logic shows the two to be unrelated. If the government’s proffered secular purpose is not genuine, then the government has no secular purpose at all. . . .

## III

Even accepting the Court’s *Lemon*-based premises, the displays at issue here were constitutional. . . . [This Part is heavily abridged.]

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court: “to display documents that played a significant role in the foundation of our system of law and government.” . . .

Acknowledgment of the contribution that religion has made to our Nation’s legal and governmental heritage partakes of a centuries-old tradition. . . . The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. . . .

In any event, the Court’s conclusion that the Counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful. In the Court’s view, the impermissible motive was apparent from the initial displays of the Ten Commandments all by themselves: When that occurs, the Court says, “a religious object is unmistakable.” Surely that cannot be. If, as discussed above, the Commandments have a proper place in our civic history, even placing them by themselves can be civically motivated . . . .

To forbid any government focus upon this aspect of our history is to display what Justice Goldberg called “untutored devotion to the concept of neutrality,” that would commit the Court (and the Nation) to a revisionist agenda of secularization.

Turning at last to the displays actually at issue in this case, the Court faults the Counties for not repealing the resolution expressing what the Court believes to be an impermissible intent. Under these circumstances, the Court says, “[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.” Even were I to accept all that the Court has said before, I would not agree with that assessment. To begin with, of course, it is unlikely that a reasonable observer would even have been aware of the resolutions, so there would be nothing to “cast off.” The Court implies that the Counties may have been able to remedy the “taint” from the old resolutions by enacting a new one. But that action would have been wholly unnecessary in light of the explanation that the Counties included with the displays themselves: A plaque next to the documents informed all who passed by that each display “contains documents that played a significant role in the foundation of our system of law and government.” Additionally, there was no reason for the Counties to repeal or repudiate the resolutions adopted with the hanging of the second displays, since they related only to the second displays. . . .

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### Notes and Questions

1. According to the majority what is the *meaning* of the Establishment Clause? What rule or principle does it enshrine? And what *doctrinal tools* does the majority apply to implement that meaning? Why? How closely are the *meaning* and *implementation doctrines* aligned in this context? What about the dissent’s views?

2. The Court uses a “reasonable observer” test. What is that? What advantages does that test have? How does it relate to other doctrines that we’ve seen in this course?

3. *McCreary County* raises a recurring issue: What bearing should Founding-Era practices have on constitutional meaning? Consider Justice Alito’s discussion of this topic in a concurring opinion in *Town of Greece v. Galloway* (2014):

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh v. Chambers* (1983), when the Court was called upon to decide whether prayer prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause “tests” set out in the opinions of this Court, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

What are the merits and drawbacks of this approach? Is it consistent or inconsistent with how the Court has incorporated traditionally accepted practices in other areas of constitutional-rights jurisprudence?

The following case is the Supreme Court's latest involving public monuments and the Establishment Clause. Although the majority did not overrule *McCreary County*, they limited its reach in certain respects. But the fractured opinions leave many aspects of Establishment Clause doctrine unclear for the time being.

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### American Legion v. American Humanist Association (2019)

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**Justice Alito announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, II-C, III, and IV, and an opinion with respect to Parts II-A and II-D, in which the Chief Justice, Justice Breyer, and Justice Kavanaugh join.**

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse.

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden v. Perry* (2005) (Breyer, J., concurring). And contrary to respondents' intimations, there is no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

#### I

*[Justice Alito began by discussing the history of the cross as a symbol, including its symbolism for the loss of life incurred during World War I.]*

Recognition of the cross's symbolism extended to local communities across the country. In late 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's fallen soldiers. . . . The committee decided that the memorial should be a cross . . . .

After selecting the design, the committee turned to the task of financing the project. The committee held fundraising events in the community and invited donations, no matter the size, with a form that read:

We, the citizens of Maryland, trusting in God, the Supreme Ruler of the Universe, Pledge Faith in our Brothers who gave their all in the World War to make [the] World Safe for Democracy. Their Mortal Bodies have turned to dust, but their spirit Lives to guide us through Life in the way of Godliness, Justice and Liberty.

With our Motto, “One God, One Country, and One Flag” We contribute to this Memorial Cross Commemorating the Memory of those who have not Died in Vain.” . . .

The Cross was to stand at the terminus of another World War I memorial—the National Defense Highway, which connects Washington to Annapolis. . . . [T]he monument was finished in 1925 [with assistance from the American Legion—a private veterans group].

The completed monument is a 32-foot tall Latin cross that sits on a large pedestal. The American Legion’s emblem is displayed at its center, and the words “Valor,” “Endurance,” “Courage,” and “Devotion” are inscribed at its base, one on each of the four faces. The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is “Dedicated to the heroes of Prince George’s County, Maryland who lost their lives in the Great War for the liberty of the world.” The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson’s request for a declaration of war: “The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives.”

At the dedication ceremony, a local Catholic priest offered an invocation. . . . The ceremony closed with a benediction offered by a Baptist pastor.

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. . . . Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road. . . .

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after the Commission acquired it, the American Humanist Association (AHA) lodged a complaint with the Commission. . . . The American Legion intervened to defend the Cross. . . .

[When the case eventually reached the Fourth Circuit,] the court held that the Bladensburg Cross failed *Lemon*’s “effects” prong because a reasonable observer would view the Commission’s ownership and maintenance of the monument as an endorsement of Christianity. The court emphasized the cross’s “inherent religious meaning” as the “preeminent symbol of Christianity.” . . .

## II

### A

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” While the concept of a formally established church is straightforward, pinning down the meaning of a “law respecting an establishment of religion” has

proved to be a vexing problem. Prior to the Court's decision in *Everson v. Board of Educ. of Ewing* (1947), the Establishment Clause was applied only to the Federal Government, and few cases involving this provision came before the Court. After *Everson* recognized the incorporation of the Clause, however, the Court faced a steady stream of difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools, to Sunday closing laws, to state subsidies for church-related schools or the parents of students attending those schools. After grappling with such cases for more than 20 years, *Lemon v. Kurtzman* (1971) ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. *County of Allegheny v. ACLU* (1989).

If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. [*Justice Alito then cited eleven cases.*]

This pattern is a testament to the *Lemon* test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them. . . . The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.

For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

## B

*First*, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. . . .

*Second*, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. Take the example of Ten Commandments monuments, the subject we addressed in *Van Orden v. Perry* (2005) and *McCreary County v. ACLU* (2005). For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. They have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent public buildings in our Nation's capital. . . .

The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage. *Cf. Sch. Dist. of Abingdon Township, Pa. v. Schempp* (1963) (Brennan, J., concurring) ("[The] government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends").

*Third*, just as the purpose for maintaining a monument, symbol, or practice may evolve, “[t]he ‘message’ conveyed . . . may change over time.” *Summum*. Consider, for example, the message of the Statue of Liberty, which began as a monument to the solidarity and friendship between France and the United States and only decades later came to be seen “as a beacon welcoming immigrants to a land of freedom.”

With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity. The community may come to value them without necessarily embracing their religious roots. . . .

In the same way, consider the many cities and towns across the United States that bear religious names. Religion undoubtedly motivated those who named Bethlehem, Pennsylvania; Las Cruces, New Mexico; Providence, Rhode Island; Corpus Christi, Texas; Nephi, Utah, and the countless other places in our country with names that are rooted in religion. Yet few would argue that this history requires that these names be erased from the map. . . .

*Fourth*, when time’s passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive. *Cf. Van Orden* (opinion of Breyer, J.) (“[D]isputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid”).

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

## C

The role of the cross in World War I memorials is illustrative of each of the four preceding considerations. Immediately following the war, “[c]ommunities across America built memorials to commemorate those who had served the nation in the struggle to make the world safe for democracy.” . . .

This is not to say that the cross’s association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here.

In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby. . . .

Finally, as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be viewed by many as a neutral

act. . . . A monument may express many purposes and convey many different messages, both secular and religious. Thus, a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront.

For example, few would say that the State of California is attempting to convey a religious message by retaining the names given to many of the State's cities by their original Spanish settlers—San Diego, Los Angeles, Santa Barbara, San Jose, San Francisco, etc. But it would be something else entirely if the State undertook to change all those names. Much the same is true about monuments to soldiers who sacrificed their lives for this country more than a century ago.

## D

While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

In *Marsh v. Chambers* (1983), the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored *Lemon* and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the *Lemon* test. Instead, the Court found it highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. We took a similar approach more recently in *Town of Greece v. Galloway* (2014).

We reached these results even though it was clear, as stressed by the *Marsh* dissent, that prayer is by definition religious. . . . “[*Marsh*] teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings” and that the decision of the First Congress to “provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society.” *Town of Greece*. . . .

The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

## III

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause.

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. Due in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. It reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy. As long as it is retained in its original place and form, it speaks as well of the community that erected the monument nearly a century ago and has maintained it ever since. The memorial represents what the relatives, friends, and neighbors of the fallen soldiers felt at the time and how they chose to express their



sentiments. And the monument has acquired additional layers of historical meaning in subsequent years. The Cross now stands among memorials to veterans of later wars. It has become part of the community.

The monument would not serve that role if its design had deliberately disrespected area soldiers who perished in World War I. More than 3,500 Jewish soldiers gave their lives for the United States in that conflict, and some have wondered whether the names of any Jewish soldiers from the area were deliberately left off the list on the memorial or whether the names of any Jewish soldiers were included on the Cross against the wishes of their families. There is no evidence that either thing was done, and we do know that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran.

The AHA's brief strains to connect the Bladensburg Cross and even the American Legion with anti-Semitism and the Ku Klux Klan, but the AHA's disparaging intimations have no evidentiary support. And when the events surrounding the erection of the Cross are viewed in historical context, a very different picture may perhaps be discerned. . . . [T]he Bladensburg Cross memorial included the names of both Black and White soldiers who had given their lives in the war; and despite the fact that Catholics and Baptists at that time were not exactly in the habit of participating together in ecumenical services, the ceremony dedicating the Cross began with an invocation by a Catholic priest and ended with a benediction by a Baptist pastor. We can never know for certain what was in the minds of those responsible for the memorial, but in light of what we know about this ceremony, we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day.

Finally, it is surely relevant that the monument commemorates the death of particular individuals. It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. . . .

#### IV

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution. . . .

#### **Justice Breyer, with whom Justice Kagan joins, concurring.**

I have long maintained that there is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its "separate spher[e]." *Van Orden v. Perry* (2005) (Breyer, J., concurring).

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. The Court's opinion eloquently explains why that is so: The Latin cross is uniquely associated with the fallen soldiers of World War I; the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group; the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration; and, finally, the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was

filed. Nothing in the record suggests that the lack of public outcry “was due to a climate of intimidation.” *Van Orden* (Breyer, J., concurring). In light of all these circumstances, the Peace Cross cannot reasonably be understood as “a government effort to favor a particular religious sect” or to “promote religion over nonreligion.” *Id.* And, as the Court explains, ordering its removal or alteration at this late date would signal “a hostility toward religion that has no place in our Establishment Clause traditions.”

The case would be different, in my view, if there were evidence that the organizers had “deliberately disrespected” members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. But those are not the circumstances presented to us here, and I see no reason to order *this* cross torn down simply because *other* crosses would raise constitutional concerns.

Nor do I understand the Court’s opinion today to adopt a “history and tradition test” that would permit any newly constructed religious memorial on public land. The Court appropriately “looks to history for guidance,” but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community. A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach. . . .

### **Justice Kavanaugh, concurring.**

I join the Court’s eloquent and persuasive opinion in full. I write separately to emphasize two points.

#### **I**

Consistent with the Court’s case law, the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross. *See Marsh v. Chambers* (1983); *Van Orden v. Perry* (2005) (plurality opinion); *Town of Greece v. Galloway* (2014).

As this case again demonstrates, this Court no longer applies the old test articulated in *Lemon v. Kurtzman* (1971). The *Lemon* test examined, among other things, whether the challenged government action had a primary effect of advancing or endorsing religion. If *Lemon* guided this Court’s understanding of the Establishment Clause, then many of the Court’s Establishment Clause cases over the last 48 years would have been decided differently . . . .

[T]he Court’s decisions over the span of several decades demonstrate that the *Lemon* test is not good law . . . .

On the contrary, each category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition. The Bladensburg Cross does not violate the Establishment Clause. . . .

#### **II**

The Bladensburg Cross commemorates soldiers who gave their lives for America in World War I. I agree with the Court that the Bladensburg Cross is constitutional. At the same time, I have deep respect for the plaintiffs’ sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion. I

recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

The conclusion that the cross does not violate the Establishment Clause does not necessarily mean that those who object to it have no other recourse. The Court’s ruling *allows* the State to maintain the cross on public land. The Court’s ruling does not *require* the State to maintain the cross on public land. . . .

**Justice Kagan, concurring in part.**

I fully agree with the Court’s reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II-B, II-C, III, and IV of its opinion, as well as Justice Breyer’s concurrence. Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows. I therefore do not join Part II-A. I do not join Part II-D out of perhaps an excess of caution. Although I too “look[ ] to history for guidance,” I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history’s role in Establishment Clause analysis. But I find much to admire in this section of the opinion—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect “respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.” Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation’s pluralism, and the values of neutrality and inclusion that the First Amendment demands.

**Justice Thomas, concurring in the judgment.**

The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.” U. S. Const., Amdt. 1. The text and history of this Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to “law[s]” enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did, this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the Cross is clearly constitutional. [*Justice Thomas then reviewed each of these points in further detail.*] . . .

**Justice Gorsuch, with whom Justice Thomas joins, concurring in the judgment.**

The American Humanist Association wants a federal court to order the destruction of a 94 year-old war memorial because its members are offended. Today, the Court explains that the plaintiffs are not entitled to demand the destruction of longstanding monuments, and I find much of its opinion compelling. In my judgment, however, it follows from the Court’s analysis that suits like this one should be dismissed for lack of standing. . . .

Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court’s decision in *Lemon v. Kurtzman* (1971). *Lemon* held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to “excessive[ly] . . . entangl[e]” church and state, a standard this Court came to understand as prohibiting

the government from doing anything that a “reasonable observer” might perceive as “endorsing” religion, *County of Allegheny v. ACLU* (1989) (opinion of Blackmun, J.). And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. . . .

As today’s plurality rightly indicates in Part II-A, however, *Lemon* was a misadventure. It sought a “grand unified theory” of the Establishment Clause but left us only a mess. . . . As the plurality documents, our “doctrine [is] in such chaos” that lower courts have been “free to reach almost any result in almost any case.” Michael McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, U. Chi. L. Rev. (1992). Scores of judges have pleaded with us to retire *Lemon*, scholars of all stripes have criticized the doctrine, and a majority of this Court has long done the same. Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms—and they don’t because they can’t. . . .

In place of *Lemon*, Part II-D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that “the Establishment Clause must be interpreted by reference to historical practices and understandings.” . . . The constitutionality of a practice doesn’t depend on some artificial and indeterminate three-part test; what matters, the plurality reminds us, is whether the challenged practice fits “within the tradition” of this country.

I agree with all this and don’t doubt that the monument before us is constitutional in light of the nation’s traditions. But then the plurality continues on to suggest that “longstanding monuments, symbols, and practices” are “presumpt[ively]” constitutional. And about that, it’s hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror? And where exactly in the Constitution does this presumption come from? The plurality does not say, nor does it even explain what work its presumption does. . . . The Constitution’s meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation’s traditions is just as permissible whether undertaken today or 94 years ago. . . .

#### **Justice Ginsburg, with whom Justice Sotomayor joins, dissenting.**

. . . Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. See *Everson v. Board of Educ. of Ewing* (1947). Numerous times since, the Court has reaffirmed the Constitution’s commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual liberty and civic harmony in favor of a “presumption of constitutionality for longstanding monuments, symbols, and practices.” . . .

In cases challenging the government’s display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the “effect of ‘endorsing’ religion.” *County of Allegheny v. ACLU* (1989). The display fails this requirement if it objectively “convey[s] a message that religion or a particular religious belief is favored or preferred.” To make that determination, a court must consider “the pertinent facts and circumstances surrounding the symbol and its placement.” *Buono* (plurality opinion); *id.* (Stevens, J., dissenting).

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. “It certainly is not common for property owners to open up their property [to] monuments that convey a message with which they do not wish to be associated.” *Pleasant Grove City v. Summum* (2009). To non-Christians . . . the State’s choice to display the cross on

public buildings or spaces conveys a message of exclusion: It tells them they “are outsiders, not full members of the political community,” *County of Allegheny* (O’Connor, J., concurring).

A presumption of endorsement, of course, may be overcome. A display does not run afoul of the neutrality principle if its “setting . . . plausibly indicates” that the government has not sought “either to adopt [a] religious message or to urge its acceptance by others.” *Van Orden* (Souter, J., dissenting). The “typical museum setting,” for example, “though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.” *Lynch v. Donnelly* (1984) (O’Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher’s purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre. . . .

Appendix to opinion of GINSBURG, J.

## APPENDIX



The Bladensburg Peace Cross. App. 887.

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### Notes and Questions

1. What is the test going forward? How should courts assess *new* monuments?
  2. As a lawyer, how might you argue about how old a monument needs to be in order to fall within the holding of *American Legion*?
  3. How did the various justices approach tradition-based analysis in this case? Was the Court’s approach consistent with its decision in *McCreary County*?
  4. What do you make of the idea—articulated by Justice Breyer in *Van Orden v. Perry* (2005)—that *removing* a monument that conveys a religious message could be seen as reflective of hostility toward religion? For Justice Breyer, this principle only applied to *judicial* orders that monuments be taken down—not political decisions to remove monuments. Is that a defensible distinction?
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## 6.4. Foreign Affairs and the Establishment Clause

Like *McCreary County v. ACLU* (2005), the next case involves the relationship between governmental motives and the Establishment Clause. How does the Court's approach differ from *McCreary County*? Why? Does the court have a different account of the Establishment Clause's meaning? Or is the majority departing from *McCreary Co.* merely in terms of *implementation doctrines*? Is the majority's decision persuasive? What are the limits of the holding?

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### Trump v. Hawaii (2018)

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#### **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 [in Proclamation No. 9645] 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. [*Those countries were Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.*] The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether . . . the entry policy violates the Establishment Clause of the First Amendment.

[*The Court began by determining that plaintiffs had standing and that the President had statutory authority to issue the Executive Order. We'll skip ahead to the constitutional analysis.*] . . .

Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente* (1982). 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.” . . .

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. . . .

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. . . .

[A]lthough 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* (1972), 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. . . .

*Mandel’s* narrow standard of review “has particular force” in admission and immigration cases that overlap with “the area of national security.” *Kerry v. Din* (2015) (Kennedy, J., concurring in judgment). For one, “[j]udicial inquiry into the national-security realm raises concerns for the separation of powers” by intruding on the President’s constitutional responsibilities in the area of foreign affairs. *Ziglar v. Abbasi* (2017). For another, “when it comes to collecting evidence and drawing inferences” on questions of national security, “the lack of competence on the part of the courts is marked.” *Holder v. Humanitarian Law Project* (2010). . . .<sup>5</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.” *Dep’t Ag. v. Moreno* (1973). 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, Inc.* (1985). 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

<sup>5</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. . . .

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* (1996).

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. . . .

[P]laintiffs 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 . . . .

Three additional features of the entry policy support the Government’s claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. . . . Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. . . . Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. . . .

[T]he dissent invokes *Korematsu v. United States* (1944). 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.” (Jackson, J., dissenting).

#### **Justice Kennedy, concurring.**

. . . There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise. . . .



**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 First Amendment itself. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* (2018). 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. . . .

On the one hand, if the Government is applying the exemption and waiver provisions as written, then [it would not be denying] visas to numerous Muslim individuals . . . 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. . . .

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. . . .

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. . . .

An examination of publicly available statistics also provides cause for concern. The State Department [approved] 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. . . .

Anecdotal evidence further heightens these concerns. For example, one *amicus* identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. . . . But after the child’s case was highlighted in an *amicus* brief before this Court, the family received an update from the consular officer who had initially denied the waiver. . . . Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

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. . . .

**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. . . .

“When the government acts with the ostensible and predominant purpose” of disfavoring a particular 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.” *McCreary County v. ACLU of Ky.* (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. . . .

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.” . . .

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. . . .

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.” . . .

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.” . . .

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO–1. . . . Rather than appeal the Ninth Circuit’s decision, the Government declined to continue defending EO–1 in court and instead announced that the President intended to issue a new executive order to replace EO–1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13,780 (EO–2). One of the President’s senior advisers publicly explained that EO–2 would “have the same basic policy outcome” as EO–1, and that any changes would address “very technical issues that were brought up by the court.” . . .

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. . . . 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].”<sup>1</sup>

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!” . . .

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. . . .

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. . . .

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. . . .

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* (1944). . . . 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. . . . And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy.

**[The concurring opinion of Justice Thomas is omitted.]**

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### Notes and Questions

1. *Trump v. Hawaii* holds that in the context of “a national security directive regulating the entry of aliens abroad,” courts should apply a deferential form of review—what the dissent characterizes as rational-basis scrutiny—without inquiring into the subjective motives of the President. Why? What are

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<sup>1</sup> According to the White House, President Trump’s statements on Twitter are “official statements.”

the costs and benefits of this approach? Is it based on the *meaning* of the First Amendment or on something else?

2. The majority relies heavily on *Kleindienst v. Mandel* (1972)—a freedom of speech case—for the principle that Courts should not inquire into the subjective motives behind Executive Branch actions in the context of immigration decisions. How might you critique this reliance on *Mandel*?

3. *Trump v. Hawaii* is yet another example of how the Court sometimes adopts *context-specific doctrines* rather than merely applying the same doctrinal rules regardless of the context. Where have we seen this before?

4. Could the plaintiffs in *Trump v. Hawaii* have brought their claim under the Equal Protection Clause, which *does* allow for subjective-motive inquiries under *Washington v. Davis* (1976)? In the 1960s and 70s, courts often evaluated religious and speech-related discrimination claims under the fundamental-rights strand of equal-protection law. (Why would that have made sense at that time? Why not bring those claims directly under the First Amendment?) Nowadays, though, discrimination claims of this type are brought directly under the First Amendment. See *Locke v. Davey* n.3 (2004) (“Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims.”). In part, this development reflects a general shift away from use of equal-protection doctrine to protect fundamental rights, as discussed in Unit 3.7. But it also reflects a shift in the Court’s approach to the Speech and Religion Clauses. How?

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## 6.5. Public Funding of Religion

This Unit will consider (1) limits on the government’s ability to fund religion under the Establishment Clause and (2) limits on the government’s ability to *not* fund religion under the Free Exercise Clause. These religious-funding issues often come up in speech cases, too. See, e.g., *Rosenberger v. Rector & Visitors of the University of Virginia* (1995). But for purposes of this Unit, we will focus only on the limits supplied by the Establishment Clause and Free Exercise Clause.

To set the stage, here is a summary of shifts in Establishment Clause doctrine leading up to 2001:\*

[T]he modern Establishment Clause dates not from the founding but from the mid-twentieth century. At that time, the Supreme Court adopted a rhetoric of radical separation of church and state. That rhetoric had as its defining application and chief consequence a constitutional ban against aid to religious schools. Later, the Court also moved to purge religious observances from public education. These two propositions—that public aid should not go to religious schools and that public schools should not be religious—make up the separationist position of the modern Establishment Clause.

We begin with the ban against aid to religious schools. The modern no-aid position drew support from a broad coalition of separationist opinion. Most visible was the pervasive secularism that came to dominate American public life, especially among educated elites, a secularism that does not so much deny religious belief as seek to confine it to a private sphere. This public secularism appears on the face of Supreme Court opinions and is deeply embedded in Establishment Clause doctrine. Additionally, the ban against aid to religious schools was supported by the great bulk of the Protestant faithful. With few exceptions, Protestant denominations, churches, and believers vigorously opposed aid to religious schools. For many

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\* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, Mich. L. Rev. (2001).

Protestant denominations, this position followed naturally from the circumstances of their founding. It was strongly reinforced, however, by hostility to Roman Catholics and the challenge they posed to the Protestant hegemony, which prevailed throughout the nineteenth and early twentieth centuries. In its political origins and constituencies, the ban against aid to religious schools aimed not only to prevent an establishment of religion but also to maintain one.

Today, much has changed. Anti-Catholic animosity has faded, and the crucial alliance between public secularists and Protestant believers has collapsed. Public secularists, whose devotion to public schools has declined in recent decades, now divide over the question of funding religious alternatives. More importantly, so do the Protestant faithful. While mainline Protestant denominations continue to demand strict separation of church and state, fundamentalist and evangelical opinion has largely deserted that position. Today, fundamentalists and evangelicals have moved from the most uncompromising opponents of aid to parochial schools to its unlikely allies.

In origin, this about-face had less to do with theology than with politics and self-interest. The defection of fundamentalist and evangelical opinion from the separationist coalition flowed initially from their embrace of the private schools that sprang up throughout the South (and elsewhere) in the wake of court-ordered desegregation. Originally, these schools were secular. They were created purely and simply to escape integration. Most of them, however, were soon transformed into, or succeeded by, Christian academies specializing in faith-based education. Today, virtually all of these schools say that they practice nondiscrimination, and many—perhaps most—enroll African-American students. Nonetheless, private academies remain havens for whites seeking to avoid minority status in public school systems dominated by persons of color.

Additionally, Christian academies are energized by antipathy to the triumphant secularism of public education and by the desire to maintain or recreate in the private sphere the unselfconscious Protestant establishment that once dominated public life. Allegiance to these schools and sympathy for the financial burden that they place on devout parents have moved many fundamentalist and evangelical Christians to rethink their traditional opposition to aid to religious schools. As a consequence, strict separationism is opposed today by true believers of many faiths, not just Roman Catholics (and a few other sects with a history of religious schools), but also by the nation's largest Protestant denomination (Southern Baptists) and by the great weight of opinion among the variety of churches called fundamentalist or evangelical.

Against this new coalition, we predict, the constitutional barrier against financial support of religious schools will not long stand. We see the current judicial uncertainty on this subject not merely as a continuation of the blurred and shifting margins that have plagued the field for years, but as a crack that goes to the core. We see the Court and the nation in the midst of a sea-change that ultimately will contradict past practice as clearly and fully as *Brown* rejected *Plessy*. This prediction does not depend (except in timing) on a guess about future appointments to the Supreme Court. It arises rather from the current realignment of the political forces historically arrayed against constitutional toleration of aid to religious institutions. Old coalitions have collapsed, and new alliances are demanding change. We think it likely that the emerging political combination in favor of government aid to religious education will prove, sooner or later, to be irresistible.

We do not, however, foresee an end to secularism in public education. In contrast to the political revolution on school aid, no new coalition has formed to overturn the Court's decisions outlawing school prayer and Bible reading. Religious exercises in public schools are endorsed today, as they were forty years ago, by the Catholic leadership and by conservative evangelicals

and fundamentalists. They are opposed today, as they were forty years ago, by public secularists, mainline Protestant clergy, and most Jews. Moreover, increasing religious pluralism reinforces the secularist position. While the growing religious diversity of private schools makes government funding seem more “neutral” and hence more acceptable, the growing religious diversity of public school students makes it more and more difficult to envision any religious exercise that would not favor some faiths and offend others. We therefore predict that the constitutional prohibition against religious exercises in the public schools will remain intact.

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In the following case, *Zelman v. Simmons-Harris* (2002), the Court considered the constitutionality of a voucher program that helped parents pay for their kids to go to accredited private schools, including religious schools. As we will see later in this Unit, the majority’s decision in *Zelman* is now foundational for recent Establishment Clause jurisprudence—with subsequent public-funding cases largely focused on the permissibility under the Free Exercise Clause of *denying* public funding to religious organizations, not the permissibility under the Establishment Clause of *providing* public funding to religious organizations—though some justices remain opposed to this doctrinal shift.

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### Zelman v. Simmons-Harris (2002)

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

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not. . . .

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion. *Agostini v. Felton* (1997). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden “effect” of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has “changed significantly” over the past two decades, *Agostini*, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. . . .

[Our cases] make clear that 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. . . .

We believe that the program challenged here is a program of true private choice . . . and thus constitutional. . . . It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. . . . Program benefits are available to participating families on neutral terms, with no reference to religion. . . .

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a “public perception that the State is endorsing religious practices and beliefs.” But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. The argument is particularly misplaced here since “the reasonable observer in the endorsement inquiry must be deemed aware” of the “history and context” underlying a challenged program. Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general. . . .

Respondents and Justice Souter claim that . . . we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller v. Allen* (1983), where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. . . . The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, “[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.” . . .

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. . . .

**Justice Thomas, concurring.**

. . . The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.” On its face, this provision places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.

The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law. . . . When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty. . . .

Thus, while the Federal Government may “make no law respecting an establishment of religion,” the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance

between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.

Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment’s guarantee of individual liberty into a prohibition on the exercise of educational choice. . . .

**Justice Souter, with whom Justices Stevens, Ginsburg, and Breyer join, dissenting.**

. . . The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Education of Ewing* (1947), which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent: “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson*.

Today, however, the majority holds that the Establishment Clause is not offended by Ohio’s Pilot Project Scholarship Program, under which students may be eligible to receive as much as \$2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. . . .

How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today’s decision on those criteria. . . .

[*Because we are reading this case most for background to understand subsequent cases, the remainder of Justice Souter’s lengthy dissenting opinion is omitted.*]

**[The concurring opinion of Justice O’Connor and the dissenting opinions of Justices Stevens and Breyer are omitted.]**

### Notes and Questions

1. Why did the Court conclude that the voucher program was “neutral” with respect to the “effects” of the spending program on advance religion? How did the Court define and assess “neutrality”? Is its approach to neutrality in this context consistent with other cases that you’ve encountered in this course?
2. What was Justice Thomas’s view in his concurring opinion? What do you think of that view? If you represented the claimant, how might you respond to it?
3. *Zelman v. Simmons-Harris* (2002) emphasized that the funding at issue was controlled by “true private choice” rather than being “direct aid” allocated on the basis of criteria chosen by the government. In *Mitchell v. Helms* (2000), a controlling concurring opinion authored by Justice



O'Connor and joined by Justice Breyer, held that although governmental funding could be directed toward religious *organizations*, direct aid could not be used for religious *uses* because of the Establishment Clause. As we will see, *Carson v. Makin* (2022) calls that holding into question. But at least for the time being, doctrine differentiates funding that flows through “true private choice” from funding that comes in the form of “direct aid.”

*Zelman* involved a voucher program that *enabled* governmental funding to go to religious schools. It thus raised a potential Establishment Clause problem but not a Free Exercise Clause problem. In the next case, however, the government set up a scholarship program that *prevented* public resources from being used to fund certain types of religious education. The claimant, a scholarship recipient who wanted to use the public funding to receive ministerial training, thus argued that his inability to do so constituted a violation of his rights under the Free Exercise Clause.

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### Locke v. Davey (2004)

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

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship [worth about \$1,500 per year] at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment. . . .

To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. A student must graduate from a Washington public or private high school and either graduate in the top 15% of his graduating class, or attain on the first attempt a cumulative score of 1,200 or better on the Scholastic Assessment Test I or a score of 27 or better on the American College Test. The student’s family income must be less than 135% of the State’s median. Finally, the student must enroll “at least half time in an eligible postsecondary institution in the state of Washington,” and may not pursue a degree in theology at that institution while receiving the scholarship. Private institutions, including those religiously affiliated, qualify as “[e]ligible postsecondary institution[s]” if they are accredited by a nationally recognized accrediting body. A “degree in theology” is not defined in the statute, but, as both parties concede, the statute simply codifies the State’s constitutional prohibition on providing funds to students to pursue degrees that are “devotional in nature or designed to induce religious faith.” . . .

Respondent, Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had “planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor.” To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Promise Scholarship Program.

At the beginning of the 1999-2000 academic year, Davey met with Northwest's director of financial aid. He learned for the first time at this meeting that he could not use his scholarship to pursue a devotional theology degree. . . .

Davey then brought an action . . . to enjoin the State from refusing to award the scholarship solely because a student is pursuing a devotional theology degree, and for damages. . . .

A divided panel of the United States Court of Appeals for the Ninth Circuit . . . concluded that the State had singled out religion for unfavorable treatment and thus under our decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993), the State's exclusion of theology majors must be narrowly tailored to achieve a compelling state interest. Finding that the State's own antiestablishment concerns were not compelling, the court declared Washington's Promise Scholarship Program unconstitutional. We granted certiorari, and now reverse.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. *Walz v. Tax Comm'n of City of New York* (1970). In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See *Zelman v. Simmons-Harris* (2002). As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in *Lukumi*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion.<sup>3</sup> We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit.<sup>4</sup> The State has merely chosen not to fund a distinct category of instruction.

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<sup>3</sup> Davey, relying on *Rosenberger v. Rector & Visitors of Univ. of Va.* (1995), contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to "encourage a diversity of views from private speakers." *United States v. Am. Library Ass'n, Inc.* (2003) (plurality opinion) (quoting *Rosenberger*). Our cases dealing with speech forums are simply inapplicable. See *Am. Library Ass'n*; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985).

Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims. . . .

<sup>4</sup> Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.

Justice Scalia argues, however, that generally available benefits are part of the “baseline against which burdens on religion are measured.” Because the Promise Scholarship Program funds training for all secular professions, Justice Scalia contends the State must also fund training for religious professions. But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. And the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State’s antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an “established” religion.

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. We have found nothing to indicate, as Justice Scalia contends, that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*. That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. . . .

In short, we find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect. . . .

**Justice Scalia, with whom Justice Thomas joins, dissenting.**

... I

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. He seeks only *equal* treatment—the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court’s reference to historical “popular uprisings against procuring taxpayer funds to support church leaders” is therefore quite misplaced. That history involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for

financial aid. . . . One can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of "play in the joints." I use the term "principle" loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives. There is nothing anomalous about constitutional commands that abut. A municipality hiring public contractors may not discriminate *against* blacks or *in favor* of them; it cannot discriminate a little bit each way and then plead "play in the joints" when haled into court. If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.

Even if "play in the joints" were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here. It is not just that "the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." The establishment question *would not even be close*, as is evident from the fact that this Court's decision in *Witters v. Washington Dep't of Servs. for Blind* (1986) was unanimous. Perhaps some formally neutral public benefits programs are so gerrymandered and devoid of plausible secular purpose that they might raise specters of state aid to religion, but an evenhanded Promise Scholarship Program is not among them.

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect.

What is the nature of the State's asserted interest here? It cannot be protecting the pocketbooks of its citizens; given the tiny fraction of Promise Scholars who would pursue theology degrees, the amount of any citizen's tax bill at stake is *de minimis*. It cannot be preventing mistaken appearance of endorsement; where a State merely declines to penalize students for selecting a religious major, "[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief." *Witters* (O'Connor, J., concurring). . . .

No, the interest to which the Court defers is not fear of a conceivable Establishment Clause violation, budget constraints, avoidance of endorsement, or substantive neutrality—none of these. It is a pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of "freedom of conscience" has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not.<sup>2</sup>

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<sup>2</sup> . . . Equally unpersuasive is the Court's argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. The Court's premise is true at some level of abstraction—the Establishment Clause discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing *actual* Establishment Clause violations. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns.

## II

. . . The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should. If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed. . . .

It may be that Washington's original purpose in excluding the clergy from public benefits was benign, and the same might be true of its purpose in maintaining the exclusion today. But those singled out for disfavor can be forgiven for suspecting more invidious forces at work. Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State's policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, *see, e.g., Romer v. Evans* (1996), its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

\* \* \*

Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? This may seem fanciful, but recall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today. When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future. I respectfully dissent.

**[The dissenting opinion of Justice Thomas is omitted.]**

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### Notes and Questions

1. Let's start with the question of scope. Why was Locke's claim within the *scope* of the Free Exercise Clause? Should it be? Is it consistent with the speech-related doctrines that apply to restrictions on public funding? If not, is there any constitutional basis for distinguishing between the scope of the Speech Clause and Free Exercise Clause?

2. How does the majority resolve the tension between the Establishment Clause and the Free Exercise Clause? What are the strengths and weaknesses of its approach?

3. In earlier speech cases—such as *U.S.A.I.D. v. Alliance for Open Society* (2013), which appears in Unit 4.14—Justice Scalia argued that the Speech Clause does not apply *at all* to limits on governmental funding for private speech. Such limits are outside the scope of the First Amendment, he argued, because they merely refuse to subsidize private speech rather than restricting private speech. Are those decisions

consistent with Justice Scalia’s view of the Free Exercise Clause in *Locke v. Davey*? Are there good reasons for treating the Speech Clause and the Free Exercise Clause differently in this respect?

4. None of the opinions in *Locke* cited *Lemon v. Kurtzman* (1971), but some of the doctrines that *Locke* mentioned were featured in the three-pronged “*Lemon test*” that framed Establishment Clause caselaw for several decades. As the Supreme Court summarized in *Lynch v. Donnelly* (1984) (citing *Lemon*):

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.

Although influential, the three-pronged *Lemon test*—looking to *purpose*, *effect*, and *entanglement*—has also been heavily criticized for being too unpredictable and too restrictive of governmental power. In cases from the 1970s and 1980s, it often prevented governmental funds from being used to subsidize religion, even pursuant to “neutral” funding programs. Cases such as *Zelman* and *Locke* reflect an important shift away from that approach. The Court continued that trend in the following two cases. But this time, in contrast to *Locke v. Davey*, the majority also held that denying public funding to religious groups violated free-exercise rights.

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### Trinity Lutheran Church of Columbia, Inc. v. Comer (2017)

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#### **Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3.\***

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department’s policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

#### I

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center . . . [T]he Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri’s Scrap Tire Program. Run by the State’s Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers

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\* Justices Kennedy, Alito, and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except for as to footnote 3.

reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant’s plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department’s view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides: “That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.” . . .

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department’s failure to approve the Center’s application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment. Trinity Lutheran sought declaratory and injunctive relief prohibiting the Department from discriminating against the Church on that basis in future grant applications. . . . [*The lower courts rejected this challenge under Locke v. Davey (2004). The Supreme Court then granted certiorari.*] . . .

### III

#### A

The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . .

[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel v. Paty* (1978) (plurality opinion) says plainly that the State has punished the free exercise of religion: “To condition the availability of benefits . . . upon [a recipient’s] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.” . . .

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Lyng v. Nw. Indian Cemetery Protective Ass’n* (1988). . . .

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The “imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.” *Sherbert v. Verner* (1963). The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. *Cf. Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville* (1993) (“[T]he ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract”). Trinity Lutheran is a

member of the community too, and the State’s decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

## B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*. It is not. . . .

According to the Court [in *Locke*], the State had “merely chosen not to fund a distinct category of instruction.” Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington’s choice was in keeping with the State’s antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could “think of few areas in which a State’s antiestablishment interests come more into play.” The claimant in *Locke* sought funding for an “essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit,” and opposition to such funding “to support church leaders” lay at the historic core of the Religion Clauses. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri’s similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington’s antiestablishment interest only after determining, as noted, that the scholarship program did not “require students to choose between their religious beliefs and receiving a government benefit.” As the Court put it, Washington’s scholarship program went “a long way toward including religion in its benefits.” Students in the program were free to use their scholarships at “pervasively religious schools.” Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. He could also use his scholarship money to attend a religious college and take devotional theology courses there. The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.<sup>3</sup>

## C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the “most rigorous” scrutiny. *Lukumi*.

Under that stringent standard, only a state interest “of the highest order” can justify the Department’s discriminatory policy. Yet the Department offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri’s same policy preference on a prior occasion, “the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.” *Widmar v. Vincent* (1981).

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<sup>3</sup> This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.



The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department’s policy violates the Free Exercise Clause. . . .

**Justice Thomas, with whom Justice Gorsuch joins, concurring in part.**

. . . This Court’s endorsement in *Locke* of even a “mil[d] kind” of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join nearly all of the Court’s opinion [except for] footnote 3, for the reasons expressed by Justice Gorsuch.

**Justice Gorsuch, with whom Justice Thomas joins, concurring in part.**

Missouri’s law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment and I am pleased to join nearly all of the Court’s opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). See *Cruzan v. Dir., Mo. Dep’t of Health* (1990) (Scalia, J., dissenting). Often enough the same facts can be described both ways.

Neither do I see why the First Amendment’s Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). And this Court has long explained that government may not “devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. See *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981); *Everson v. Board of Educ. of Ewing* (1947). I don’t see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey* (2004). In that case, this Court upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion’s claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.

Second and for similar reasons, I am unable to join the footnoted observation [in footnote 3], that “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing.” Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only “playground resurfacing” cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court’s opinion. Such a reading would be

unreasonable for our cases are “governed by general principles, rather than ad hoc improvisations.” *Elk Grove Unified Sch. Dist. v. Newdow* (2004) (Rehnquist, C. J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

**Justice Breyer, concurring in the judgment.**

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the “public benefit” here at issue. . . .

The Court stated in *Everson* that “cutting off church schools from” such “general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.” Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

[*Note: Justice Sotomayor’s lengthy dissent is omitted because many of the same ideas are explained in her dissent in the following case.*]

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### Notes and Questions

1. How does the majority distinguish *Locke v. Davey*? Is its effort persuasive?
  2. What is Justice Gorsuch’s point in his concurring opinion? Does his opinion reveal a different perspective about what ought to count as a religious discrimination?
  3. Unlike *Zelman* and *Locke v. Davey*, the funding program at issue in *Trinity Lutheran* did not involve an intermediating private choice. Rather, the funding was allocated entirely on the basis of government-chosen criteria. Should that matter? Why or why not?
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### Carson v. Makin (2022)

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

Maine has enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own. Under the program, parents designate the secondary school they would like their child to attend—public or private—and the school district transmits payments to that school to help defray the costs of tuition. Most private schools are eligible to receive the payments, so long as they are “nonsectarian.” The question presented is whether this restriction violates the Free Exercise Clause of the First Amendment.

## I

## A

Maine’s Constitution provides that the State’s legislature shall “require . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.” In accordance with that command, the legislature has required that every school-age child in Maine “shall be provided an opportunity to receive the benefits of a free public education,” and that the required schools be operated by “the legislative and governing bodies of local school administrative units.” But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed. Indeed, of Maine’s 260 school administrative units (SAUs), fewer than half operate a public secondary school of their own.

Maine has sought to deal with this problem in part by creating a program of tuition assistance for families that reside in such areas. Under that program, if an SAU neither operates its own public secondary school nor contracts with a particular public or private school for the education of its school-age children, the SAU must “pay the tuition . . . at the public school or the approved private school of the parent’s choice at which the student is accepted.” Parents who wish to take advantage of this benefit first select the school they wish their child to attend. If they select a private school that has been “approved” by the Maine Department of Education, the parents’ SAU “shall pay the tuition” at the chosen school up to a specified maximum rate. . . .

[In 1981,] Maine imposed a new requirement that any school receiving tuition assistance payments must be “a nonsectarian school in accordance with the First Amendment of the United States Constitution.” That provision was enacted in response to an opinion by the Maine attorney general taking the position that public funding of private religious schools violated the Establishment Clause of the First Amendment. We subsequently held, however, that a benefit program under which private citizens “direct government aid to religious schools wholly as a result of their own genuine and independent private choice” does not offend the Establishment Clause. *Zelman v. Simmons-Harris* (2002). Following our decision in *Zelman*, the Maine Legislature considered a proposed bill to repeal the “nonsectarian” requirement, but rejected it. . . .

[Chief Justice Roberts then summarized the facts of the case, which involved parents who wanted to use the public tuition program to send their kids to “sectarian” schools run by churches. The parents filed a lawsuit, alleging that the policy violated the Free Exercise Clause and Establishment Clause.]

## II

. . . Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, BCS and Temple Academy are disqualified from this generally available benefit “solely because of their religious character.” By “condition[ing] the availability of benefits” in that manner, Maine’s tuition assistance program—like the program in *Trinity Lutheran*—“effectively penalizes the free exercise” of religion. . . .

To satisfy strict scrutiny, government action “must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). “A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases.” *Id.*

This is not one of them. As noted, a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. *See Zelman*. Maine’s decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires.

But . . . such an “interest in separating church and state ‘more fiercely’ than the Federal Constitution . . . ‘cannot qualify as compelling’ in the face of the infringement of free exercise.” *Espinoza v. Montana Dep’t of Revenue* (2020) (quoting *Trinity Lutheran*); *see also Widmar v. Vincent* (1981) (“[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.”). Justice Breyer stresses the importance of “government neutrality” when it comes to religious matters, but there is nothing neutral about Maine’s program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State’s antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.

### III

#### . . . A

The First Circuit held that the “nonsectarian” requirement was constitutional because the benefit was properly viewed not as tuition assistance payments to be used at approved private schools, but instead as funding for the “rough equivalent of the public school education that Maine may permissibly require to be secular.” . . .

Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools. But “the definition of a particular program can always be manipulated to subsume the challenged condition,” and to allow States to “recast a condition on funding” in this manner would be to see “the First Amendment . . . reduced to a simple semantic exercise.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.* (2013). Maine’s formulation does not answer the question in this case; it simply restates it. . . .

Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. In order to provide an education to children who live in certain parts of its far-flung State, Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine’s administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient’s religious exercise.

The dissents are wrong to say that under our decision today Maine “*must*” fund religious education. Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not “forced upon” it. The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own. As we held in *Espinoza*, a “State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”

## B

The Court of Appeals also attempted to distinguish this case from *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were “solely status-based religious discrimination,” while the challenged provision here “imposes a use-based restriction.” Justice Breyer makes the same argument.

In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of “any church, sect or denomination of religion.” We noted that the case involved “express discrimination based on religious identity,” which was sufficient unto the day in deciding it, and that our opinion did “not address religious uses of funding.” *Id.* n.3 (plurality opinion).

So too in *Espinoza*, . . . we noted that nothing in our analysis was “meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”

Maine’s argument, however—along with the decision below and Justice Breyer’s dissent—is premised on precisely such a distinction.

That premise, however, misreads our precedents. In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. “[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2020).

Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism. *See id.* Indeed, Maine concedes that the Department barely engages in any such scrutiny when enforcing the “nonsectarian” requirement. *See* Brief for Respondent (asserting that there will be no need to probe private schools’ uses of tuition assistance funds because “schools self-identify as nonsectarian” under the program and the need for any further questioning is “extremely rare”). That suggests that any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke v. Davey* (2004) in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. In that case, Washington had established a scholarship fund to assist academically gifted students with postsecondary education expenses. But the program excluded one particular use of the scholarship funds: the “essentially religious endeavor” of pursuing a degree designed to “train[] a minister to lead a congregation.” We upheld that restriction against a free exercise challenge, reasoning that the State had “merely chosen not to fund a distinct category of instruction.”

Our opinions in *Trinity Lutheran* and *Espinoza*, however, have already explained why *Locke* can be of no help to Maine here. Both precedents emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used “to prepare for the ministry.” Funds could be and were used for theology courses; only pursuing a “vocational religious” degree was excluded.

*Locke*’s reasoning expressly turned on what it identified as the “historic and substantial state interest” against using “taxpayer funds to support church leaders.” But as we explained at length in *Espinoza*, “it is clear that there is no ‘historic and substantial’ tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*.” *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude

religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. . . .

**Justice Breyer, with whom Justice Kagan joins, and with whom Justice Sotomayor joins except as to Part I-B, dissenting.**

The First Amendment begins by forbidding the government from “mak[ing] [any] law respecting an establishment of religion.” It next forbids them to make any law “prohibiting the free exercise thereof.” The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second. The majority also fails to recognize the “play in the joints” between the two Clauses. That “play” gives States some degree of legislative leeway. It sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution’s protections for the free exercise of religion. In my view, Maine’s nonsectarian requirement falls squarely within the scope of that constitutional leeway. I respectfully dissent.

**I**

**A**

. . . Although the Religion Clauses are, in practice, often in tension, they nonetheless “express complementary values.” *Cutter v. Wilkinson* (2005). Together they attempt to chart a “course of constitutional neutrality” with respect to government and religion. *Walz v. Tax Comm’n of City of New York* (1970). . . .

The Religion Clauses thus created a compromise in the form of religious freedom. They aspired to create a “benevolent neutrality”—one which would “permit religious exercise to exist without sponsorship and without interference.” *Id.* “[T]he basic purpose of these provisions” was “to insure that no religion be sponsored or favored, none commanded, and none inhibited.” *Id.*

And in applying these Clauses, we have often said that “there is room for play in the joints” between them. *Id.*; *see, e.g., Locke; Trinity Lutheran*. This doctrine reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so. Rather than attempting to draw a highly reticulated and complex free-exercise/establishment line that varies based on the specific circumstances of each state-funded program, we have provided general interpretive principles that apply uniformly in all Religion Clause cases. At the same time, we have made clear that States enjoy a degree of freedom to navigate the Clauses’ competing prohibitions. This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. *See, e.g., Locke*. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. *Id.* (“[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause”). The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.

**B**

. . . We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. As Thomas Jefferson, one of the leading drafters and proponents of those Clauses, wrote, “to

compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” And as James Madison, another drafter and proponent, said, compelled taxpayer sponsorship of religion “is itself a signal of persecution,” which “will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.” To interpret the Clauses with these concerns in mind may help to further their original purpose of avoiding religion-based division. . . .

[A] “rigid, bright-line” approach to the Religion Clauses—an approach without any leeway or “play in the joints”—will too often work against the Clauses’ underlying purposes. . . . Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. In my view, that risk can best be understood by considering the particular benefit at issue, along with the reasons for the particular religious restriction at issue. Recognition that States enjoy a degree of constitutional leeway allows States to enact laws sensitive to local circumstances while also allowing this Court to consider those circumstances in light of the basic values underlying the Religion Clauses.

In a word, to interpret the two Clauses as if they were joined at the hip will work against their basic purpose: to allow for an American society with practitioners of over 100 different religions, and those who do not practice religion at all, to live together without serious risk of religion-based social divisions.

## II

The majority believes that the principles set forth in this Court’s earlier cases easily resolve this case. But they do not.

We have previously found, as the majority points out, that “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.” We have thus concluded that a State *may*, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the “government aid . . . reach[es] religious institutions only by way of the deliberate choices of . . . individual [aid] recipients.” *Zelman*.

But the key word is “may.” We have never previously held what the Court holds today, namely, that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education. . . .

The majority also asserts that “[t]he ‘unremarkable’ principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.” Not so. The state-funded program at issue in *Trinity Lutheran* provided payment for resurfacing school playgrounds to make them safer for children. Any Establishment Clause concerns arising from providing money to religious schools for the creation of safer play yards are readily distinguishable from those raised by providing money to religious schools through the program at issue here—a tuition program designed to ensure that all children receive their constitutionally guaranteed right to a free public education. After all, cities and States normally pay for police forces, fire protection, paved streets, municipal transport, and hosts of other services that benefit churches as well as secular organizations. But paying the salary of a religious teacher as part of a public school tuition program is a different matter.

In addition, schools were excluded from the playground resurfacing program at issue in *Trinity Lutheran* because of the mere fact that they were “owned or controlled by a church, sect, or other religious entity.” Schools were thus disqualified from receiving playground funds “solely because of their religious character,” not because of the “religious uses of [the] funding” they would receive. *Id.* n.3. Here, by contrast, . . . Maine chooses not to fund only those schools that “promot[e] the faith or belief system with which [the schools are] associated and/or presen[t] the [academic] material taught through the lens of this faith”—*i.e.*, schools that will use public money for religious purposes. Maine

thus excludes schools from its tuition program not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals. . . .

These distinctions are important. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion. State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent. And, unlike the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case.

### III

. . . The differences between this kind of [sectarian religious] education and a purely civic, public education are important. “The religious education and formation of students is the very reason for the existence of most private religious schools.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2020). “[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith,” we have said, “are responsibilities that lie at the very core of the mission of a private religious school.” *Id.* Indeed, we have recognized that the “connection that religious institutions draw between their central purpose and educating the young in the faith” is so “close” that teachers employed at such schools act as “ministers” for purposes of the First Amendment. *Id.*

By contrast, public schools, including those in Maine, seek first and foremost to provide a primarily civic education. We have said that, in doing so, they comprise “a most vital civic institution for the preservation of a democratic system of government, and . . . the primary vehicle for transmitting the values on which our society rests.” *Plyler v. Doe* (1982). To play that role effectively, public schools are religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs. We accordingly have, as explained above, consistently required public school education to be free from religious affiliation or indoctrination. *Cf. Edwards v. Aguillard* (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary [public] schools”).

Maine legislators who endorsed the State’s nonsectarian requirement recognized these differences between public and religious education. They did not want Maine taxpayers to finance, through a tuition program designed to ensure the provision of free public education, schools that would use state money for teaching religious practices. Underlying these views is the belief that the Establishment Clause seeks government neutrality. And the legislators thought that government payment for this kind of religious education would be antithetical to the religiously neutral education that the Establishment Clause requires in public schools. Maine’s nonsectarian requirement, they believed, furthered the State’s antiestablishment interests in not promoting religion in its public school system; the requirement prevented public funds—funds allocated to ensure that all children receive their constitutional right to a free public education—from being given to schools that would use the funds to promote religion.

In the majority’s view, the fact that private individuals, not Maine itself, choose to spend the State’s money on religious education saves Maine’s program from Establishment Clause condemnation. But that fact, as I have said, simply *permits* Maine to route funds to religious schools. *See, e.g., Zelman*. It does not *require* Maine to spend its money in that way. That is because, as explained above, this Court has long followed a legal doctrine that gives States flexibility to navigate the tension between the two Religion Clauses. This doctrine “recognize[s] that there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Trinity Lutheran* (quoting *Locke*). This wiggle-room means that “[t]he course of constitutional neutrality in this area cannot be an absolutely straight line.” *Walz*. And in walking this line of government neutrality, States must have



“some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause,” *Cutter v. Wilkinson* (2005), in which they can navigate the tension created by the Clauses and consider their own interests in light of the Clauses’ competing prohibitions.

Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. As explained above, this Court’s decisions in *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of a school’s religious *status*—that is, its affiliation with or control by a religious organization. But we have never said that the Free Exercise Clause prohibits States from withholding funds because of the religious *use* to which the money will be put. To the contrary, we upheld in *Locke* a State’s decision to deny public funding to a recipient “because of what he proposed *to do*” with the money, when what he proposed to do was to “use the funds to prepare for the ministry.” *Trinity Lutheran*. Maine does not refuse to pay tuition at private schools because of religious status or affiliation. The State only denies funding to schools that will use the money to promote religious beliefs through a religiously integrated education—an education that, in Maine’s view, is not a replacement for a civic-focused public education. This makes Maine’s decision to withhold public funds more akin to the state decision that we upheld in *Locke*, and unlike the withholdings that we invalidated in *Trinity Lutheran* and *Espinoza*.

The Free Exercise Clause thus does not require Maine to fund, through its tuition program, schools that will use public money to promote religion. And considering the Establishment Clause concerns underlying the program, Maine’s decision not to fund such schools falls squarely within the play in the joints between those two Clauses. Maine has promised all children within the State the right to receive a free public education. In fulfilling this promise, Maine endeavors to provide children the religiously neutral education required in public school systems. And that, in significant part, reflects the State’s antiestablishment interests in avoiding spending public money to support what is essentially religious activity. The Religion Clauses give Maine the ability, and flexibility, to make this choice. . . .

Maine’s nonsectarian requirement also serves to avoid religious strife between the State and the religious schools. Given that Maine is funding the schools as part of its effort to ensure that all children receive the basic public education to which they are entitled, Maine has an interest in ensuring that the education provided at these schools meets certain curriculum standards. Religious schools, on the other hand, have an interest in teaching a curriculum that advances the tenets of their religion. And the schools are of course entitled to teach subjects in the way that best reflects their religious beliefs. But the State may disagree with the particular manner in which the schools have decided that these subjects should be taught.

This is a situation ripe for conflict, as it forces Maine into the position of evaluating the adequacy or appropriateness of the schools’ religiously inspired curriculum. Maine does not want this role. . . .

Nor do the schools want Maine in this role. Bangor Christian asserted that it would only consider accepting public funds if it “did not have to make any changes in how it operates.” . . . The nonsectarian requirement ensures that Maine is not pitted against private religious schools in these battles over curriculum or operations, thereby avoiding the social strife resulting from this state-versus-religion confrontation. By invalidating the nonsectarian requirement, the majority today subjects the State, the schools, and the people of Maine to social conflict of a kind that they, and the Religion Clauses, sought to prevent.

I emphasize the problems that may arise out of today’s decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for a religious education simply because, in some rural areas, the State will help parents pay for a secular education. . . . The Establishment Clause was intended to keep the State out of this area. . . .

**Justice Sotomayor, dissenting.**

This Court continues to dismantle the wall of separation between church and state that the Framers fought to build. Justice Breyer explains why the Court’s analysis falters on its own terms, and I join all but Part I-B of his dissent. I write separately to add three points.

First, this Court should not have started down this path five years ago. *See Trinity Lutheran Church v. Comer* (2017). Before *Trinity Lutheran*, it was well established that “both the United States and state constitutions embody distinct views” on “the subject of religion”—“in favor of free exercise, but opposed to establishment”—“that find no counterpart” with respect to other constitutional rights. *Locke v. Davey* (2004). Because of this tension, the Court recognized “room for play in the joints between” the Religion Clauses, with “some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Id.* Using this flexibility, and consistent with a rich historical tradition, *see Trinity Lutheran* (Sotomayor, J., dissenting), States and the Federal Government could decline to fund religious institutions. Moreover, the Court for many decades understood the Establishment Clause to prohibit government from funding religious exercise.

Over time, the Court eroded these principles in certain respects. *See, e.g., Zelman v. Simmons-Harris* (2002) (allowing government funds to flow to religious schools if private individuals selected the benefiting schools; the government program was “entirely neutral with respect to religion”; and families enjoyed a “genuine choice among options public and private, secular and religious”). Nevertheless, the space between the Clauses continued to afford governments “some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.” *Trinity Lutheran* (Sotomayor, J., dissenting).

*Trinity Lutheran* veered sharply away from that understanding. After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State’s decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status. A plurality, however, limited the Court’s decision to “express discrimination based on religious identity” (*i.e.*, status), not “religious uses of funding.” *Id.* n.3. In other words, a State was barred from withholding funding from a religious entity “solely because of its religious character,” *id.* (opinion of the Court), but retained authority to do so on the basis that the funding would be put to religious uses. Two Terms ago, the Court reprised and extended *Trinity Lutheran*’s error to hold that a State could not limit a private-school voucher program to secular schools. *Espinoza v. Montana Dep’t of Revenue* (2020). The Court, however, again refrained from extending *Trinity Lutheran* from funding restrictions based on religious status to those based on religious uses.

As Justice Breyer explains, this status-use distinction readily distinguishes this case from *Trinity Lutheran* and *Espinoza*. I warned in *Trinity Lutheran*, however, that the Court’s analysis could “be manipulated to call for a similar fate for lines drawn on the basis of religious use.” That fear has come to fruition: The Court now holds for the first time that “any status-use distinction” is immaterial in both “theory” and “practice.” It reaches that conclusion by embracing arguments from prior separate writings and ignoring decades of precedent affording governments flexibility in navigating the tension between the Religion Clauses. As a result, in just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.

Second, the consequences of the Court’s rapid transformation of the Religion Clauses must not be understated. From a doctrinal perspective, the Court’s failure to apply the play-in-the-joints principle here leaves one to wonder what, if anything, is left of it. The Court’s increasingly expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once “permit[ted] religious exercise to exist without sponsorship and without interference.” *Walz*. . . .

The upshot is that Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices.

Finally, the Court’s decision is especially perverse because the benefit at issue is the public education to which all of Maine’s children are entitled under the State Constitution. As this Court has long recognized, the Establishment Clause requires that public education be secular and neutral as to religion. The Court avoids this framing of Maine’s benefit because, it says, “Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice.” In fact, any such “deci[sion]” was forced upon Maine by “the realities of remote geography and low population density,” which render it impracticable for the State to operate its own schools in many communities.

The Court’s analysis does leave some options open to Maine. For example, under state law, school administrative units (SAUs) that cannot feasibly operate their own schools may contract directly with a public school in another SAU, or with an approved private school, to educate their students. I do not understand today’s decision to mandate that SAUs contract directly with schools that teach religion, which would go beyond *Zelman*’s private-choice doctrine and blatantly violate the Establishment Clause. Nonetheless, it is irrational for this Court to hold that the Free Exercise Clause bars Maine from giving money to parents to fund the only type of education the State may provide consistent with the Establishment Clause: a religiously neutral one. Nothing in the Constitution requires today’s result. . . .

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### Notes and Questions

1. If you were arguing in *Carson* for the government, what precedent would you emphasize the most? Why? What about if you were arguing for the challenger?
2. What did the Court hold in *Carson*? Why didn’t it rely on the status/use distinction that it had articulated in *Trinity Lutheran*?
3. Did the Court persuasively distinguish *Locke v. Davey*? Why or why not?
4. What do you think of the dissents? What are their strongest and weakest arguments?
5. We are now in a position to evaluate the current landscape of constitutional restrictions on how the government structures public-funding programs in relation to religion. Consider the following scenarios and then answer in the righthand columns whether each scenario is constitutional or unconstitutional under the Establishment Clause and under the Free Exercise Clause:

Scenario	Free Exercise Clause	Establishment Clause
Public funding, with true private choice, for religious persons/institutions but not secular persons/institutions.		
Public funding, with true private choice, for religious uses but not secular uses.		
Public funding, with true private choice, for secular persons/institutions but not religious persons/institutions.		

Public funding, with true private choice, for secular uses but not religious uses.

Public funding, with true private choice, for secular and religious uses *except* vocational religious degrees.

Public funding, with true private choice, for secular and religious uses, including vocational religious degrees.

Direct aid for religious persons/institutions but not secular persons/institutions.

Direct aid for religious uses but not secular uses.

Direct aid for secular persons/institutions but not religious persons/institutions.

Direct aid for secular uses but not religious uses.

Direct aid for secular and religious uses *except* vocational religious degrees.

Direct aid for secular and religious uses, including vocational religious degrees.

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## 7. Gun Rights

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“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.” U.S. Const., Amdt. II.

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As you read the following case, *District of Columbia v. Heller* (2008), try to assess not only what the Supreme Court did but also what might come next. How, for instance, should courts assess restrictions on gun possession *outside* the home? What about restrictions on grenades, or tasers? A subsequent decision, *McDonald v. Chicago* (2010), held that the Second Amendment right is “incorporated” against state and local governments, but otherwise *Heller* provides the Supreme Court’s only guidance so far on the scope and strength of the Second Amendment right.

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### District of Columbia v. Heller (2008)

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

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

#### **I**

The District of Columbia generally prohibits the possession of handguns. . . . [N]o person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, “unloaded and disassembled or bound by a trigger lock or similar device” unless they are located in a place of business or are being used for lawful recreational activities.

Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of “functional firearms within the home.” . . .

#### **II**

We turn first to the meaning of the Second Amendment.

## A

The Second Amendment provides: “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.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague* (1931). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. . . .

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, “A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.” That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause. (“The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.” The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. . . . Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

### 1. Operative Clause.

**a. “Right of the People.”** The first salient feature of the operative clause is that it codifies a “right of the people.” The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”). All three of these instances unambiguously refer to individual rights, not “collective” rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to “the people” in a context other than “rights”—the famous preamble (“We the people”), § 2 of Article I (providing that “the people” will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with “the States” or “the people”). Those provisions arguably refer to “the people” acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right. . . .

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

**b. “Keep and Bear Arms.”** We move now from the holder of the right—“the people”—to the substance of the right: “to keep and bear Arms.”

Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “[w]eapons of offence, or armour of defence.” . . .

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. . . .

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. ACLU* (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States* (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases “keep arms” and “bear arms.” Johnson defined “keep” as, most relevantly, “[t]o retain; not to lose,” and “[t]o have in custody.” . . . Thus, the most natural reading of “keep Arms” in the Second Amendment is to “have weapons.”

The phrase “keep arms” was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to “keep Arms” as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to “keep arms in their houses.” *Commentaries on the Laws of England* (1769). Petitioners point to militia laws of the founding period that required militia members to “keep” arms in connection with militia service, and they conclude from this that the phrase “keep Arms” has a militia-related connotation. This is rather like saying that, since there are many statutes that authorize aggrieved employees to “file complaints” with federal agencies, the phrase “file complaints” has an employment-related connotation. “Keep arms” was simply a common way of referring to possessing arms, for militiamen *and everyone else*.

At the time of the founding, as now, to “bear” meant to “carry.” When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose—confrontation. . . . Although the phrase implies that the carrying of the weapon is for the purpose of “offensive or defensive action,” it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. . . .

The phrase “bear Arms” also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or “to wage war.” But it *unequivocally* bore that idiomatic meaning only when followed by the preposition “against,” which was in turn followed by the target of the hostilities. . . .

In any event, the meaning of “bear arms” that petitioners and Justice Stevens propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby “bear arms” connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving “bear Arms” its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. Worse still, the phrase “keep and bear Arms” would be incoherent. The word “Arms” would have two different meanings at once: “weapons” (as the object

of “keep”) and (as the object of “bear”) one-half of an idiom. It would be rather like saying “He filled and kicked the bucket” to mean “He filled the bucket and died.” Grotesque. . . .

**c. Meaning of the Operative Clause.** Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. . . .

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. . . . These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.” This right has long been understood to be the predecessor to our Second Amendment. It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. But it was secured to them as individuals, . . . not as members of a fighting force.

By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, “constituted the preeminent authority on English law for the founding generation,” *Alden v. Maine* (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, “the natural right of resistance and self-preservation” . . . .

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760’s and 1770’s, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that “[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence.” They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone’s Commentaries (by the law professor and former Anti-federalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the “right of self-preservation” as permitting a citizen to “repe[l] force by force” when “the intervention of society in his behalf, may be too late to prevent an injury.”

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

## 2. Prefatory Clause.

The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State. . . .”



**a. “Well-Regulated Militia.”** In *United States v. Miller* (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources. . . .

**b. “Security of a Free State.”** The phrase “security of a free State” meant “security of a free polity,” not security of each of the several States . . . . It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free State” and close variations seem to have been terms of art in 18th-century political discourse, meaning a “free country” or free polity. . . .

### 3. Relationship Between Prefatory Clause and Operative Clause.

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that 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. . . .

It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. . . .

[But] if petitioners are correct, the Second Amendment protects citizens’ right to use a gun in an organization from which Congress has plenary authority to exclude them [under its power to regulate state militias, including eligibility criteria]. It guarantees a select militia of the sort the Stuart kings found useful, but not the people’s militia that was the concern of the founding generation.

#### B

*[Justice Scalia argued that contemporary state constitutional provisions supported his interpretation. That discussion is omitted.]*

#### C

Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.

It is true, as Justice Stevens says, that there was concern that the Federal Government would abolish the institution of the state militia. That concern found expression, however, *not* in the various Second Amendment precursors proposed in the state conventions, but in separate [proposed] structural provisions that would have given the States concurrent and seemingly non-preemptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so. . . .

## D

We now address how the Second Amendment was interpreted from immediately after its ratification . . . . [*The Court then described a variety of sources that, in its view, supported an individual-rights view of the Second Amendment.*]

We have found only one early-19th century-commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. “The provision of the constitution, declaring the right of the people to keep and bear arms, & c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.” Benjamin Oliver, *The Rights of an American Citizen* (1832).

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. [*The Court then described a variety of sources that, in its view, supported an individual-rights view of the Second Amendment, but a right “subject to certain restrictions.”*]

In *Nunn v. State* (Ga. 1846), the Georgia Supreme Court construed the Second Amendment as protecting the “*natural* right of self-defence” and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!*

Those who believe that the Second Amendment preserves only a militia-centered right place great reliance on the Tennessee Supreme Court’s 1840 decision in *Aymette v. State*. The case does not stand for that broad proposition; in fact, the case does not mention the word “militia” at all, except in its quoting of the Second Amendment. *Aymette* held that the state constitutional guarantee of the right to “bear” arms did not prohibit the banning of concealed weapons. The opinion first recognized that both the state right and the federal right were descendents of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to “protect[ion of] the public liberty” and “keep[ing] in awe those who are in power.” The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny. This odd reading of the right is, to be sure, not the one we adopt—but it is not petitioners’ reading either. . . .

[*Justice Scalia then discussed evidence from later in the 1800s. That discussion is omitted.*]

## E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

*United States v. Cruikshank* (1876), in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right “is not a right granted by the Constitution [or] in any manner dependent upon that instrument for its existence. The second amendment . . . means no more than that it shall not be infringed by Congress.” States, we said, were free to restrict or protect the right under their police powers. The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation. . . . That discussion makes little sense if it is only a right to bear arms in a state militia. . . .

Justice Stevens places overwhelming reliance upon this Court’s decision in *United States v. Miller* (1939) [which, in his view, held that the Second Amendment] “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.”

Nothing so clearly demonstrates the weakness of Justice Stevens’ case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men’s federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act. It is entirely clear that the Court’s basis for saying that the Second Amendment did not apply was *not* that the defendants were “bear[ing] arms” not “for . . . military purposes” but for “nonmilitary use.” Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: “In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*.” . . .

Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. . . . *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons. . . .

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. . . .

### III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

#### IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. . . .

Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. . . .

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

[T]he District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. . . .

Justice Breyer has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District’s prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District’s law “imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted.” [*Justice Scalia then took issue with Justice Breyer’s historical evidence; that discussion is omitted.*]

Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. 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. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. *See Nat’l Socialist Party of Am. v. Skokie* (1977). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home. . . .

\* \* \*

We are aware of the problem of handgun violence in this country . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

**Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer join, dissenting.**

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller* (1939) provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Sustaining an indictment the Act, this Court held that, “[i]n the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this

time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.

Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there;<sup>2</sup> we ourselves affirmed it in 1980. See *Lewis v. United States* (1980).<sup>3</sup> No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and unpersuasive reading of the Amendment’s text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller*; and, ultimately, a feeble attempt to distinguish *Miller* . . . .

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law. . . .

In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the post-ratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

## I

. . . Three portions of [the Second Amendment’s] text merit special focus: the introductory language defining the Amendment’s purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

### “A well regulated Militia, being necessary to the security of a free State”

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” . . .

<sup>2</sup> Until the Fifth Circuit’s decision in *United States v. Emerson* (5th Cir. 2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. [*The Court then cited cases from the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits.*]

<sup>3</sup> Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: “These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller* (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’).”

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison* (1803).

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment’s operative provision and returning to the preamble merely “to ensure that our reading of the operative clause is consistent with the announced purpose.” That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some “logical connection” between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. Without identifying any language in the text that even mentions civilian uses of firearms, the Court proceeds to “find” its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court’s approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

### “[T]he right of the people”

The centerpiece of the Court’s textual argument is its insistence that the words “the people” as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution’s preamble, § 2 of Article I, and the Tenth Amendment—“the term unambiguously refers to all members of the political community, not an unspecified subset.” But the Court *itself* reads the Second Amendment to protect a “subset” significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to “law-abiding, responsible citizens.” But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

The Court also overlooks the significance of the way the Framers used the phrase “the people” in these constitutional provisions. In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of “the people.” These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words “the people” in the Second Amendment refer back to the object announced in the Amendment’s preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States’ share of the divided sovereignty created by the Constitution.

As used in the Fourth Amendment, “the people” describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase “the people” when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First

Amendment. Although the abstract definition of the phrase “the people” could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the First and Second Amendments are the same in referring to a collective activity. By way of contrast, the Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the Second Amendment, the words “the people” do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

### “[T]o keep and bear Arms”

Although the Court’s discussion of these words treats them as two “phrases”—as if they read “to keep” and “to bear”—they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.

As a threshold matter, it is worth pausing to note an oddity in the Court’s interpretation of “to keep and bear Arms.” Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for “lawful, private purposes.” Instead, the Court limits the Amendment’s protection to the right “to possess and carry weapons in case of confrontation.” No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment’s text *does* justify a different limitation: The “right to keep and bear Arms” protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term “bear arms” is a familiar idiom; when used unadorned by any additional words, its meaning is “to serve as a soldier, do military service, fight.” *Oxford English Dictionary* (2d ed. 1989). . . .

The Court argues that a “qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass.” But this fundamentally fails to grasp the point.

The stand-alone phrase “bear arms” most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text. . . .

The Amendment’s use of the term “keep” in no way contradicts the military meaning conveyed by the phrase “bear arms” and the Amendment’s preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment’s drafting used the term “keep” to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. . . .

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right “to keep . . . Arms” and a separate right “to bear . . . Arms.” Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary. Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment. . . .

And the Court’s emphatic reliance on the claim “that the Second Amendment . . . codified a *pre-existing* right” is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right. . . .



## II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. . . . Two themes relevant to our current interpretive task ran through the debates on the original Constitution [*namely, fear of standing armies and the inadequacies of poorly trained militias*].

[The fear that the federal government might invoke its authority to regulate the militia in order to dissolve or disarm state militias was] one of the primary objections to the original Constitution voiced by its opponents. [*Justice Stevens then summarized some of the historical evidence, including the various proposed amendments recommended by several state ratifying conventions.*] . . .

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed. . . .

## III

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history. All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion. [*This discussion is omitted.*]

## IV

The brilliance of the debates that resulted in the Second Amendment faded into oblivion during the ensuing years, for the concerns about Article I's Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the Second Amendment were short lived. . . . [*Justice Stevens then summarized post-ratification evidence, including Supreme Court decisions and early legislative restrictions of guns in the early twentieth century.*]

Thus, for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial. Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia."

The key to that decision did not, as the Court belatedly suggests, turn on the difference between muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes? . . .

[T]he majority simply does not approve of the conclusion the *Miller* Court reached . . . . Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

## V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights “enshrine[d]” in the Constitution. But the right the Court announces was not “enshrined” in the Second Amendment by the Framers; it is the product of today’s law-changing decision. The majority’s exegesis has utterly failed to establish that as a matter of text or history, “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” is “elevate[d] above all other interests” by the Second Amendment.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a “law-abiding, responsible citize[n]” the right to keep and use weapons in the home for self-defense is “off the table.” Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District’s policy choice may well be just the first of an unknown number of dominoes to be knocked off the table. . . .

### **Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg join, dissenting.**

. . . The majority’s conclusion is wrong for two independent reasons. The first reason is that set forth by Justice Stevens—namely, that the Second Amendment protects militia-related, not self-defense-related, interests. . . . [S]elf-defense alone, detached from any militia-related objective, is not the Amendment’s concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do. . . . [A] legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. . . .

[C]olonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the “right to keep and bear arms,” whether embodied in Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home. [*Justice Breyer then summarized historical restrictions.*]

. . .

This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law’s constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute’s rationale, the problems that called it into being, its relation to those objectives—in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." How could that be? It certainly would not be unconstitutional under, for example, a "rational-basis" standard . . . . The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective. . . .

Respondent proposes that the Court adopt a "strict scrutiny" test . . . . But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear.

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government—a concern for the safety and indeed the lives of its citizens." *United States v. Salerno* (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," *see id.*, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, *see, e.g., Brandenburg v. Ohio* (1969) (First Amendment free speech rights); *Sherbert v. Verner* (1963) (First Amendment religious rights) . . . . Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries.

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another the interests are likely to prove stronger on one side of a typical constitutional case than on the other. *See, e.g., United States v. Virginia* (1996) (applying heightened scrutiny to gender-based

classifications, based upon experience with prior cases); *Williamson v. Lee Optical Co.* (1955) (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach [akin to rational-basis review]. . . .

[Justice Breyer concluded that, as a matter of statutory interpretation, the D.C. ban on use of a firearm in the home included a self-defense exception, and thus did not conflict with the Second Amendment. He then assessed the constitutionality of the registration requirement, concluding that gun-violence statistics supported the legislative rationale for the regulation. He emphasized that “legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.”]

It does not help respondent’s case to describe the District’s objective more generally as an “effort to diminish the dangers associated with guns.” That is because the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous. . . . This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. . . .

The majority derides my approach as “judge-empowering.” I take this criticism seriously, but I do not think it accurate. As I have previously explained, this is an approach that the Court has taken in other areas of constitutional law. Application of such an approach, of course, requires judgment, but the very nature of the approach—requiring careful identification of the relevant interests and evaluating the law’s effect upon them—limits the judge’s choices; and the method’s necessary transparency lays bare the judge’s reasoning for all to see and to criticize.

The majority’s methodology is, in my view, substantially less transparent than mine. At a minimum, I find it difficult to understand the reasoning that seems to underlie certain conclusions that it reaches.

The majority spends the first 54 pages of its opinion attempting to [demonstrate that the Second Amendment] protects an interest in armed personal self-defense, at least to some degree. But the majority does not tell us precisely what that interest is. “Putting all of [the Second Amendment’s] textual elements together,” the majority says, “we find that they guarantee the individual right to possess and carry weapons in case of confrontation.” Then, three pages later, it says that “we do not read the Second Amendment to permit citizens to carry arms for *any sort* of confrontation.” Yet, with one critical exception, it does not explain which confrontations count. It simply leaves that question unanswered.

The majority does, however, point to one type of confrontation that counts, for it describes the Amendment as “elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” What is its basis for finding that to be the core of the Second Amendment right? The only historical sources identified by the majority that even appear to touch upon that specific matter consist of an 1866 newspaper editorial discussing the Freedmen’s Bureau Act, two quotations from that 1866 Act’s legislative history, and a 1980 state-court opinion saying that in colonial times the same were used to defend the home as to maintain the militia. How can citations such as these support the far-reaching proposition that the Second Amendment’s primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one’s bedside to shoot intruders?

Nor is it at all clear to me how the majority decides *which* loaded “arms” a homeowner may keep. The majority says that that Amendment protects those weapons “typically possessed by law-abiding citizens for lawful purposes.” This definition conveniently excludes machineguns, but permits handguns, which the majority describes as “the most popular weapon chosen by Americans for self-defense in the home.” But what sense does this approach make? According to the majority’s reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy

machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached to "the commercial sale of arms." Why these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count?

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? . . . One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*. . . .

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### Notes and Questions

1. How did Justice Scalia construe the relationship between the "preamble," which refers to militias, and the "operative" clause, which refers to the right to keep and bear arms?
2. How did *Heller* define the right, and what limits did it identify?

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*Heller* held that the Second Amendment secures an individual right, but *Heller* did not clarify how courts should define the *scope* and *strength* of that right. For the most part, lower courts in the years after *Heller* borrowed doctrines from First Amendment caselaw and used a two-step inquiry. The first step asked "whether the conduct at issue falls within the scope of the Second Amendment right." *NRA v. Bureau of Alcohol, Tobacco, and Firearms* (5th Cir. 2012). For the most part, lower courts used a blend of logical and historical analysis to make this determination. As part of this assessment, courts generally treated the traditionally recognized categories of weapons regulations identified in *Heller* as being outside the scope of the Second Amendment. If the claim survived step one, most courts then used a tiers-of-scrutiny framework. As the Court of Appeals for the Fifth Circuit stated, "the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* For the most part, lower courts applied strict scrutiny if laws significantly burdened "core" Second Amendment activity, often defined in terms of arms bearing for self-defense—and with some courts limiting this "core" to self-defense within the home. Other limits on bearing arms usually triggered intermediate scrutiny.

In the next case, the Supreme Court rejected this approach. What method did it embrace instead? What are the benefits and drawbacks of that approach?

## New York State Rifle &amp; Pistol Assoc. v. Bruen (2022)

**Justice Thomas, delivered the opinion of the Court.**

... I

New York State has regulated the public carry of handguns at least since the early 20th century. . . .

Today’s licensing scheme largely tracks that of the early 1900s. It is a crime in New York to possess “any firearm” without a license, whether inside or outside the home . . . .

A license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a “licensing officer”—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that “no good cause exists for the denial of the license.” If he wants to carry a firearm *outside* his home or place of business for self-defense, the applicant must obtain an unrestricted license to “have and carry” a concealed “pistol or revolver.” To secure that license, the applicant must prove that “proper cause exists” to issue it. If an applicant cannot make that showing, he can receive only a “restricted” license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines “proper cause.” But New York courts have held that an applicant shows proper cause only if he can “demonstrate a special need for self-protection distinguishable from that of the general community.” *E.g., In re Klenosky* (N.Y. App. Div. 1980). This “special need” standard is demanding. For example, living or working in an area “noted for criminal activity” does not suffice. *In re Bernstein* (N.Y. App. Div. 1981). Rather, New York courts generally require evidence “of particular threats, attacks or other extraordinary danger to personal safety.” *In re Martinek* (N.Y. App. Div. 2002); *see also In re Kaplan* (N.Y. App. Div. 1998) (approving the New York City Police Department’s requirement of “extraordinary personal danger, documented by proof of recurrent threats to life or safety”).

When a licensing officer denies an application, judicial review is limited. New York courts defer to an officer’s application of the proper-cause standard unless it is “arbitrary and capricious.” *In re Bando* (N.Y. App. Div. 2002). In other words, the decision “must be upheld if the record shows a rational basis for it.” *Kaplan*. The rule leaves applicants little recourse if their local licensing officer denies a permit.

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are “shall issue” jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. Meanwhile, only six States and the District of Columbia have “may issue” licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria . . . .

[Justice Thomas then summarized the facts. In short, two individuals—members of the New York State Rifle & Pistol Association—were denied “unrestricted” permits because officials decided that their preference for carrying a firearm for self-defense was insufficient cause. Instead, the individuals received permits to carry for limited activities, such as hunting and target practice.]

II

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws

that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a “two-step” framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.

Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” *Konigsberg v. State Bar of Cal.* (1961).

## A

Since *Heller* and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by “establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.” *Kanter v. Barr* (7th Cir. 2019). The Courts of Appeals then ascertain the original scope of the right based on its historical meaning. *E.g.*, *United States v. Focia* (11th Cir. 2017). If the government can prove that the regulated conduct falls beyond the Amendment’s original scope, “then the analysis can stop there; the regulated activity is categorically unprotected.” *United States v. Greeno* (6th Cir. 2012). But if the historical evidence at this step is “inconclusive or suggests that the regulated activity is *not* categorically unprotected,” the courts generally proceed to step two. *Kanter*.

At the second step, courts often analyze “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.” *Id.* The Courts of Appeals generally maintain “that the core Second Amendment right is limited to self-defense *in the home*.” *Gould v. Morgan* (1st Cir. 2018) (emphasis added). *But see Wrenn v. District of Columbia* (D.C. Cir. 2017) (“[T]he Amendment’s core generally covers carrying in public for self defense”). If a “core” Second Amendment right is burdened, courts apply “strict scrutiny” and ask whether the Government can prove that the law is “narrowly tailored to achieve a compelling governmental interest.” *Kolbe v. Hogan* (4th Cir. 2017). Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is “substantially related to the achievement of an important governmental interest.” *Kachalsky v. County of Westchester* (2d Cir. 2012). Both respondents and the United States largely agree with this consensus, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.

## B

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms. . . .

*Heller*’s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.

Moreover, *Heller* and *McDonald* expressly rejected the application of any “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’” *Heller* (quoting *id.* (Breyer, J., dissenting)). We declined to engage in means-end scrutiny because “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Heller*. We then concluded: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Id.* . . .

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” *Konigsberg v. State Bar of California* (1961).

## C

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. In that context, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entm’t Group, Inc.* (2000). In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment’s protections. *See, e.g., United States v. Stevens* (2010) (placing the burden on the government to show that a type of speech belongs to a “historic and traditional categor[y]” of constitutionally unprotected speech “long familiar to the bar”).

And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to “be confronted with the witnesses against him,” U. S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right. *See, e.g., Giles v. California* (2008) (“admitting only those exceptions [to the Confrontation Clause] established at the time of the founding”). Similarly, when a litigant claims a violation of his rights under the Establishment Clause, Members of this Court “loo[k] to history for guidance.” *Am. Legion v. Am. Humanist Ass’n* (2019) (plurality opinion). We adopt a similar approach here.

To be sure, “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” *McDonald v. City of Chicago* (2010) (Scalia, J., concurring). But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to “make difficult empirical judgments” about “the costs and benefits of firearms restrictions,” especially given their “lack [of] expertise” in the field. *Id.* (plurality opinion).<sup>6</sup>

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the

<sup>6</sup> The dissent claims that *Heller*’s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to “resolv[e] difficult historical questions” or engage in “searching historical surveys.” We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That “legal inquiry is a refined subset” of a broader “historical inquiry,” and it relies on “various evidentiary principles and default rules” to resolve uncertainties. William Baude & Stephen Sachs, *Originalism and the Law of the Past*, L. & Hist. Rev. (2019). For example, “[i]n our adversarial system of adjudication, we follow the principle of party presentation.” *United States v. Sineneng-Smith* (2020). Courts are thus entitled to decide a case based on the historical record compiled by the parties.



banner of “intermediate scrutiny” often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment “is the very *product* of an interest balancing by the people” and it “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense. *Heller*. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

## D

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

*Heller* itself exemplifies this kind of straightforward historical inquiry. . . . [A]fter considering “founding-era historical precedent,” including “various restrictive laws in the colonial period,” and finding that none was analogous to the District’s ban, *Heller* concluded that the handgun ban was unconstitutional.

New York’s proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: “handgun violence,” primarily in “urban area[s].” Following the course charted by *Heller*, we will consider whether “historical precedent” from before, during, and even after the founding evinces a comparable tradition of regulation. And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question. *See* Part III-B.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland* (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. *See, e.g., United States v. Jones* (2012) (holding that installation of a tracking device was “a physical intrusion [that] would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted”).

We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to “arms” does not apply “only [to] those arms in existence in the 18th century.” *Heller*. “Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* Thus, even though the Second Amendment’s definition of “arms” is fixed according to its historical understanding, that general definition covers modern

instruments that facilitate armed self-defense. *Cf. Caetano v. Massachusetts* (2016) (*per curiam*) (stun guns).

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are “relevantly similar.” Cass Sunstein, *On Analogical Reasoning*, Harv. L. Rev. (1993). And because “[e]verything is similar in infinite ways to everything else,” *id.*, one needs “some metric enabling the analogizer to assess which similarities are important and which are not,” Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, U. Chi. L. Rev. (2017). For instance, a green truck and a green hat are relevantly similar if one’s metric is “things that are green.” They are not relevantly similar if the applicable metric is “things you can wear.”

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, “individual self-defense is ‘the *central component*’ of the Second Amendment right.” *McDonald* (quoting *Heller*). Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are “*central*” considerations when engaging in an analogical inquiry.<sup>7</sup>

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” *Drummond v. Robinson* (3d Cir. 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Consider, for example, *Heller*’s discussion of “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” Although the historical record yields relatively few 18th- and 19th-century “sensitive places” where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that these locations were “sensitive places” where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of “sensitive places” to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define “sensitive places” in this case, we do think respondents err in their attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law. In their view, “sensitive places” where the government may lawfully disarm law-abiding citizens include all “places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.” It is true that people sometimes

<sup>7</sup> This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the “product of an interest balancing *by the people*,” not the evolving product of federal judges. *Heller* (emphasis altered). Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent’s assertion, there is nothing “[i]roni[c]” about that undertaking. It is not an invitation to revise that balance through means-end scrutiny.

congregate in “sensitive places,” and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of “sensitive places” simply to all places of public congregation that are not isolated from law enforcement defines the category of “sensitive places” far too broadly. Respondents’ argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. See Part III-B. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department. . . .

[W]e acknowledge that “applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins.” *Heller v. District of Columbia* (D.C. Cir. 2011) (Kavanaugh, J., dissenting). “But that is hardly unique to the Second Amendment. It is an essential component of judicial decisionmaking under our enduring Constitution.” *Id.* We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims.

### III

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York’s proper-cause requirement.

#### A

It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of “the people” whom the Second Amendment protects. Nor does any party dispute that handguns are weapons “in common use” today for self-defense. We therefore turn to whether the plain text of the Second Amendment protects Koch’s and Nash’s proposed course of conduct—carrying handguns publicly for self-defense.

We have little difficulty concluding that it does. . . . Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms. . . .

This definition of “bear” naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often “keep” firearms in their home, at the ready for self-defense, most do not “bear” (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.

Moreover, confining the right to “bear” arms to the home would make little sense given that self-defense is “the *central component* of the [Second Amendment] right itself.” *Heller*. After all, the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation,” *Heller*, and confrontation can surely take place outside the home. . . .

The Second Amendment’s plain text thus presumptively guarantees petitioners Koch and Nash a right to “bear” arms in public for self-defense.

#### B

Conceding that the Second Amendment guarantees a general right to public carry, respondents instead claim that the Amendment “permits a State to condition handgun carrying in areas ‘frequented by the general public’ on a showing of a nonspeculative need for armed self-defense in those areas.” To support that claim, the burden falls on respondents to show that New York’s proper-cause

requirement is consistent with this Nation’s historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners’ proposed course of conduct.

Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.

We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal. “Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.” *Heller* (emphasis added). The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. . . .

As with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights. The common law, of course, developed over time. And English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution. . . .

Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. It is true that in *Heller* we reiterated that evidence of “how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century” represented a “critical tool of constitutional interpretation.” We therefore examined “a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification.” And, in other contexts, we have explained that “‘a regular course of practice’ can ‘liquidate & settle the meaning of’ disputed or indeterminate ‘terms & phrases’” in the Constitution. *Chiafalo v. Washington* (2020). In other words, we recognize that “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.” *NLRB v. Noel Canning* (2014) (Scalia, J., concurring in judgment); *see also Myers v. United States* (1926); *Printz v. United States* (1997).

But to the extent later history contradicts what the text says, the text controls. “[L]iquidating indeterminacies in written laws is far removed from expanding or altering them.” *Gamble v. United States* (2019) (Thomas, J., concurring). Thus, “post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.” *Heller v. District of Columbia* (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also Espinoza v. Montana Dep’t of Revenue* (2020).

As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms “took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.” . . .

A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. *See, e.g., Barron v. Baltimore* (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. *See, e.g., Ramos v. Louisiana* (2020); *Timbs v. Indiana* (2019). And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. *See, e.g., Crawford v. Washington* (2004) (Sixth Amendment); *Virginia v. Moore* (2008) (Fourth Amendment); *Nevada Comm’n on Ethics v. Carrigan* (2011) (First Amendment).

We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). *See, e.g.,* Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (1998); Kurt Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* (manuscript). We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.

\* \* \*

With these principles in mind, we turn to respondents’ historical evidence. Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense. We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York’s proper-cause requirement. Under *Heller*’s text-and-history standard, the proper-cause requirement is therefore unconstitutional.

*[Justice Thomas then engaged in an extended discussion of historical sources, concluding that “all told, in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry.” That discussion is omitted. He then surveyed evidence from after the Founding and summarized his conclusion as follows:]*

The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

None of these historical limitations on the right to bear arms approach New York’s proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

*[Justice Thomas then surveyed evidence from the Reconstruction era. He acknowledged that gun regulations in Texas at that time supported the constitutionality of New York’s law. Nonetheless, he stated, “we will not give disproportionate weight to a single state statute.” Finally, he considered evidence from later in the 1800s. He noted that there was a “slight uptick in gun regulation during the late-19th century,” but he further stated that “late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”]*

#### IV

The constitutional right to bear arms in public for self-defense is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *McDonald v. City of Chicago* (2010) (plurality opinion). We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the

Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense. . . .

**Justice Kavanaugh, with whom the Chief Justice joins, concurring.**

. . . I join the Court’s opinion, and I write separately to underscore two important points about the limits of the Court’s decision.

*First*, the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court’s decision does not affect the existing licensing regimes—known as “shall-issue” regimes—that are employed in 43 States.

The Court’s decision addresses only the unusual discretionary licensing regimes, known as “may-issue” regimes, that are employed by 6 States including New York. As the Court explains, New York’s outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York’s regime—the unchanneled discretion for licensing officials and the special-need requirement—in effect deny the right to carry handguns for self-defense . . . .

Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. . . .

*Second*, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment “is neither a regulatory straightjacket nor a regulatory blank check.” Properly interpreted, the Second Amendment allows a “variety” of gun regulations. *Heller*. . . .

**Justice Barrett, concurring.**

I join the Court’s opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution. Scholars have proposed competing and potentially conflicting frameworks for this analysis, including liquidation, tradition, and precedent. *See, e.g.,* Caleb Nelson, *Originalism and Interpretive Conventions*, U. Chi. L. Rev. (2003); Michael W. McConnell, *Time, Institutions, and Interpretation*, B. U. L. Rev. (2015). The limits on the permissible use of history may vary between these frameworks (and between different articulations of each one). To name just a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning? *Cf. McCulloch v. Maryland* (1819) (citing practice “introduced at a very early period of our history”). What form must practice take to carry weight in constitutional analysis? *See Myers v. United States* (1926) (citing a “legislative exposition of the Constitution . . . acquiesced in for a long term of years”). And may practice settle the meaning of individual rights as well as structural provisions? *See* William Baude, *Constitutional Liquidation*, Stan. L. Rev. (2019) (canvassing arguments). The historical inquiry presented in this case does not require us to answer such questions, which might make a difference in another case.

Second and relatedly, the Court avoids another “ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868” or when the Bill of Rights was ratified in 1791. Here, the lack of support for New York’s law in either period makes it unnecessary to choose between them. But if 1791 is the benchmark, then New York’s appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little). *Cf. Espinoza v. Montana Dep’t of Revenue* (2020) (a practice that “arose in the second half of the 19th century . . . cannot by itself establish an early American tradition” informing our understanding of the First

Amendment). So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving post-enactment history more weight than it can rightly bear."

**Justice Breyer, with whom Justices Sotomayor and Kagan join, dissenting.**

In 2020, 45,222 Americans were killed by firearms. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents.

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York's law operates in practice. Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York's law, the Court fails to correctly identify and analyze the relevant historical facts. Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not "consistent with the Nation's historical tradition of firearm regulation."

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The Second Circuit has done so and has held that New York's law does not violate the Second Amendment. I would affirm that holding. At a minimum, I would not strike down the law based only on the pleadings, as the Court does today—without first allowing for the development of an evidentiary record and without considering the State's compelling interest in preventing gun violence. I respectfully dissent.

## I

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than in any other country in the world. *Id.* (By comparison, Yemen is second with about 52.8 firearms per 100 people—less than half the per capita rate in the United States—and some countries, like Indonesia and Japan, have fewer than one firearm per 100 people.)

Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. . . .

Worse yet, gun violence appears to be on the rise. . . . [I]n 2020, an average of about 124 people died from gun violence every day. . . . And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular. . . .

I am not simply saying that “guns are bad.” Some Americans use guns for legitimate purposes, such as sport (*e.g.*, hunting or target shooting), certain types of employment (*e.g.*, as a private security guard), or self-defense. Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Consider, for one thing, that different types of firearms may pose different risks and serve different purposes. The Court has previously observed that handguns, the type of firearm at issue here, “are the most popular weapon chosen by Americans for self-defense in the home.” *District of Columbia v. Heller* (2008). But handguns are also the most popular weapon chosen by perpetrators of violent crimes. In 2018, 64.4% of firearm homicides and 91.8% of nonfatal firearm assaults were committed with a handgun. . . .

Or consider, for another thing, that the dangers and benefits posed by firearms may differ between urban and rural areas. Firearm-related homicides and assaults are significantly more common in urban areas than rural ones. For example, from 1999 to 2016, 89.8% of the 213,175 firearm-related homicides in the United States occurred in “metropolitan” areas. . . .

All of the above considerations illustrate that the question of firearm regulation presents a complex problem—one that should be solved by legislatures rather than courts. What kinds of firearm regulations should a State adopt? Different States might choose to answer that question differently. They may face different challenges because of their different geographic and demographic compositions. . . .

## II

. . . In describing New York’s law, the Court . . . suggests that New York’s licensing regime gives licensing officers too much discretion and provides too “limited” judicial review of their decisions, that the proper cause standard is too “demanding,” and that these features make New York an outlier compared to the “vast majority of States.” But on what evidence does the Court base these characterizations? Recall that this case comes to us at the pleading stage. The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record. Thus, at this point, there is no record to support the Court’s negative characterizations, as we know very little about how the law has actually been applied on the ground.

Consider each of the Court’s criticisms in turn. First, the Court says that New York gives licensing officers too much discretion and “leaves applicants little recourse if their local licensing officer denies a permit.” But there is nothing unusual about broad statutory language that can be given more specific content by judicial interpretation. Nor is there anything unusual or inadequate about subjecting licensing officers’ decisions to arbitrary-and-capricious review. . . .

Based on the pleadings alone, we cannot know how often New York courts find the denial of a concealed-carry license to be arbitrary and capricious or on what basis. We do not even know how a court would have reviewed the licensing officer’s decisions in Koch’s and Nash’s cases because they do not appear to have sought judicial review at all.

Second, the Court characterizes New York’s proper cause standard as substantively “demanding.” But, again, the Court has before it no evidentiary record to demonstrate how the standard has actually



been applied. How “demanding” is the proper cause standard in practice? Does that answer differ from county to county? How many license applications are granted and denied each year? At the pleading stage, we do not know the answers to these and other important questions, so the Court’s characterization of New York’s law may very well be wrong.

In support of its assertion that the law is “demanding,” the Court cites only to cases originating in New York City. But cases from New York City may not accurately represent how the proper cause standard is applied in other parts of the State, including in Rensselaer County where petitioners reside.

To the contrary, *amici* tell us that New York’s licensing regime is purposefully flexible: It allows counties and cities to respond to the particular needs and challenges of each area. . . . Given the geographic variation across the State, it is too sweeping for the Court to suggest, without an evidentiary record, that the proper cause standard is “demanding” in Rensselaer County merely because it may be so in New York City.

Finally, the Court compares New York’s licensing regime to that of other States. It says that New York’s law is a “may issue” licensing regime, which the Court describes as a law that provides licensing officers greater discretion to grant or deny licenses than a “shall issue” licensing regime. Because the Court counts 43 “shall issue” jurisdictions and only 7 “may issue” jurisdictions, it suggests that New York’s law is an outlier. Implicitly, the Court appears to ask, if so many other States have adopted the more generous “shall issue” approach, why can New York not be required to do the same?

But the Court’s tabulation, and its implicit question, overlook important context. In drawing a line between “may issue” and “shall issue” licensing regimes, the Court ignores the degree of variation within and across these categories. Not all “may issue” regimes are necessarily alike, nor are all “shall issue” regimes. Conversely, not all “may issue” regimes are as different from the “shall issue” regimes as the Court assumes. For instance, . . . three States (Connecticut, Delaware, and Rhode Island) have statutes with discretionary criteria, like so-called “may issue” regimes do. But the Court nonetheless counts them among the 43 “shall issue” jurisdictions because, it says, these three States’ laws operate in practice more like “shall issue” regimes.

As these three States demonstrate, the line between “may issue” and “shall issue” regimes is not as clear cut as the Court suggests, and that line depends at least in part on how statutory discretion is applied in practice. Here, because the Court strikes down New York’s law without affording the State an opportunity to develop an evidentiary record, we do not know how much discretion licensing officers in New York have in practice or how that discretion is exercised, let alone how the licensing regimes in the other six “may issue” jurisdictions operate.

Even accepting the Court’s line between “may issue” and “shall issue” regimes and assuming that its tally (7 “may issue” and 43 “shall issue” jurisdictions) is correct, that count does not support the Court’s implicit suggestion that the seven “may issue” jurisdictions are somehow outliers or anomalies. The Court’s count captures only a snapshot in time. It forgets that “shall issue” licensing regimes are a relatively recent development. Until the 1980s, “may issue” regimes predominated. . . .

And there are good reasons why these seven jurisdictions may have chosen not to follow other States in shifting toward “shall issue” regimes. The seven remaining “may issue” jurisdictions are among the most densely populated in the United States . . . .

New York and its *amici* present substantial data justifying the State’s decision to retain a “may issue” licensing regime. The data show that stricter gun regulations are associated with lower rates of firearm-related death and injury. In particular, studies have shown that “may issue” licensing regimes, like New York’s, are associated with lower homicide rates and lower violent crime rates than “shall issue” licensing regimes. For example, one study compared homicide rates across all 50 States during the 25-year period

from 1991 to 2015 and found that “shall issue” laws were associated with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates. . . .

### III

#### A

How does the Court justify striking down New York’s law without first considering how it actually works on the ground and what purposes it serves? The Court does so by purporting to rely nearly exclusively on history. It requires “the government [to] affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of ‘the right to keep and bear arms.’” Beyond this historical inquiry, the Court refuses to employ what it calls “means-end scrutiny.” *Id.* That is, it refuses to consider whether New York has a compelling interest in regulating the concealed carriage of handguns or whether New York’s law is narrowly tailored to achieve that interest. Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court’s near-exclusive reliance on that single tool today goes much too far. . . .

The opinion in *Heller* did focus primarily on “constitutional text and history,” but it did *not* “rejec[t] . . . means-end scrutiny,” as the Court claims. Consider what the *Heller* Court actually said. True, the Court spent many pages in *Heller* discussing the text and historical context of the Second Amendment. But that is not surprising because the *Heller* Court was asked to answer the preliminary question whether the Second Amendment right to “bear Arms” encompasses an individual right to possess a firearm in the home for self-defense. The *Heller* Court concluded that the Second Amendment’s text and history were sufficiently clear to resolve that question: The Second Amendment, it said, does include such an individual right. There was thus no need for the Court to go further—to look beyond text and history, or to suggest what analysis would be appropriate in other cases where the text and history are not clear.

But the *Heller* Court did not end its opinion with that preliminary question. After concluding that the Second Amendment protects an individual right to possess a firearm for self-defense, the *Heller* Court added that that right is “not unlimited.” It thus had to determine whether the District of Columbia’s law, which banned handgun possession in the home, was a permissible regulation of the right. In answering that second question, it said: “Under *any of the standards of scrutiny that we have applied to enumerated constitutional rights*, banning from the home the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family would fail constitutional muster.” *Heller* (emphasis added). That language makes clear that the *Heller* Court understood some form of means-end scrutiny to apply. It did not need to specify whether that scrutiny should be intermediate or strict because, in its view, the District’s handgun ban was so “severe” that it would have failed either level of scrutiny.

Despite *Heller*’s express invocation of means-end scrutiny, the Court today claims that the majority in *Heller* rejected means-end scrutiny because it rejected my dissent in that case. But that argument misreads both my dissent and the majority opinion. . . . The majority rejected my dissent, not because I proposed using means-end scrutiny, but because, in its view, I had done the opposite. In its own words, the majority faulted my dissent for proposing “a *freestanding* ‘interest-balancing’ approach” that accorded with “*none of the traditionally expressed levels* [of scrutiny] (strict scrutiny, intermediate scrutiny, rational basis).” *Id.* (emphasis added).

The majority further made clear that its rejection of freestanding interest balancing did *not* extend to traditional forms of means-end scrutiny. It said: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” To illustrate this point, it cited as an example the First Amendment right to free speech. Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret

or apply the First Amendment. The majority therefore cannot have intended its opinion, consistent with our First Amendment jurisprudence, to be read as rejecting all traditional forms of means-end scrutiny.

As *Heller*'s First Amendment example illustrates, the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history "accords with how we protect other constitutional rights." As the Court points out, we do look to history in the First Amendment context to determine "whether the expressive conduct falls outside of the category of protected speech." But, if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden. *See, e.g., Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) (applying strict scrutiny to laws that burden political speech); *Ward v. Rock Against Racism* (1989) (applying intermediate scrutiny to time, place, and manner restrictions); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980) (applying intermediate scrutiny to laws that burden commercial speech).

Additionally, beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) (applying strict scrutiny under the First Amendment to laws that restrict free exercise of religion in a way that is not neutral and generally applicable); *Adarand Constructors, Inc. v. Peña* (1995) (applying strict scrutiny under the Equal Protection Clause to race-based classifications); *Clark v. Jeter* (1988) (applying intermediate scrutiny under the Equal Protection Clause to sex-based classifications).

The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional anomaly. Rather, it is the Court's rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.

## B

The Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its "ends") against the methods used to achieve those objectives (its "means"). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

Consider *Heller* itself. That case, fraught with difficult historical questions, illustrates the practical problems with expecting courts to decide important constitutional questions based solely on history. The majority in *Heller* undertook 40 pages of textual and historical analysis and concluded that the Second Amendment's protection of the right to "keep and bear Arms" historically encompassed an "individual right to possess and carry weapons in case of confrontation"—that is, for self-defense. Justice Stevens' dissent conducted an equally searching textual and historical inquiry and concluded, to the contrary, that the term "bear Arms" was an idiom that protected only the right "to use and possess arms in conjunction with service in a well-regulated militia." I do not intend to relitigate *Heller* here. I

accept its holding as a matter of *stare decisis*. I refer to its historical analysis only to show the difficulties inherent in answering historical questions and to suggest that judges do not have the expertise needed to answer those questions accurately.

For example, the *Heller* majority relied heavily on its interpretation of the English Bill of Rights. Citing Blackstone, the majority claimed that the English Bill of Rights protected a “right of having and using arms for self-preservation and defence.” *Id.* (quoting Blackstone, *Commentaries on the Laws of England* (1765)). The majority interpreted that language to mean a private right to bear arms for self-defense, “having nothing whatever to do with service in a militia.” Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald v. Chicago* (2010) that the *Heller* Court had gotten the history wrong: The English Bill of Rights “did not . . . protect an individual’s right to possess, own, or use arms for private purposes such as to defend a home against burglars.” Rather, these *amici* historians explained, the English right to “have arms” ensured that the Crown could not deny Parliament (which represented the people) the power to arm the landed gentry and raise a militia—or the right of the people to possess arms to take part in that militia—“should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation.” Thus, the English right did protect a right of “self-preservation and defence,” as Blackstone said, but that right “was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives,” *i.e.*, Parliament. The Court, not an expert in history, had misread Blackstone and other sources explaining the English Bill of Rights.

And that was not the *Heller* Court’s only questionable judgment. The majority rejected Justice Stevens’ argument that the Second Amendment’s use of the words “bear Arms” drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so. *See, e.g.*, Brief for Corpus Linguistics Professors and Experts as *Amici Curiae*. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase “bear arms,” and they concluded that the phrase was overwhelmingly used to refer to “war, soldiering, or other forms of armed action by a group rather than an individual.” . . .

The Court’s past experience with historical analysis should serve as a warning against relying exclusively, or nearly exclusively, on this mode of analysis in the future.

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. The Court’s historical analysis in this case is over 30 pages long and reviews numerous original sources from over 600 years of English and American history. Lower courts—especially district courts—typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court’s approach requires. . . . In contrast, lawyers and courts are well equipped to administer means-end scrutiny, which is regularly applied in a variety of constitutional contexts.

Second, the Court’s opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. The Court declines to “provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment.” Other than noting that its history-only analysis is “neither a . . . straightjacket nor a . . . blank check,” the Court offers little explanation of how stringently its test should be applied. Ironically, the only two “relevan[t]” metrics that the Court does identify are “how and why” a gun control regulation “burden[s the] right to armed self-defense.” In other words, the Court believes that the most relevant metrics of comparison are a regulation’s means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court believes that some historical laws and decisions cannot justify upholding modern regulations because, it says, they were outliers. It explains that just two court decisions or three colonial laws are not enough to satisfy its test. But the Court does not say how many cases or laws would suffice “to show a tradition of public-carry regulation.” Other laws are irrelevant, the Court claims, because they are too dissimilar from New York’s concealed-carry licensing regime. But the Court does not say what “representative historical analogue,” short of a “twin” or a “dead ringer,” would suffice. Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history’s crowd. At worst, they create a one-way ratchet that will disqualify virtually any “representative historical analogue” and make it nearly impossible to sustain common-sense regulations necessary to our Nation’s safety and security.

Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. . . . As a result, history, as much as any other interpretive method, leaves ample discretion to “loo[k] over the heads of the [crowd] for one’s friends.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court’s apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was “predominantly rural.” . . . Even New York City, the largest American city then, as it is now, had a population of just 33,000 people. Small founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs.

This problem is all the more acute when it comes to “modern-day circumstances that [the Framers] could not have anticipated.” *Heller* (Breyer, J., dissenting). How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting “ghost guns” constructed with the aid of a three-dimensional printer? Or modern laws requiring all gun shops to offer smart guns, which can only be fired by authorized users? Or laws imposing additional criminal penalties for the use of bullets capable of piercing body armor?

The Court’s answer is that judges will simply have to employ “analogical reasoning.” But, as I explained above, the Court does not provide clear guidance on how to apply such reasoning. . . .

Although I hope—fervently—that future courts will be able to identify historical analogues supporting the validity of regulations that address new technologies, I fear that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified. Laws addressing repeating crossbows, launcigays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems. And as technological progress pushes our society ever further beyond the bounds of the Framers’ imaginations, attempts at “analogical reasoning” will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

#### IV

Indeed, the Court’s application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage

of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York’s licensing requirements do today. Thus, even applying the Court’s history-only analysis, New York’s law must be upheld because “historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation.” (majority opinion). . . .

[Justice Breyer then discussed historical sources at length. That discussion is omitted.]

The historical examples of regulations similar to New York’s licensing regime are legion. Closely analogous English laws were enacted beginning in the 13th century, and similar American regulations were passed during the colonial period, the founding era, the 19th century, and the 20th century. Not all of these laws were identical to New York’s, but that is inevitable in an analysis that demands examination of seven centuries of history. At a minimum, the laws I have recounted *resembled* New York’s law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes. That is all that the Court’s test, which allows and even encourages “analogical reasoning,” purports to require.

In each instance, the Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York’s law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either. . . .

[The concurring opinion of Justice Alito is omitted.]

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### Notes and Questions

1. What interpretive method did Justice Thomas use for identifying the scope and strength of constitutional rights? What were the various steps in his analysis? Is he correct about this method being consistent with the approach taken in *Heller*? How did it contrast with the approach taken by lower courts after *Heller*?
2. What are the benefits and drawbacks of Justice Thomas’s approach?
3. Why might the Justices in the *Bruen* majority have worried about using ends/means analysis?
4. Was Justice Thomas correct that the interpretive method in *Bruen* is the same method applied in other areas of rights jurisprudence? Does that matter? Should the methods used to identify the scope and strength of various constitutional rights be essentially the same? Why or why not?

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Between *Heller* and *Bruen*, lower courts had coalesced around a two-step “tiers of scrutiny” test for assessing the constitutionality of firearms restrictions. *Bruen* upended that approach, but important questions remained about exactly how to apply the “text and history” method. Only two years later, the following case presented an opportunity to clarify how that approach ought to work.

## United States v. Rahimi (2024)

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

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he “represents a credible threat to the physical safety of [an] intimate partner,” or a child of the partner or individual. 18 U.S.C. § 922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

**I**

In December 2019, Rahimi met his girlfriend, C. M., for lunch in a parking lot. C. M. is also the mother of Rahimi’s young child, A. R. During the meal, Rahimi and C. M. began arguing, and Rahimi became enraged. C. M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C. M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C. M. or the witness. Rahimi later called C. M. and warned that he would shoot her if she reported the incident.

Undeterred by this threat, C. M. went to court to seek a restraining order. In the affidavit accompanying her application, C. M. recounted the parking lot incident as well as other assaults. She also detailed how Rahimi’s conduct had endangered A. R. Although Rahimi had an opportunity to contest C. M.’s testimony, he did not do so. On February 5, 2020, a state court in Tarrant County, Texas, issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed “family violence.” App. 2. It also found that this violence was “likely to occur again” and that Rahimi posed “a credible threat” to the “physical safety” of C. M. or A. R. . . .

In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon. And while Rahimi was under arrest for that assault, the Texas police identified him as the suspect in a spate of at least five additional shootings. . . .

Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. § 922(g)(8). . . . A prosecution under Section 922(g)(8) may proceed only if three criteria are met. First, the defendant must have received actual notice and an opportunity to be heard before the order was entered. Second, the order must prohibit the defendant from either “harassing, stalking, or threatening” his “intimate partner” or his or his partner’s child, or “engaging in other conduct that would place [the] partner in reasonable fear of bodily injury” to the partner or child. A defendant’s “intimate partner[s]” include his spouse or any former spouse, the parent of his child, and anyone with whom he cohabitates or has cohabitated. Third . . . the order must either contain a finding that the defendant “represents a credible threat to the physical safety” of his intimate partner or his or his partner’s child, or “by its terms explicitly prohibit[ ] the use,” attempted use, or threatened use of “physical force” against those individuals. . . .

Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violated on its face the Second Amendment right to keep and bear arms. . . .

While Rahimi’s petition was pending, this Court decided *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022). In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction “is consistent with the Nation’s historical tradition of firearm regulation.” . . .

Surveying the evidence that the Government had identified, the [Court of Appeals for the Fifth Circuit] panel concluded that Section 922(g)(8) does not fit within our tradition of firearm regulation. . . .

We granted certiorari.

## II

When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

### A

. . . In *District of Columbia v. Heller* (2008), our inquiry into the scope of the right began with “constitutional text and history.” *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022). In *Bruen*, we directed courts to examine our “historical tradition of firearm regulation” to help delineate the contours of the right. *Id.* We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to “justify its regulation.” *Id.*

Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it “extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence.” By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.

As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is “relevantly similar” to laws that our tradition is understood to permit, “apply[ing] faithfully the balance struck by the founding generation to modern circumstances.” Discerning and developing the law in this way is “a commonplace task for any lawyer or judge.”

Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, “it still may be analogous enough to pass constitutional muster.” The law must comport with the principles underlying the Second Amendment, but it need not be a “dead ringer” or a “historical twin.”



**B**

Bearing these principles in mind, we conclude that Section 922(g)(8) survives Rahimi’s challenge.

**1**

Rahimi challenges Section 922(g)(8) on its face. This is the “most difficult challenge to mount successfully,” because it requires a defendant to “establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno* (1987). That means that to prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications. And here the provision is constitutional as applied to the facts of Rahimi’s own case.

Recall that Section 922(g)(8) provides two independent bases for liability. Section 922(g)(8)(C)(i) bars an individual from possessing a firearm if his restraining order includes a finding that he poses “a credible threat to the physical safety” of a protected person. Separately, Section 922(g)(8)(C)(ii) bars an individual from possessing a firearm if his restraining order “prohibits the use, attempted use, or threatened use of physical force.” Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. We need not decide whether regulation under Section 922(g)(8)(C)(ii) is also permissible.

**2**

This Court reviewed the history of American gun laws extensively in *Heller* and *Bruen*. From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. The act of “go[ing] armed to terrify the King’s subjects” was recognized at common law as a “great offence.” *Sir John Knight’s Case* (K. B. 1686). Parliament began codifying prohibitions against such conduct as early as the 1200s and 1300s, most notably in the Statute of Northampton of 1328. In the aftermath of the Reformation and the English Civil War, Parliament passed further restrictions. The Militia Act of 1662, for example, authorized the King’s agents to “seize all Armes in the custody or possession of any person . . . judge[d] dangerous to the Peace of the Kingdome.” . . .

Through these centuries, English law had disarmed not only brigands and highwaymen but also political opponents and disfavored religious groups. By the time of the founding, however, state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic. But regulations targeting individuals who physically threatened others persisted. Such conduct was often addressed through ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits against individuals who threatened others. *See* William Blackstone, *Commentaries on the Laws of England* (10th ed. 1787) (Blackstone). By the 1700s and early 1800s, however, two distinct legal regimes had developed that specifically addressed firearms violence.

The first were the surety laws. A form of “preventive justice,” these laws derived from the ancient practice of frankpledges. Reputedly dating to the time of Canute, the frankpledge system involved compelling adult men to organize themselves into ten-man “tithing[s].” The members of each tithing then “mutually pledge[d] for each other’s good behaviour.” Blackstone. Should any of the ten break the law, the remaining nine would be responsible for producing him in court, or else face punishment in his stead.

Eventually, the communal frankpledge system evolved into the individualized surety regime. Under the surety laws, a magistrate could “oblig[e] those persons, [of] whom there is a probable ground

to suspect of future misbehaviour, to stipulate with and to give full assurance . . . that such offence . . . shall not happen[,] by finding pledges or securities.” Blackstone. In other words, the law authorized magistrates to require individuals suspected of future misbehavior to post a bond. *Ibid.* If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit.

Well entrenched in the common law, the surety laws could be invoked to prevent all forms of violence, including spousal abuse. As Blackstone explained, “[w]ives [could] demand [sureties] against their husbands; or husbands, if necessary, against their wives.” . . .

Importantly for this case, the surety laws also targeted the misuse of firearms. In 1795, for example, Massachusetts enacted a law authorizing justices of the peace to “arrest” all who “go armed offensively [and] require of the offender to find sureties for his keeping the peace.” Later, Massachusetts amended its surety laws to be even more specific, authorizing the imposition of bonds from individuals “[who went] armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon.” At least nine other jurisdictions did the same. . . .

While the surety laws provided a mechanism for preventing violence before it occurred, a second regime provided a mechanism for punishing those who had menaced others with firearms. These were the “going armed” laws, a particular subset of the ancient common-law prohibition on affrays.

Derived from the French word “affraier,” meaning “to terrify,” the affray laws traced their origin to the Statute of Northampton (1328). Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of “arm[ing]” oneself “to the Terror of the People,” T. Barlow, *The Justice of the Peace: A Treatise* (1745). . . .

Whether classified as an affray law or a distinct prohibition, the going armed laws prohibited “riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land.” Blackstone. Such conduct disrupted the “public order” and “le[d] almost necessarily to actual violence.” *State v. Huntly* (N.C. 1843). Therefore, the law punished these acts with “forfeiture of the arms . . . and imprisonment.” Blackstone.

In some instances, prohibitions on going armed and affrays were incorporated into American jurisprudence through the common law. Moreover, at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia—expressly codified prohibitions on going armed.

### 3

Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of another. This provision is “relevantly similar” to those founding era regimes in both why and how it burdens the Second Amendment right. *Bruen*. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally.

The burden Section 922(g)(8) imposes on the right to bear arms also fits within our regulatory tradition. While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, *see Heller*, we note that Section 922(g)(8) applies only once a court has found that

the defendant “represents a credible threat to the physical safety” of another. That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.

Moreover, like surety bonds of limited duration, Section 922(g)(8)’s restriction was temporary as applied to Rahimi. Section 922(g)(8) only prohibits firearm possession so long as the defendant “is” subject to a restraining order. . . .

Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The going armed laws provided for imprisonment, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible. . . .

#### 4

. . . For its part, the Fifth Circuit made two errors. First, like the dissent, it read *Bruen* to require a “historical twin” rather than a “historical analogue.” Second, it did not correctly apply our precedents governing facial challenges. As we have said in other contexts, “[w]hen legislation and the Constitution brush up against each other, [a court’s] task is to seek harmony, not to manufacture conflict.” *United States v. Hansen* (2023). Rather than consider the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns. That error left the panel slaying a straw man.

#### 5

Finally, in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government’s contention that Rahimi may be disarmed simply because he is not “responsible.” “Responsible” is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term “responsible” to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not “responsible.” The question was simply not presented. . . .

#### **Justice Sotomayor, with whom Justice Kagan joins, concurring.**

. . . The Court’s opinion also clarifies an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should “consider whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.” . . .

The dissent reaches a different conclusion by applying the strictest possible interpretation of *Bruen*. It picks off the Government’s historical sources one by one, viewing any basis for distinction as fatal. . . . The dissent criticizes this Court for adopting a more “piecemeal approach” that distills principles from a variety of historical evidence rather than insisting on a precise historical analogue. . . .

This case lays bare the perils of the dissent’s approach. Because the dissent concludes that “§ 922(g)(8) addresses a societal problem—the risk of interpersonal violence—that has persisted since the 18th century,” it insists that the means of addressing that problem cannot be “materially different” from the means that existed in the 18th century. That is so, it seems, even when the weapons in question have evolved dramatically. According to the dissent, the solution cannot be “materially different” even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at

the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, *see, e.g.*, Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, Yale L.J. (1996), it is no surprise that that generation did not have an equivalent to § 922(g)(8). Under the dissent’s approach, the legislatures of today would be limited not by a distant generation’s determination that such a law was unconstitutional, but by a distant generation’s failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstringing our democracy.

The Court today clarifies *Bruen*’s historical inquiry and rejects the dissent’s exacting historical test. I welcome that development. That being said, I remain troubled by *Bruen*’s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. In my view, the Second Amendment allows legislators “to take account of the serious problems posed by gun violence,” *Bruen* (Breyer, J., dissenting), not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions. Under the means-end scrutiny that this Court rejected in *Bruen* but “regularly use[s] . . . in cases involving other constitutional provisions,” *id.*, the constitutionality of § 922(g)(8) is even more readily apparent. . . .

**Justice Gorsuch, concurring.**

. . . In this case, no one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment. So, in this facial challenge, the question becomes whether that law, in at least some of its applications, is consistent with historic firearm regulations. To prevail, the government need not show that the current law is a “dead ringer” for some historical analogue. But the government must establish that, in at least some of its applications, the challenged law “impose[s] a comparable burden on the right of armed self-defense” to that imposed by a historically recognized regulation. And it must show that the burden imposed by the current law “is comparably justified.” *Bruen*.

Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment “codified a *pre-existing* right” belonging to the American people, one that carries the same “scope” today that it was “understood to have when the people adopted” it. *Heller*. When the people ratified the Second Amendment, they surely understood an arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty. . . .

We have no authority to question that judgment. As judges charged with respecting the people’s directions in the Constitution—directions that are “trapped in amber”—our only lawful role is to apply them in the cases that come before us. Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. If changes are to be made to the Constitution’s directions, they must be made by the American people. . . .

Discerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult. Asking that question, however, at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever indeterminacy may be associated with seeking to honor the Constitution’s original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time. Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. (As we have today.) Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have

any idea how they might rule. (Except the judges themselves.) Faithful adherence to the Constitution’s original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.

Just consider how lower courts approached the Second Amendment before our decision in *Bruen*. They reviewed firearm regulations under a two-step test that quickly “devolved” into an interest-balancing inquiry, where courts would weigh a law’s burden on the right against the benefits the law offered. Some judges expressed concern that the prevailing two-step test had become “just window dressing for judicial policymaking.” *Duncan v. Bonta* (9th Cir. 2021) (en banc) (Bumatay, J., dissenting). To them, the inquiry worked as a “black box regime” that gave a judge broad license to support policies he “[f]avored” and discard those he disliked. How did the government fare under that regime? In one circuit, it had an “undefeated, 50–0 record.” *Id.* (VanDyke, J., dissenting). In *Bruen*, we rejected that approach for one guided by constitutional text and history. Perhaps judges’ jobs would be easier if they could simply strike the policy balance they prefer. And a principle that the government always wins surely would be simple for judges to implement. But either approach would let judges stray far from the Constitution’s promise.

One more point: Our resolution of Mr. Rahimi’s facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in “particular circumstances.” *United States v. Salerno* (1987). So, for example, we do not decide today whether the government may disarm a person without a judicial finding that he poses a “credible threat” to another’s physical safety. We do not resolve whether the government may disarm an individual permanently.

#### **Justice Kavanaugh, concurring.**

The Framers of the Constitution and Bill of Rights wisely sought the best of both worlds: democratic self-government and the protection of individual rights against excesses of that form of government. In justiciable cases, this Court determines whether a democratically enacted law or other government action infringes on individual rights guaranteed by the Constitution. When performing that Article III duty, the Court does not implement its own policy judgments about, for example, free speech or gun regulation. Rather, the Court interprets and applies the Constitution by examining text, pre-ratification and post-ratification history, and precedent. The Court’s opinion today does just that, and I join it in full.

The concurring opinions, and the briefs of the parties and *amici* in this case, raise important questions about judicial reliance on text, history, and precedent, particularly in Second Amendment cases. I add this concurring opinion to review the proper roles of text, history, and precedent in constitutional interpretation.

### **I**

The American people established an enduring American Constitution. The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood. The text of the Constitution is the “Law of the Land.” Art. VI. As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls. . . .

Of course, some provisions of the Constitution are broadly worded or vague—to put it in Madison’s words, “more or less obscure and equivocal.” *The Federalist No. 37*.

That is especially true with respect to the broadly worded or vague individual-rights provisions. (I will use the terms “broadly worded” and “vague” interchangeably in this opinion.) For example, the First Amendment provides that “Congress shall make no law” “abridging the freedom of speech.” And the Second Amendment, at issue here, guarantees that “the right of the people to keep and bear Arms” “shall not be infringed.”

Read literally, those Amendments might seem to grant *absolute* protection, meaning that the government could never regulate speech or guns in any way. But American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.

With respect to the First Amendment, for example, this Court’s “jurisprudence over the past 216”—now 233—“years has rejected an absolutist interpretation.” *F.E.C. v. Wisconsin Right to Life, Inc.* (2007) (opinion of Roberts, C.J.); see Robert Bork, *Neutral Principles and Some First Amendment Problems*, Ind. L.J. (1971). From 1791 to the present, “the First Amendment has permitted restrictions upon the content of speech in a few limited areas”—including obscenity, defamation, fraud, and incitement. *United States v. Stevens* (2010). So too with respect to the Second Amendment: “Like most rights, the right secured by the Second Amendment is not unlimited”; it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *District of Columbia v. Heller* (2008).

## II

A recurring and difficult issue for judges, therefore, is how to interpret vague constitutional text. That issue often arises (as here) in the context of determining exceptions to textually guaranteed individual rights. To what extent does the Constitution allow the government to regulate speech or guns, for example?

In many cases, judicial precedent informs or controls the answer (more on that later). But absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy.

Generally speaking, the historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text. The policy approach rests on the philosophical or policy dispositions of the individual judge.

History, not policy, is the proper guide.

For more than 200 years, this Court has relied on history when construing vague constitutional text in all manner of constitutional disputes. For good reason. History can supply evidence of the original meaning of vague text. History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.

Judges are like umpires, as the Chief Justice has aptly explained. And in a constitutional system that counts on an independent Judiciary, judges must act like umpires. To be an umpire, the judge “must stick close to the text and the history, and their fair implications,” because there “is no principled way” for a neutral judge “to prefer any claimed human value to any other.” Robert Bork, *Neutral Principles and Some First Amendment Problems*, Ind. L. J. (1971). History establishes a “criterion that is conceptually quite separate from the preferences of the judge himself.” Antonin Scalia, *Originalism: The Lesser Evil*, U. Cin. L. Rev. (1989). When properly applied, history helps ensure that judges do not simply create constitutional meaning “out of whole cloth.” Antonin Scalia, *The Rule of Law as a Law of Rules*, U. Chi. L. Rev. (1989).

Absent precedent, therefore, history guides the interpretation of vague constitutional text. Of course, this Court has been deciding constitutional cases for about 230 years, so relevant precedent often exists. As the Court’s opinions over time amply demonstrate, precedent matters a great deal in constitutional interpretation.

I now turn to explaining how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text.

## A

*Pre-ratification history.* When interpreting vague constitutional text, the Court typically scrutinizes the stated intentions and understandings of the Framers and Ratifiers of the Constitution (or, as relevant, the Amendments). The Court also looks to the understandings of the American people from the pertinent ratification era. Those intentions and understandings do not necessarily determine meaning, but they may be strong evidence of meaning.

Especially for the original Constitution and the Bill of Rights, the Court also examines the pre-ratification history in the American Colonies, including pre-ratification laws and practices. And the Court pays particular attention to the historical laws and practices in the United States from Independence in 1776 until ratification in 1788 or 1791. Pre-ratification American history can shed light on constitutional meaning in various ways.

For example, some provisions of the Constitution use language that appeared in the Articles of Confederation or state constitutional provisions. And when the language that appeared in the Articles of Confederation or in state constitutions is the same as or similar to the language in the U.S. Constitution, the history of how people understood the language in the Articles or state constitutions can inform interpretation of that language in the U.S. Constitution. . . .

On the other hand, some pre-ratification history can be probative of what the Constitution does *not* mean. The Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings. . . .

This Court has recognized, for example, that no “purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.” *Bridges v. California* (1941). Ratified as it was “while the memory of many oppressive English restrictions on the enumerated liberties was still fresh,” the Bill of Rights “cannot reasonably be taken as approving prevalent English practices.” *Id.* . . .

[I]n using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.

## B

*Post-ratification history.* As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history—sometimes referred to as tradition—can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.

After ratification, the National Government and the state governments began interpreting and applying the Constitution’s text. They have continued to do so ever since. As the national and state governments over time have enacted laws and implemented practices to promote the general welfare, those laws and practices have often reflected and reinforced common understandings of the Constitution’s authorizations and limitations.

Post-ratification interpretations and applications by government actors—at least when reasonably consistent and longstanding—can be probative of the meaning of vague constitutional text. The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later. *See, e.g., Republican Party of Minn. v. White* (2002) (a “universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional”).

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. They understood that some constitutional text may be “more or less obscure and equivocal” such that questions “daily occur in the course of practice.” *The Federalist No. 37*. Madison explained that the meaning of vague text would be “liquidated and ascertained by a series of particular discussions and adjudications.” *Id.* In other words, Madison articulated the Framers’ expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text. . . .

Throughout his consequential 30-year tenure on this Court, Justice Scalia repeatedly emphasized that constitutional interpretation must take account of text, pre-ratification history, and post-ratification history—the last of which he often referred to as “tradition.” In his words, when judges interpret vague or broadly worded constitutional text, the “traditions of our people” are “paramount.” *McDonald v. Chicago* (2010) (Scalia, J., concurring). Constitutional interpretation should reflect “the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.” *Rutan v. Republican Party of Ill.* (1990) (Scalia, J., dissenting). . . .<sup>6</sup>

## C

*Precedent.* With a Constitution and a Supreme Court that are both more than two centuries old, this Court and other courts are rarely interpreting a constitutional provision for the first time. Rather, a substantial body of Supreme Court precedent already exists for many provisions of the Constitution.

Precedent is fundamental to day-to-day constitutional decisionmaking in this Court and every American court. The “judicial Power” established in Article III incorporates the principle of *stare decisis*, both vertical and horizontal. As Hamilton stated, to “avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents” that will “unavoidably swell to a very considerable bulk” and “serve to define and point out their duty in every particular case that comes before them.” *The Federalist No. 78*.

Courts must respect precedent, while at the same time recognizing that precedent on occasion may appropriately be overturned. *See, e.g., Brown v. Board of Education* (1954). In light of the significant

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<sup>6</sup> The Court has similarly relied on history when deciding cases involving textually unenumerated rights under the Due Process Clause or the Privileges or Immunities Clause. In those contexts, the baseline is 180-degrees different: The text supplies no express protection of any asserted substantive right. The Court has recognized exceptions to that textual baseline, but in doing so has regularly observed that the Fourteenth Amendment “specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg* (1997); *see, e.g., Pierce v. Society of Sisters* (1925) (“liberty of parents and guardians to direct the upbringing and education of children under their control”).



amount of Supreme Court precedent that has built up over time, this Court and other courts often decide constitutional cases by reference to those extensive bodies of precedent. . . .

### III

Some say that courts should determine exceptions to broadly worded individual rights, including the Second Amendment, by looking to policy. Uphold a law if it is a good idea; strike it down if it is not. True, the proponents of a policy-based approach to interpretation of broadly worded or vague constitutional text usually do not say so explicitly (although some do). Rather, they support a balancing approach variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny. Whatever the label of the day, that balancing approach is policy by another name. It requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important. . . .

The balancing tests (heightened scrutiny and the like) are a relatively modern judicial innovation in constitutional decisionmaking. The “tiers of scrutiny have no basis in the text or original meaning of the Constitution.” Joel Alicea & John Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs (2019). And before the late 1950s, “what we would now call strict judicial scrutiny did not exist.” Richard Fallon, *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* (2019).

The Court “appears to have adopted” heightened-scrutiny tests “by accident” in the 1950s and 1960s in a series of Communist speech cases, “rather than as the result of a considered judgment.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) (Kennedy, J., concurring in judgment). The Court has employed balancing only in discrete areas of constitutional law—and even in those cases, history still tends to play a far larger role than overt judicial policymaking.

To be clear, I am not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests. But I am challenging the notion that those tests are the ordinary approach to constitutional interpretation. And I am arguing against extending those tests to new areas, including the Second Amendment.

One major problem with using a balancing approach to determine exceptions to constitutional rights is that it requires highly subjective judicial evaluations of how important a law is—at least unless the balancing test itself incorporates history, in which case judges might as well just continue to rely on history directly.

The subjective balancing approach forces judges to act more like legislators who decide what the law should be, rather than judges who “say what the law is.” *Marbury v. Madison* (1803). That is because the balancing approach requires judges to weigh the benefits of a law against its burdens—a value-laden and political task that is usually reserved for the political branches. And that power in essence vests judges with “a roving commission to second-guess” legislators and administrative officers “concerning what is best for the country.” William Rehnquist, *The Notion of a Living Constitution* (1976). Stated otherwise, when a court “does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.” Antonin Scalia, *The Rule of Law as a Law of Rules*, U. Chi. L. Rev. (1989).

Moreover, the balancing approach is ill-defined. Some judges will apply heightened scrutiny with a presumption in favor of deference to the legislature. Other judges will apply heightened scrutiny with a presumption in favor of the individual right in question. Because it is unmoored, the balancing approach presents the real “danger” that “judges will mistake their own predilections for the law.” Antonin Scalia, *Originalism: The Lesser Evil*, U. Cin. L. Rev. (1989). . . .

The balancing approach can be antithetical to the principle that judges must act like umpires. It turns judges into players. Justice Black once protested that the Court should not balance away bedrock free speech protections for the perceived policy needs of the moment. He argued that “the balancing approach” “disregards all of the unique features of our Constitution” by giving “the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest.” Hugo Black, *The Bill of Rights*, N.Y.U. L. Rev. (1960). Like Justice Black, the Court in *Heller* cautioned that a “constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”

Some respond that history can be difficult to decipher. It is true that using history to interpret vague text can require “nuanced judgments,” *McDonald v. Chicago* (2010) (Scalia, J., concurring), and is “sometimes inconclusive,” Scalia, *Originalism: The Lesser Evil*. But at a minimum, history tends to narrow the range of possible meanings that may be ascribed to vague constitutional language. A history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decisionmaking.

The historical approach is not perfect. 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.” *McDonald* (Scalia, J., concurring) (emphasis in original). And the historical approach is superior to judicial policymaking. The historical approach “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.” *Id.* Moreover, the historical 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.” *Id.* . . .

#### **Justice Barrett, concurring.**

Despite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and pre-existing limits on that right are part and parcel of it. *District of Columbia v. Heller* (2008). Those limits define the scope of “the right to bear arms” as it was originally understood; to identify them, courts must examine our “historical tradition of firearm regulation.” *New York State Rifle & Pistol Assoc., Inc. v. Bruen* (2022). That evidence marks where the right stops and the State’s authority to regulate begins. A regulation is constitutional only if the government affirmatively proves that it is “consistent with the Second Amendment’s text and historical understanding.” *Id.*

Because the Court has taken an originalist approach to the Second Amendment, it is worth pausing to identify the basic premises of originalism. The theory is built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the “discoverable historical meaning . . . has legal significance and is authoritative in most circumstances.” Keith Whittington, *Originalism: A Critical Introduction*, Fordham L. Rev. (2013) (Whittington). Ratification is a democratic act that renders constitutional text part of our fundamental law, see Arts. V, VII, and that text “remains law until lawfully altered,” Stephen E. Sachs, *Originalism: Standard and Procedure*, Harv. L. Rev. (2022). So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function. To be sure, postenactment history can be an important tool. For example, it can “reinforce our understanding of the Constitution’s original meaning”; “liquidate ambiguous constitutional provisions”; provide persuasive evidence of the original meaning; and, if *stare decisis* applies, control the outcome. But generally speaking, the use of postenactment history requires some justification other than originalism simpliciter. . . .

Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?

Many courts, including the Fifth Circuit, have understood *Bruen* to require the former, narrower approach. But *Bruen* emphasized that “analogical reasoning” is not a “regulatory straightjacket.” To be *consistent* with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us “a law trapped in amber.” And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a “use it or lose it” view of legislative authority. Such assumptions are flawed, and originalism does not require them.

“Analogical reasoning” under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.

Here, though, the Court settles on just the right level of generality: “Since the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.” Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi’s facial challenge fails. Harder level-of-generality problems can await another day.

#### **Justice Jackson, concurring.**

This case tests our Second Amendment jurisprudence as shaped in particular by *New York State Rifle & Pistol Assoc., Inc. v. Bruen* (2022). I disagree with the methodology of that decision; I would have joined the dissent had I been a Member of the Court at that time. But *Bruen* is now binding law. Today’s decision fairly applies that precedent, so I join the opinion in full.

I write separately because we now have two years’ worth of post-*Bruen* cases under our belts, and the experiences of courts applying its history-and-tradition test should bear on our assessment of the workability of that legal standard. This case highlights the apparent difficulty faced by judges on the ground. . . .

The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*’s madness. It isn’t just that *Bruen*’s history-and-tradition test is burdensome (though that is no small thing to courts with heavier caseloads and fewer resources than we have). The more worrisome concern is that lower courts appear to be diverging in both approach and outcome as they struggle to conduct the inquiry *Bruen* requires of them. . . .

Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*’s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified. . . .

Maybe time will resolve these and other key questions. Maybe appellate courts, including ours, will find a way to “[b]rin[g] discipline to the increasingly erratic and unprincipled body of law that is emerging after *Bruen*.” Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, Yale. L.J. (2023). Indeed, “[m]any constitutional standards involve undoubted gray areas,” and “it normally might be fair to venture the assumption that case-by-case

development [will] lead to a workable standard.” *Garcia v. San Antonio Metropolitan Transit Authority* (1985). By underscoring that gun regulations need only “comport with the *principles* underlying the Second Amendment,” today’s opinion inches that ball forward.

But it is becoming increasingly obvious that there are miles to go. Meanwhile, the Rule of Law suffers. That ideal—key to our democracy—thrives on legal standards that foster stability, facilitate consistency, and promote predictability. So far, *Bruen*’s history-focused test ticks none of those boxes. . . .

### **Justice Thomas, dissenting.**

After *New York State Rifle & Pistol Assoc., Inc. v. Bruen* (2022), this Court’s directive was clear: A firearm regulation that falls within the Second Amendment’s plain text is unconstitutional unless it is consistent with the Nation’s historical tradition of firearm regulation. Not a single historical regulation justifies the statute at issue, 18 U.S.C. § 922(g)(8). Therefore, I respectfully dissent. . . .

## **II**

The Second Amendment provides that “[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.” As the Court recognizes, *Bruen* provides the framework for analyzing whether a regulation such as § 922(g)(8) violates the Second Amendment’s mandate. “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Id.* To overcome this presumption, “the government must demonstrate that the regulation is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* The presumption against restrictions on keeping and bearing firearms is a central feature of the Second Amendment. That Amendment does not merely narrow the Government’s regulatory power. It is a barrier, placing the right to keep and bear arms off limits to the Government.

When considering whether a modern regulation is consistent with historical regulations and thus overcomes the presumption against firearms restrictions, our precedents “point toward at least two metrics [of comparison]: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* A historical law must satisfy both considerations to serve as a comparator. While a historical law need not be a “historical twin,” it must be “well-established and representative” to serve as a historical analogue. *Id.* . . .

## **III**

Section 922(g)(8) violates the Second Amendment. First, it targets conduct at the core of the Second Amendment—possessing firearms. Second, the Government failed to produce any evidence that § 922(g)(8) is consistent with the Nation’s historical tradition of firearm regulation. To the contrary, the founding generation addressed the same societal problem as § 922(g)(8) through the “materially different means” of surety laws.

## **A**

It is undisputed that § 922(g)(8) targets conduct encompassed by the Second Amendment’s plain text. After all, the statute bans a person subject to a restraining order from possessing or using virtually any firearm or ammunition. . . .

## B

The Government fails to carry its burden of proving that § 922(g)(8) is “consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*. Despite canvassing laws before, during, and after our Nation’s founding, the Government does not identify even a single regulation with an analogous burden and justification.

The Government’s failure is unsurprising given that § 922(g)(8) addresses a societal problem—the risk of interpersonal violence—“that has persisted since the 18th century,” yet was addressed “through [the] materially different means” of surety laws. *Id.* Surety laws were, in a nutshell, a fine on certain behavior. If a person threatened someone in his community, he was given the choice to either keep the peace or forfeit a sum of money. Surety laws thus shared the same justification as § 922(g)(8), but they imposed a far less onerous burden. The Government has not shown that § 922(g)(8)’s more severe approach is consistent with our historical tradition of firearm regulation. . . .

The Government points to various English laws from the late 1600s and early 1700s to argue that there is a tradition of restricting the rights of “dangerous” persons. . . .

At first glance, these laws targeting “dangerous” persons might appear relevant. After all, if the Second Amendment right was historically understood to allow an official to disarm anyone he deemed “dangerous,” it may follow that modern Congresses can do the same. Yet, historical context compels the opposite conclusion. The Second Amendment stems from English resistance *against* “dangerous” person laws.

The sweeping disarmament authority wielded by English officials during the 1600s, including the Militia Act of 1662, prompted the English to enshrine an individual right to keep and bear arms. “[T]he Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.” *District of Columbia v. Heller* (2008). Englishmen, as a result, grew “to be extremely wary of concentrated military forces run by the state and to be jealous of their arms.” *Id.* Following the Glorious Revolution, they “obtained an assurance . . . in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed.” *Id.*

The English Bill of Rights “has long been understood to be the predecessor to our Second Amendment.” *Id.* In fact, our Founders expanded on it and made the Second Amendment even more protective of individual liberty. The English Bill of Rights assured Protestants “Arms for their Defence,” but only where “suitable to their Conditions and as allowed by Law.” The Second Amendment, however, contains no such qualifiers and protects the right of “the people” generally. In short, laws targeting “dangerous” persons led to the Second Amendment. It would be passing strange to permit the Government to resurrect those selfsame “dangerous” person laws to chip away at that Amendment’s guarantee.

Even on their own terms, laws targeting “dangerous” persons cannot support § 922(g)(8). Those laws were driven by a justification distinct from that of § 922(g)(8)—quashing treason and rebellion. [*Justice Thomas’s discussion of evidence from the 17th and 18th Centuries is omitted.*] . . .

While the English were concerned about preventing insurrection and armed rebellion, § 922(g)(8) is concerned with preventing interpersonal violence. “Dangerous” person laws thus offer the Government no support.

The Government also points to historical commentary referring to the right of “peaceable” citizens to carry arms. It principally relies on commentary surrounding two failed constitutional proposals. First, at the Massachusetts convention, Samuel Adams unsuccessfully proposed that the Bill of Rights deny Congress the power “to prevent the people of the United States, who are peaceable citizens, from

keeping their own arms.” Second, Anti-Federalists at the Pennsylvania convention unsuccessfully proposed a Bill of Rights providing a “right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game.” The Anti-Federalists’ Bill of Rights would also state that “no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.”

These proposals carry little interpretative weight. To begin with, it is “dubious to rely on [drafting] history to interpret a text that was widely understood to codify a pre-existing right.” *Heller*. Moreover, the States rejected the proposals. Samuel Adams withdrew his own proposal after it “alarmed both Federalists and Antifederalists.” The Pennsylvania Anti-Federalists’ proposal similarly failed to gain a majority of the state convention.

The Government never explains why or how language *excluded* from the Constitution could operate to limit the language actually ratified. The more natural inference seems to be the opposite—the unsuccessful proposals suggest that the Second Amendment preserves a more expansive right. After all, the Founders considered, and rejected, any textual limitations in favor of an unqualified directive: “[T]he right of the people to keep and bear Arms, shall not be infringed.” . . .

The Government’s remaining evidence is even further afield. The Government points to an assortment of firearm regulations, covering everything from storage practices to treason and mental illness. They are all irrelevant for purposes of § 922(g)(8). Again, the “central considerations” when comparing modern and historical regulations are whether they “impose a comparable burden” that is “comparably justified.” The Government’s evidence touches on one or *none* of these considerations.

The Government’s reliance on firearm storage laws is a helpful example. These laws penalized the improper storage of firearms with forfeiture of those weapons. First, these storage laws did not impose a “comparable burden” to that of § 922(g)(8). Forfeiture still allows a person to keep their other firearms or obtain additional ones. It is in no way equivalent to § 922(g)(8)’s complete prohibition on owning or possessing any firearms. . . .

The Government resists the conclusion that forfeiture is less burdensome than a possession ban, arguing that “[t]he burdens imposed by bans on keeping, bearing, and obtaining arms are all comparable.” But, there is surely a distinction between having *no* Second Amendment rights and having *some* Second Amendment rights. If self-defense is “the central component of the [Second Amendment] right,” then common sense dictates that it matters whether you can defend yourself with a firearm anywhere, only at home, or nowhere. *Heller*. And, the Government’s suggestion ignores that we have repeatedly drawn careful distinctions between various laws’ burdens. *See, e.g., id.* (explaining that laws that “did not clearly prohibit loaded weapons ... do not remotely burden the right of self-defense as much as an absolute ban on handguns”).

Our careful parsing of regulatory burdens makes sense given that the Second Amendment codifies a right with a “historically fixed meaning.” Accordingly, history is our reference point and anchor. If we stray too far from it by eliding material differences between historical and modern laws, we “risk endorsing outliers that our ancestors would never have accepted.” *Id.*

Second, the Government offers no “comparable justification” between laws punishing firearm storage practices and § 922(g)(8). It posits that both laws punish persons whose “conduct suggested that he would not use [firearms] responsibly.” The Government, however, does not even attempt to ground that justification in historical evidence.

The Government’s proposed justification is also far too general. Nearly all firearm regulations can be cast as preventing “irresponsible” or “unfit” persons from accessing firearms. In addition, to argue that a law limiting access to firearms is justified by the fact that the regulated groups should not have access to firearms is a logical merry-go-round. . . .

In sum, the Government has not identified any historical regulation that is relevantly similar to § 922(g)(8). . . .

### C

The Court has two rejoinders, surety and affray laws. Neither is a compelling historical analogue. As I have explained, surety laws did not impose a burden comparable to § 922(g)(8). And, affray laws had a dissimilar burden *and* justification. . . .

First, affray laws had a distinct justification from § 922(g)(8) because they regulated only certain public conduct that injured the entire community. An affray was a “common Nusanc[e],” defined as “the fighting of two or more persons in some public place, to the terror of his majesty’s subjects,” Blackstone. Even though an affray generally required “actual violence,” certain other conduct could suffice. As relevant here, an affray included arming oneself “with dangerous and unusual weapons, in such a manner as [to] naturally cause a terror to the people”—*i.e.*, “going armed.” . . .

Affrays were defined by their public nature and effect. An affray could occur only in “some public place,” and captured only conduct affecting the broader public. Blackstone. To that end, going armed laws did not prohibit carrying firearms at home or even public carry generally. Instead, they targeted only public carry that was “accompanied with such circumstances as are apt to terrify the people.” R. Burn, *The Justice of the Peace, and Parish Officer* (1756). . . .

Second, affray laws did not impose a burden analogous to § 922(g)(8). They regulated a niche subset of Second Amendment-protected activity. As explained, affray laws prohibited only carrying certain weapons (“dangerous and unusual”) in a particular manner (“terrifying the good people of the land” without a need for self-defense) and in particular places (in public). Meanwhile, § 922(g)(8) prevents a covered person from carrying any firearm or ammunition, in any manner, in any place, at any time, and for any reason. Section 922(g)(8) thus bans *all* Second Amendment-protected activity. Indeed, this Court has already concluded that affray laws do not impose a burden “analogous to the burden created by” an effective ban on public carry. *Bruen*. Surely, then, a law that imposes a public and private ban on a covered individual cannot have an analogous burden either.

The Court counters that since affray laws “provided for imprisonment,” they imposed a greater burden than § 922(g)(8)’s disarmament. But, that argument serves only to highlight another fundamental difference: Affray laws were criminal statutes that penalized past behavior, whereas § 922(g)(8) is triggered by a civil restraining order that seeks to prevent future behavior. Accordingly, an affray’s burden was vastly harder to impose. To imprison a person, a State had to prove that he committed the crime of affray beyond a reasonable doubt. The Constitution provided a bevy of protections during that process—including a right to a jury trial, counsel, and protections against double jeopardy.

The imposition of § 922(g)(8)’s burden, however, has far fewer hurdles to clear. There is no requirement that the accused has actually committed a crime; instead, he need only be prohibited from threatening or using force, or pose a “credible threat” to an “intimate partner or child.” Section 922(g)(8) thus revokes a person’s Second Amendment right based on the suspicion that he *may* commit a crime in the future. In addition, the only process required before that revocation is a hearing on the underlying court order. During that civil hearing—which is not even about § 922(g)(8)—a person has fewer constitutional protections compared to a criminal prosecution for affray. Gone are the Sixth Amendment’s panoply of rights, including the rights to confront witnesses and have assistance of counsel, as well as the Fifth Amendment’s protection against double jeopardy. . . .

While the Second Amendment does not demand a historical twin, it requires something closer than affray laws, which expressly carve out the very conduct § 922(g)(8) was designed to prevent

(interpersonal violence in the home). Nor would I conclude that affray laws—criminal laws regulating a specific type of public carry—are analogous to § 922(g)(8)’s use of a civil proceeding to bar all Second Amendment-protected activity.

The Court recognizes that surety and affray laws on their own are not enough. So it takes pieces from each to stitch together an analogue for § 922(g)(8). Our precedents foreclose that approach. The question before us is whether a single historical law has both a comparable burden and justification as § 922(g)(8), not whether several laws can be cobbled together to qualify. . . .

The Court’s contrary approach of mixing and matching historical laws—relying on one law’s burden and another law’s justification—defeats the purpose of a historical inquiry altogether. Given that imprisonment (which involved disarmament) existed at the founding, the Government can always satisfy this newly minted comparable-burden requirement. That means the Government need only find a historical law with a comparable justification to validate modern disarmament regimes. As a result, historical laws fining certain behavior could justify completely disarming a person for the same behavior. That is the exact sort of “regulatory blank check” that *Bruen* warns against and the American people ratified the Second Amendment to preclude.

Neither the Court nor the Government identifies a single historical regulation with a comparable burden and justification as § 922(g)(8). Because there is none, I would conclude that the statute is inconsistent with the Second Amendment. . . .

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### Notes and Questions

1. *Rahimi* holds that § 922(g)(8) is facially constitutional. Why? What changes to the statute might make it facially unconstitutional? Does the opinion suggest that the Second Amendment right provides a shield around certain forms of individual behavior, or prevents the government from using certain types of rules, or both? In this respect, how does the right to keep and bear arms compare to the other rights that you’ve encountered in this course?

2. After *Rahimi*, lower courts will have to grapple with what counts as a “clear threat of physical violence.” Courts may allow for “as applied” constitutional challenges on this ground. But it is also possible that courts will simply construe § 922(g)(8) as not applying in cases where a claimant would otherwise have a valid as-applied Second Amendment claim.

3. The Chief Justice’s majority opinion in *Rahimi* was joined by all of the Justices except for Justice Thomas, who had authored the majority opinion in *Bruen*. Was the majority’s reasoning in *Rahimi* faithful to *Bruen*? Does it successfully avoid the *Bruen* majority’s concerns about judicial “balancing” of rights and governmental interests? Why or why not?

4. What role does tradition play in the reasoning of the different Justices? What types of tradition do the various Justices look to? What are strengths and weaknesses of looking to tradition?

5. The Justices in the majority emphasize the need to examine historically grounded “principles” that define the right (and its limitations). As Justice Kavanaugh states in his concurring opinion, “Historical regulations reveal a principle, not a mold.” On what basis do the Justices reach that conclusion? And on what basis do they identify the relevant “principle” at issue in this case? What are potential critiques of their reasoning?

6. *Bruen* rejected a “tiers of scrutiny” framework for evaluating Second Amendment claims. What are the relative strengths and weaknesses of *Bruen*’s “history and tradition” method compared to using the “tiers of scrutiny” framework?

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## 8. Takings

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“[N]or shall private property be taken for public use without just compensation . . .” U.S. Const., Amdt. V.

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### Introduction

Takings law generally addresses three distinct questions:

1. *When is property “taken”?* The government must pay for any real or personal property that it takes through the power of eminent domain. But what if the government, rather than appropriating private property, merely *regulates* the private use of that property in a way that significantly affects the property’s value?

2. *What counts as “public use”?* The Takings Clause does not *explicitly* limit the power to take property; it only requires compensation. And historically, the “public use” language likely refers to the social-contractarian principle that *all* exercises of governmental power, and particularly those involving life, liberty, and property, must be done in pursuit of the public good.\* But the Supreme Court has nonetheless read the Takings Clause itself as *implicitly* limiting eminent-domain authority to “public uses” of property. So what counts as a “public use”?

3. *What counts as “just compensation”?* Who gets to decide how much property is worth, and how are they supposed to make that assessment?

Think carefully about how these questions fit together. First, courts ask whether the government has “taken” property within the meaning of the Takings Clause. If not, then the Clause simply has no application. If the government has “taken” property, then we need to ask whether the taking was *valid*. Takings are valid if they are for “public use.” If a taking isn’t for public use, then it is *unconstitutional*. But not all “takings” are invalid! In general, the government *can* take private property. Only takings that aren’t for a “public use” are invalid. Finally, assuming a taking is valid, the government must pay just compensation.

For this unit, we will focus on whether there has been a taking and whether the taking is constitutional. (We will ignore the issue of how to calculate just compensation.) But before we get ahead of ourselves, let’s step back and consider what purpose the Takings Clause serves. Why should the government have to pay for takings? Indeed, the federal and state governments can take property *without compensation* through the power of taxation, and the government imposes all sorts of

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\* Cf. *Taylor v. Porter & Ford* (N.Y. Sup. Ct. 1843) (Nelson, J., dissenting) (“It is said the laying out of a private road over the land of another is an appropriation of the property for private and not for public purposes, and therefore a violation of the spirit of that clause in the constitution which forbids the taking of it for public use without making just compensation. Whether the security of the citizen against such arbitrary legislation as the argument contemplates, depends upon this clause of the constitution, or rests upon the broader and more solid ground of natural right never delegated by the people to the law making power, it is unnecessary now to enquire. I am far from disputing the existence of the rule itself. Private property cannot be taken for strictly private purposes without the consent of the owner, whether compensation be provided or not.”).

restrictions on the *use* of property in ways that lessen its economic value. So why have a rule against uncompensated “takings”?

The Supreme Court has generally answered this question by emphasizing the governmental obligation to act *impartially*. “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation,” the Court explained in *Armstrong v. United States* (1960), “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” If the government wants to build a highway for the public benefit, for instance, it should pay for the land with general tax revenue—not by imposing a hefty share of the costs on particular individuals who happen to own land along the highway’s route. The owners still have to give up their property (through eminent domain), but at least they will be compensated for the takings.

*Pennell v. San Jose* (1988) nicely illustrates the importance of impartiality within takings doctrine. The case involved a rent-control ordinance that limited annual rent increases based in part on whether the rent increase would cause “hardship to a tenant.” A landlord brought suit alleging that limiting rent increases based on a particular tenant’s financial circumstances constituted a “taking,” thus triggering the need for just compensation. The majority held that the claim was premature, but Justice Scalia wrote separately and reached the merits. As you read his opinion, be sure to identify the particular feature of San Jose’s ordinance that (in his view) triggered the need for just compensation.

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### Pennell v. San Jose (1988)

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#### **Justice Scalia, with whom Justice O’Connor joins, concurring in part and dissenting in part.**

. . . I would decide that claim on the merits, and would hold that the tenant hardship provision of the Ordinance effects a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments. . . .

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that “private property [shall not] be taken for public use, without just compensation.” We have repeatedly observed that the purpose of this provision is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States* (1960).

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner’s use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as “unfair.” That justification might apply to the rent regulation in the present case, apart from the single feature under attack here.

Appellants do not contest the validity of rent regulation in general. . . . Appellants' only claim is that a reduction of a rent increase below what would otherwise be a "reasonable rent" under this scheme may not, consistently with the Constitution, be based on consideration of . . . the hardship to the tenant . . . . I think they are right.

Once [a landlord] is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. [T]he "hardship" provision is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But that problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. And even if the neediness of renters could be regarded as a problem distinctively attributable to landlords in general, it is not remotely attributable to the particular landlords that the Ordinance singles out—namely, those who happen to have a "hardship" tenant . . . .

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals. Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants.

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called "regulation," at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of "hardship" tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as high as \$32,400 a year—the generous maximum necessary to qualify automatically as a "hardship" tenant under the rental Ordinance. The voters might well see other, more pressing, social priorities. And of course what \$32,400-a-year renters can acquire through spurious "regulation," other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in

general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription—perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.

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### What Counts as a Taking?

When the government takes title to private property, except through taxation, the existence of a “taking” is obvious. The difficult cases, like *Pennell*, involve potential “regulatory takings,” where the government never actually “takes” the property but instead regulates the owner’s use of that property (like the rent regulation in *Pennell*). The Court articulated the key principles in Part II.A. and then applied them in Part II.C. (In the intervening section, the Court responded to two of Penn Central’s arguments for applying stricter takings rules.)

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### Penn Central Transp. Co. v. N.Y. City (1978)

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

The question presented is . . . whether the application of New York City’s Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has “taken” its owners’ property . . .

#### I

. . . The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in land-use decisions affecting these properties . . .

[T]he Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner’s interest in use of the property. . . .

Although the designation of a landmark and landmark site restricts the owner’s control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City’s zoning laws, owners of real property who have not developed their property to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. . . .

This case involves the application of New York City’s Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City’s most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style. . . .

On August 2, 1967, following a public hearing, the Commission designated the Terminal a “landmark” and designated the “city tax block” it occupies a “landmark site.” . . . [*Penn Central then*

sought to build a multistory office complex above the historic site, and the Commission rejected the proposal, leading Penn Central to allege that the landmark designation and building restriction constituted a taking.] . . .

## II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" . . . . We need only address the question whether a "taking" has occurred.

### A

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States* (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. *See Goldblatt v. Hempstead* (1962). . . .

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon* (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example . . . but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller v. Schoene* (1928) is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered the claimants to cut down

a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. . . . [*The Court held that no taking occurred.*]

Again, *Hadacheck v. Sebastian* (1915) upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses. . . .

*Goldblatt v. Hempstead* (1962) is a recent example. There, a 1958 city safety ordinance banned any excavations below the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. . . . Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner’s use of the property.

*Pennsylvania Coal Co. v. Mahon* (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Court held that the statute was invalid as effecting a “taking” without just compensation. . . .

## B

[*In this section, the Court rejected two arguments that Penn Central made for applying stricter takings rules in this context.*] . . .

[Appellants first] urge that the Landmarks Law has deprived them of any gainful use of their “air rights” above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has “taken” their right to this superjacent airspace, thus entitling them to “just compensation” measured by the fair market value of these air rights. . . .

[T]he submission that appellants may establish a “taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels. “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

Secondly, appellants . . . argue that New York City’s regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City’s law apply only to individuals who own selected properties. . . .

[C]ontrary to appellants’ suggestions, landmark laws are not like discriminatory, or “reverse spot,” zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the

antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan. . . .

It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a “taking.” Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants’ repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.

## C

Rejection of appellants’ broad arguments is not, however, the end of our inquiry . . . . We now must consider whether the interference with appellants’ property is of such a magnitude that “there must be an exercise of eminent domain and compensation to sustain [it].” *Pa. Coal Co. v. Mahon*. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants’ parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. . . . Since appellants have not sought approval for the construction of a smaller [than 50-story] structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in

the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

**Justice Rehnquist, with whom the Chief Justice and Justice Stevens join, dissenting.**

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. . . . The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon* (1922), there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. . . . To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States* (1960). . . .

Here, . . . a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. . . .

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co. v. Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly



across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits. . . .

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*. The Court’s opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

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### Notes and Questions

1. What is the legal test for identifying a “regulatory taking”?
2. The dissent makes a nice point about the underlying purpose of the Takings Clause and its application to this case. What countervailing concerns might favor the majority’s position?
3. What does the Takings Clause *mean*? What are the challenges in creating *doctrinal rules* to implement that meaning? What are advantages and disadvantages of the Court’s approach in *Penn Central*?
4. *Penn Central* articulates the Court’s *general* approach to regulatory-takings cases. And that approach is very mushy—though with a fairly heavy thumb on the scale in favor of the government. But regulatory-takings doctrine also features three more determinate “*per se*” rules:
  - a) *Physical invasions*: Regulations that enable the government or private parties to physically invade property are generally considered takings. See *Cedar Point Nursery v. Hassid* (2021). The Supreme Court had originally held in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) that only *permanent physical occupations*, such regulations requiring the permanent installation of a cell tower or satellite dish on someone’s property, were “*per se*” takings. But in *Cedar Point*, the Court expanded this category to include even temporary physical invasions, such as a regulation requiring business owners to allow labor organizers onto their property.
  - b) *Confiscatory regulations* (“*total wipeouts*”): These occur “where regulation denies all economically beneficial or productive use of land.” *Lucas v. South Carolina Coastal Council* (1992). For example, an environmental law might prevent an owner from using an entire tract of property in any way, thus depriving the owner of all value. This principle reflects the fact that, from the standpoint of the owner, total deprivations of value *effectively* operate as takings. *Id.* And it also reflects the notion that confiscatory regulations “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” *Id.*
  - c) *Background Law*: Notwithstanding the two rules just mentioned, regulations *cannot* count as regulatory takings if they inhere in the background legal rules, such as nuisance, that *already* limit property rights. As the Supreme Court stated in *Lucas*,

[Regulations cannot count as takings if they] inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree [that would otherwise count as a regulatory taking] must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

5. *The Right to Exclude.* Justice Scalia’s opinion in *Pennell* and the majority and dissenting opinions in *Penn Central* all emphasize the *Armstrong* principle—that is, the notion that the public as a whole should bear the burden of paying for public benefits, rather than imposing that cost on particular landowners. But as Justice Scalia pointed out, it is perfectly sensible for the government to impose regulations that disproportionately burden certain property owners *if* those property owners are particularly responsible for the harms that the regulations seek to remedy. For instance, it is okay for the government to impose general rent-control rules that apply to all rental properties and for the government to apply height limits that apply to all new construction. In these situations, the principle of impartiality is maintained because the government has legitimate reasons to impose the rules, even though the burden will fall most heavily on certain property owners (namely, those who are leasing their property and those who want to construct tall buildings on their property).

The Supreme Court’s decision in *Cedar Point Nursery v. Hassid* (2021), however, did not rely on the *Armstrong* principle. The case involved a California statute that required farmers to allow union organizers onto their property in order to provide farm workers with union-related information. The Court held that this requirement constituted a *per se* regulatory taking because “[t]he access regulation appropriates a right to invade the growers’ property,” thus depriving the property owner of the “right to exclude,” which “is one of the most treasured rights of property ownership.” *Id.* Notice the Court’s concern. It was *not* that the government was disproportionately and unjustifiably singling out particular property owners to pay the general costs of governance that should be borne by the public at large. Rather, the Court’s central concern in *Cedar Point* was that the government was impairing a right that lays at the very core of property ownership: the right to exclude. And to take away *that* right from an owner’s proverbial “bundle of sticks” was a step too far under the Takings Clause.

Does the tension between the *Armstrong* principle and the Court’s reasoning in *Cedar Point* map onto disputes that you’ve encountered with respect to other constitutional rights? Which ones?

6. *The Scope of Property Rights.* Another related point about takings doctrine concerns how the Court defines “property” for purposes of regulatory takings analysis. In particular, when applying regulatory takings doctrine under *Penn Central*’s balancing test and under *Lucas*’s *per se* rule for confiscatory regulations, courts consider the extent of the economic harm that regulations impose on landowners. When engaging in this analysis, courts focus on the harm done to an owner’s *entire bundle of rights*—not to a particular piece of the property or to a particular stick in the bundle. For instance, if someone owns an 100-acre tract, and the government severely limits the ability to use a 5-acre piece of that tract, that regulation is very unlikely to count as a regulatory taking, since the owner may freely use the remaining 95 acres. Or consider a regulation that deprives the owner of engaging in mining operations but otherwise leaves her free to use the property. Again, that restriction would likely *not* be a regulatory taking under *Penn Central*.

Yet the very same restrictions would likely count as regulatory takings if the owner had previously divided the property rights. For instance, let’s return to the two examples above: Suppose the owner of the 100-acre tract had previously divided the property and sold the 5-acre parcel to a someone else, and *then* the government imposed a regulation that rendered the 5-acre parcel worthless; or suppose that the owner had previously sold the mineral rights to someone else, and *then* the government

imposed a regulation that banned mining. In these situations, courts *would* conclude that regulatory takings had occurred; after all, the new owners would be deprived of the *full value* of their property!

Notice that this result obtains even though, *when viewed from the government's standpoint*, the regulations have the same legal effect. In his dissent in *Pennsylvania Coal Co. v. Mahon* (1922), Justice Brandeis criticized the majority on precisely this ground:

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value . . . . But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole.

If judges are supposed to evaluate takings from the standpoint of what the *government* is doing, then Brandeis made a great point. But the majority in *Mahon* focused instead on how a regulation of property use impacts particular *individuals*. Which approach is better in this context? Why? And how does this dispute relate to other issues that we've encountered in this course?

### The “Public Use” Requirement

As mentioned in the introduction, identifying a “taking” normally just triggers a requirement of “just compensation.” In other words, the takings themselves are generally okay! But there's an important exception: The taking must be for “public use.” Takings that are not for “public use” are invalid. But what does “public use” mean? The Supreme Court took up that question in the following case.

### Kelo v. New London (2005)

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

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

#### I

[Poor economic] conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue

toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. . . . Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels [*designated for a variety of residential and commercial uses, a museum, and so on*]. . . .

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. The NLDC successfully negotiated the purchase of most of the real estate . . . , but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

## II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull . . . . There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. [*The case eventually reached the United States Supreme Court, which "granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."*]

## III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. [*For obvious reasons, this situation is known as an "A to B transfer."*] On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a

private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. . . . [T]he City’s development plan was not adopted “to benefit a particular class of identifiable individuals.” *Hawaii Hous. Auth. v. Midkiff* (1984).

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” *Midkiff*. Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. . . . We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker* (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. . . . The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a “better balanced, more attractive community” was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful. . . . The public use underlying the taking was unequivocally affirmed:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . .

In *Hawaii Housing Authority v. Midkiff* (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit’s view that it was “a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B’s private use and benefit.” Reaffirming *Berman*’s deferential approach to legislative judgments in this field, we concluded that the State’s purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals . . . somehow diminished the public character of the taking. “[I]t is only the taking’s purpose, and not its mechanics,” we explained, that matters in determining public use. . . .

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

## IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. . . . Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City’s plan will provide only purely economic benefits, neither precedent nor logic supports petitioners’ proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. . . .

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties. . . .<sup>16</sup>

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*’s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a “reasonable certainty” that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.” *Midkiff*. . . .

[W]e do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. . . .

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<sup>16</sup> Nor do our cases support Justice O’Connor’s novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some “harmful property use.” There was nothing “harmful” about the nonblighted department store at issue in *Berman* [or other property in other cases]. In each case, the public purpose we upheld depended on a private party’s *future* use of the concededly nonharmful property that was taken. By focusing on a property’s future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. Justice O’Connor’s intimation that a “public purpose” may not be achieved by the action of private parties, confuses the *purpose* of a taking with its *mechanics*, a mistake we warned of in *Midkiff*.

**Justice Kennedy, concurring.**

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U. S. Const., Amdt. 5, as long as it is “rationally related to a conceivable public purpose.” *Hawaii Hous. Auth. v. Midkiff* (1984); *see also Berman v. Parker* (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. *See Cleburne v. Cleburne Living Center, Inc.* (1985); *Dep’t of Ag. v. Moreno* (1973). . . .

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose. . . .

The trial court concluded . . . that benefiting Pfizer was not “the primary motivation or effect of this development plan”; instead, “the primary motivation for [respondents] was to take advantage of Pfizer’s presence.” . . . Even the dissenting justices on the Connecticut Supreme Court agreed that respondents’ development plan was intended to revitalize the local economy, not to serve the interests of Pfizer . . . . This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause. . . .

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*. The identities of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.

**Justice O’Connor, with whom the Chief Justice and Justices Scalia and Thomas join, dissenting.**

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote [in *Calder v. Bull* (1798) (opinion of Chase, J.)]:

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent. . . .

## II

. . . We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. . . .

Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman v. Parker* (1954), we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. . . .

In *Hawaii Housing Authority v. Midkiff* (1984), we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State’s land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State’s most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature had concluded that the oligopoly in land ownership was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,” and therefore enacted a condemnation scheme for redistributing title.

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. . . . Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature’s ends.

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” *Midkiff*. To protect that principle, those decisions reserved “a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is ‘an extremely narrow’ one.” *Id.*

The Court’s holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a



public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. . . .

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power. . . .

The Court protests that . . . it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee—without detailing how courts are to conduct that complicated inquiry. For his part, Justice Kennedy suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take—without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the “stupid staff[er]” failing it. The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. . . .

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. “[T]hat alone is a *just* government,” wrote James Madison, “which *impartially* secures to every man, whatever is his *own*.” *For the Nat'l Gazette, Property* (Mar. 27, 1792). . . .

### **Justice Thomas, dissenting.**

. . . Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

*[In Parts I and II, Justice Thomas argued that the original meaning of the Takings Clause limited takings to situations where “the government or the public actually uses the taken property.” In Part III, he argued that the Court has compounded its misreading of the Clause by allowing legislatures to define what sorts of aims would satisfy this standard.]*

### **III**

. . . There is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a “public use.” . . . [I]t is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a

convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause. . . . [I]t is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, *see, e.g., Goldberg v. Kelly* (1970), while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property. . . .

*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, *see Mugler v. Kansas* (1887), in sharp contrast to the takings power, which has always required compensation. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. . . . To construe the Public Use Clause to overlap with the States’ police power conflates these two categories.

The “public purpose” test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. “When we depart from the natural import of the term ‘public use,’ and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience . . . we are afloat without any certain principle to guide us.” *Bloodgood v. Mohawk & Hudson R. Co.* (N.Y. 1837) (opinion of Tracy, Sen.). . . . It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a “purely private purpose”—unless the Court means to eliminate public use scrutiny of takings entirely. . . .

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property. . . .

#### IV

The consequences of today’s decision are not difficult to predict, and promise to be harmful. So-called “urban renewal” programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities,” *United States v. Carolene Products Co.* n.4 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. . . .

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#### Notes and Questions

1. As noted at the outset of this Unit, takings doctrine addresses three distinct questions. First, *when is property “taken”*? Second, *what counts as “public use”*? Third, *what counts as “just compensation”*? With respect to the second question, the Court had identified three buckets of takings, corresponding to three different “public uses”:

First, takings where *the government takes title* to the property.

Second, takings where the property is to be *open for use by the public*, as with takings for railroads, airports, private amusement parks, etc., even though the government itself does not take title to the property.

Third, takings where the taking *promotes a public purpose*, like eliminating urban blight or promoting economic development, even though the government does not take title to the property and the property is not open for use by the public.

In *Kelo*, the justices agreed that takings in the first two buckets are consistent with the “public use” requirement of the Takings Clause. The controversy in *Kelo* was all about the third bucket. On that issue, the justices took four different approaches:

- The majority defined “public use” broadly—essentially reaching any taking that benefits the public—and held that legislatures have ample leeway to define and assess what this entails.
- Justice Kennedy joined the majority opinion, but he wrote separately to clarify his view that in certain situations judges could identify takings effected for a purely private purpose if plaintiffs made a “clear showing” that the government had offered “only incidental or pretextual public benefits.” He also expressed his view that “[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted under the Public Use Clause.”
- In dissent, Justice O’Connor argued that takings should not be allowed where the asserted public purpose is merely economic development.
- In dissent, Justice Thomas argued that takings in the third bucket are invalid. On his view, takings are limited to the first two buckets.

Why might the justices have adopted these views? Were these ideas grounded on interpretations of “public use,” concerns about how to *implement* that principle, or both? What are the strengths and weaknesses of each of the four approaches?

2. Is Justice Kennedy’s description of rational-basis review accurate? How does his *Kelo* opinion fit into the other Kennedy decisions that we’ve read? Is Justice O’Connor right about the flaws of “Justice Kennedy’s yet-as-undisclosed” test?

3. Justice Thomas insists that “public use” must mean something *more restrictive* than a general public-good requirement. Why? Now suppose that he’s wrong, and that the “public use” requirement just means that the taking must be in support of the general welfare. How closely do you think judges should scrutinize takings for consistency with this principle? Why?

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## Appendix: Constitution of the United States

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### Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### Article I

§ 1. 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.

§ 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

§ 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

§ 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

§ 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

§ 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

§ 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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.

§ 8. The Congress shall have Power

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; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards and other needful Buildings;—And

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.

§ 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

§ 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article II

§ 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—  
“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United



States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’’

§ 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

§ 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

§ 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### Article III

§ 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have 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.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

§ 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### **Article IV**

§ 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§ 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

§ 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

§ 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### **Article V**

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging 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.

### Amendment II

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.

### Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **Amendment VII**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### **Amendment VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **Amendment IX**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### **Amendment X**

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.

### **Amendment XI**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### **Amendment XII**

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be

necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

### **Amendment XIII**

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

### **Amendment XIV**

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

### **Amendment XV**

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

### **Amendment XVI**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

### **Amendment XVII**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

### **Amendment XVIII**

§ 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

§ 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

### **Amendment XIX**

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

### **Amendment XX**

§ 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

§ 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

#### **Amendment XXI**

§ 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

#### **Amendment XXII**

§ 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

§ 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

#### **Amendment XXIII**

§ 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those

appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

#### **Amendment XXIV**

§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

#### **Amendment XXV**

§ 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

§ 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

§ 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

§ 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

#### **Amendment XXVI**

§ 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

§ 2. The Congress shall have the power to enforce this article by appropriate legislation.



**Amendment XXVII**

No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

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